

Competition Act 1998

Decision of the Director General of Fair Trading
No CA98/4/2001¹

15 June 2001

Consignia plc and Postal Preference Service Limited

Non-confidential version
(Case CP/0155-01)

The Director General of Fair Trading (the 'Director') has concluded that in implementing an agreement to allow Postal Preference Service Limited (PPS) to use Royal Mail trade marks² on its consumer lifestyle survey questionnaires Consignia plc ('Consignia') has not infringed the prohibition imposed by Section 18 (the 'Chapter II prohibition') of the Competition Act 1998 (the 'Act').

The Director's investigation was initiated by two complaints that Consignia had abused its dominant position in the ordinary mail delivery market by allowing PPS to use the Royal Mail trade marks on its consumer lifestyle style surveys. It was alleged that this would enable PPS to achieve such a high response rate that competition in the market for consumer lifestyle data would be seriously undermined.

However, the investigation found that PPS had not achieved substantially higher response rates than its competitors, that the Royal Mail trade marks appeared not to have markedly boosted the response rate, and that potential customers of

¹ Certain information has been excluded from this decision in order to comply with the provisions of section 56 of the Competition Act 1998 (confidentiality and disclosure of information). Excisions are denoted by [...]. Where appropriate, following such excisions, wording has been added and this has been placed in square brackets and italicised.

² UK Registered Numbers 1450209, 1450210, 1450211, 1450221, 1450222, 1450223 and 2124505.

PPS data were likely to continue to purchase data from their current suppliers. The evidence leads to the conclusion that PPS has been competing legitimately, not that competition is being undermined.

I THE FACTS

A The complaints

1. The case results from complaints made by Claritas (UK) Limited and the Direct Marketing Association. Both complainants argued that by granting PPS a licence to use Royal Mail trade marks on its lifestyle data questionnaires, Consignia had abused its dominant position in the ordinary mail delivery market.
2. It was alleged that the use of Royal Mail trade marks would give the impression that the PPS survey had a quasi-official and public interest function and thereby induce higher response rates. This would have a knock on effect upon the response rates achieved by competitors' surveys, thereby reducing the value and appeal of their datasets.
3. It was also alleged that PPS's 'negative response' database (which will identify types of direct mail that households do not wish to receive) would make PPS datasets indispensable to direct mail companies to the detriment of other datasets, lists and suppression databases, particularly the Mailing Preference Service (MPS).

B The parties

4. Consignia is a newly formed UK company which is wholly owned by the Post Office³. The assets and business of The Post Office, including Royal Mail, Parcelforce and Post Office Counters⁴, have been transferred to Consignia by a statutory transfer. Amongst other services, Consignia provides a range of letter and parcel services in the UK and internationally, principally under the Royal Mail, Parcelforce and German Parcel⁵ trade marks.

³ From shortly before 26 March 2001 Consignia has been a wholly owned subsidiary of Consignia Holdings plc as the Post Office's shareholding in Consignia was statutorily transferred to that company.

⁴ Parcelforce Worldwide is the correct trading name. Post Office Counters Limited is a wholly owned subsidiary of Consignia.

⁵ The trade mark used is General Parcel. German Parcel (a wholly owned subsidiary of Consignia) is a member of General Parcel. Consignia also has a majority stake in General Parcel (a network of parcel services in over 20 European countries).

5. PPS is a co-operative joint venture company formed on 23 October 2000. Consignia acquired a 44.6 per cent shareholding in PPS [...] [*further details regarding share holdings*], with the other shareholders being: PTT Post B.V. (the Dutch postal administration), Direct Vision (UK) Limited, [...] [*another named undertaking*], Bryan Cassady and Thomas Adelbert.

II LEGAL AND ECONOMIC ASSESSMENT

A. The relevant markets

6. Consignia is the only postal operator currently licensed under section 11 of the Postal Services Act 2000 to convey letters costing less than £1 per item and weighing less than 350g in the UK ('ordinary mail'). The market for the delivery of such items in the UK is a distinct, relevant market for the purposes of this analysis.
7. The conduct complained of in this case related to another economic activity, namely the collection and sale of consumer lifestyle data in the UK. Consumer surveys are an established method of collecting such data. They may be conducted by post, telephone or face-to-face, over the internet, through newspapers and magazines or via registration cards included in the documentation accompanying a purchase of electrical or other household goods. The data are sold or rented to end users and intermediaries, usually in the form of lists charged on a per address basis. Users will typically employ a variety of data sources.
8. Typically, consumer lifestyle surveys are conducted on a national basis and national datasets and lists are produced as a result. Consumer lifestyle questionnaires are drafted in the national language of the country in which they are conducted, prices for datasets and list rental are set on a national basis and they are subject to national regulatory considerations (for example, the Data Protection Act 1998 in the UK).
9. Given the findings of the investigation (see paras. 10 – 40), it is not necessary to define the market on which the conduct in question occurred more precisely than the UK market for the collection and sale of consumer lifestyle data: the 'consumer lifestyle data market'.

B. The Director's investigation

10. Following an initial examination of the complaints there were reasonable grounds for suspecting that Consignia had abused a dominant position in

the ordinary mail delivery market by giving PPS a licence to use Royal Mail trade marks. This was on the hypothesis that such a licence would seriously undermine competition in the downstream market for the collection and sale of consumer lifestyle data to the detriment, ultimately, of consumers.

DOMINANCE

11. Given its monopoly (see para 6), Consignia has a dominant position in the market for the delivery of ordinary mail.

ABUSE

12. Before investigating whether the licence to PPS was abusive, three preliminary issues were considered: whether the market on which the conduct occurred was closely associated with the dominated market; whether the grant of a trade mark licence could constitute an abuse in breach of the Chapter II prohibition; and whether that conduct was excluded from the application of the Chapter II prohibition by paragraph 2(1)(b) of Schedule 1, Part I to the Act.

(i) Associated markets

13. In this case the abuse was alleged to have occurred on the consumer lifestyle data market, on which neither Consignia nor PPS is dominant. However, in order to establish an infringement of the Chapter II prohibition, it is not necessary to show an abuse on the market which an undertaking dominates⁶.
14. This principle was set out by the European Court in *Tetra Pak v. Commission*⁷ which held that the application of Article 82 to conduct by a dominant undertaking on an associated, non-dominated market could be justified by special circumstances.
15. In assessing whether such circumstances existed in this case, Consignia's monopoly of the ordinary mail market and the vertical links between the ordinary mail market and the consumer lifestyle data market were considered to be relevant.
16. Consignia's long term monopoly position in the delivery of ordinary mail means that its Royal Mail trade marks have wide public recognition and are, for many purposes, still synonymous with mail services generally in the UK. As a consequence, it is reasonable to expect that any activity

⁶ See OFT 402 'The Chapter II Prohibition' (March 1999), para. 4.50

⁷ Case C-333/94 P [1996] ECR I - 5951

connected with the delivery of ordinary mail and carrying a Royal Mail trade mark is likely to have a special status in the eyes of consumers. Acquiring consumer lifestyle data via postal surveys requires the delivery of a large amount of survey forms by ordinary mail.

17. There are also further vertical links between the two markets - purchasers of consumer lifestyle data frequently undertake large mailshots for advertising purposes, using the data they have acquired and employing Consignia's ordinary mail delivery services. The combination of these factors provided reasonable grounds for suspecting that there were sufficiently close associative links between the ordinary mail market and the consumer lifestyle data market to merit an investigation of Consignia's conduct on that market.

(ii) Grant of a trade mark licence

18. Section 18(2) of the Act sets out examples of conduct which are capable of constituting an abuse. However, that list is illustrative only and is not exhaustive of the types of abusive conduct subject to the Chapter II prohibition.
19. Dominant undertakings have 'a special responsibility not to allow their conduct to impair genuine, undistorted competition'⁸. Thus, business practices considered generally to be normal may constitute an abuse for the purposes of the Chapter II prohibition if they are carried out by an undertaking which holds a dominant position⁹. However, the exercise of an intellectual property right, such as a trade mark, by a dominant undertaking will not constitute an abuse provided it is legitimate¹⁰.
20. In assessing whether the exercise of such a right was legitimate in this particular case, account was taken of Consignia's position as a statutory monopolist¹¹, the unique status of the Royal Mail trade marks as a consequence of that position, and Consignia's vertical links with the consumer lifestyle data market.
21. In view of these factors, it was reasonable to suspect that the circulation of surveys bearing Royal Mail trade marks would induce such high response rates that competition on the consumer lifestyle data market

⁸ Case 322/81 *NV Nederlandsche Baden-Industrie Michelin v Commission* [1983] ECR 3461, para. 57

⁹ Case T-65/89 *British Industries and British Gypsum v Commission* [1993] ECR II-389

¹⁰ See OFT 402, 'The Chapter II Prohibition' (March 1999), para. 4.4

¹¹ On 26 March 2001, Consignia plc became the first licensed provider of universal postal services ('USO services') under the Postal Services Act 2000. Currently it is the sole licenced provider of USO services and as a result has a de facto monopoly.

would be seriously undermined and hence that the licence of the trademarks was not legitimate.

22. These factors gave reasonable grounds for suspecting that the grant of the trademark licence by Consignia to PPS may not have been legitimate in this particular case and was therefore capable of amounting to an abuse under the Chapter II prohibition.

(iii) Schedule 1 exclusion

23. The grant of the Royal Mail trade marks licence by Consignia to PPS formed part of the arrangements whereby Consignia initially acquired a 44.6 per cent interest in PPS. The Director considered that acquisition in connection with his duties under Part V of the Fair Trading Act 1973 (the '1973 Act'). On 12 December 2000, the Director informed Consignia he was satisfied that the acquisition resulted in two enterprises ceasing to be distinct within the meaning of section 65(1) of the 1973 Act but that the merger did not meet the qualifying thresholds in section 64(1) of the 1973 Act for investigation.
24. Although Consignia made submissions to the contrary, the Director is satisfied that the licence to PPS does not benefit from the exclusion in paragraph 2(1)(b) Schedule 1, Part I of the Act. This provides that conduct which is 'directly related and necessary to the attainment' of two enterprises ceasing to be distinct is excluded from the scope of the Chapter II prohibition. In contrast, paragraph 1(2) of that Schedule, which provides the equivalent exclusion for ancillary restrictions in relation to the Chapter I prohibition, refers to provisions 'directly related and necessary to the implementation of merger provisions'.
25. This difference in wording is significant. In the Director's view, paragraph 1(2) applies to provisions concerned with the operation of a merged entity *following* the acquisition of control while paragraph 2(1)(b) of Schedule 1 applies only to conduct directly related and necessary to the acquisition of control itself.
26. The Commission Notice regarding restrictions ancillary to concentrations¹² defines restrictions as necessary to the implementation of a concentration if '*in their absence the concentration could not be implemented or could only be implemented under more uncertain conditions, at substantially higher cost, over a considerably longer period or with considerably less probability of success*'. Having regard to this statement in accordance with the requirements of section 60(3) of the Act, the Director has

¹² OJ 90/C 203/05

therefore considered whether, in the absence of the trade mark licence, Consignia could not have acquired control of PPS, or could only have done so at substantially higher cost, over a considerably longer period or with considerably less probability of success.

27. While the trade mark licence is clearly relevant to the merged entity's business activities, it has no bearing on the rights¹³ which gave Consignia control of PPS. Consequently, the Director is satisfied that the licence is not directly related and necessary to the attainment of the merger and therefore does not fall within the exclusion in paragraph 2(1)(b) of Schedule 1, Part I to the Act.

THE SECTION 25 INVESTIGATION

28. Formal notices under section 26 of the Act requiring the provision of specified information and documents for the purposes of the investigation were sent to Consignia, PPS, existing competitors of PPS in the consumer lifestyle data market and direct mail companies which purchase such data.

RESPONSE RATES FOR CONSUMER LIFESTYLE SURVEYS

29. The actual response rate recorded so far for the first mailing of the survey, which was sent to 7 million households in November 2000, was [...]. In the PPS pilot exercise prior to the launch of the survey, five designs were used (two without a Royal Mail trade mark). In an exact comparison between two survey designs sent out in September 2000 the 'No Royal Mail' version recorded a [...] response and the Royal Mail trade mark version recorded [...].
30. The highest responses recorded at any stage of the pilot exercise were [...] for a 'No Royal Mail' version and [...] for one using a Royal Mail trade mark. Overall the average response rates recorded by 'No Royal Mail' and Royal Mail trade mark versions of the survey during the pilot exercise were [...] and [...] respectively.
31. Evidence collected under section 26 of the Act suggests that response rates typically recorded for consumer lifestyle surveys do not differ significantly from the [...] figure recorded for the first PPS mailing. Competitors of PPS have sometimes recorded higher response rates with their own branded surveys. For example, [...] [*a major supplier of consumer lifestyle data*] recorded response rates for branded surveys of [...] [*response rates for three branded surveys*] in 2000.

¹³ These include the acquisition of a significant shareholding, board representation and certain veto rights.

32. The PPS response rate is not exceptional for an untargeted 'cold' mailing to first time recipients of the survey. Furthermore, the use of a Royal Mail trade mark explains only part of the response rate achieved. Initial market research undertaken by PPS suggests that other factors such as survey design and presentation and accompanying offers of free coupons and samples will also have contributed to the response rate.

IMPACT OF RESPONSE RATES ON SALES OF DATA

33. Of the [...] purchasers of consumer lifestyle data from whom information and documents were requested, [...] had so far purchased PPS data. These were mainly small purchases made to test the data and of these only [...] confirmed they intended to purchase 'negative response' data.
34. Evidence collected from third parties suggests that in many cases response rates are not a major consideration when data users are deciding which datasets and lists to purchase. A typical comment by [...] [*a financial services company*] is that 'the response rates PPS achieve will be of little or no relevance to my decision whether to purchase data from PPS'. Comments from purchasers of large amounts of data in particular suggest that response rates are not as crucial to data purchasing decisions as originally suspected.
35. These undertakings have indicated that their main concern is in the sales per mailing they actually achieve when using a database or list. In this context, existing databases and lists are preferred because the sales per mailing ratio can be estimated with a reasonable degree of accuracy. Purchasers also commented that the PPS data is as yet unproven.
36. In addition to proven sales per mailing, the cost of data in relation to prevailing market rates, how old the data is, how long the data purchased can actually be used for and whether the supplier can offer any exclusivity in relation to the data were all repeatedly cited as important considerations. This was not so for actual survey response rates.
37. Among undertakings which confirmed that they have purchased PPS data, the main factors influencing purchasing decisions relate more to the size and originality of the survey rather than response rates expected. Since the survey is intended to be delivered to as many as 31 million households and contains some questions drafted and sponsored by data purchasers, a considerable volume of data, much of which will not be readily obtainable from other sources, is expected to be produced.

NEGATIVE RESPONSE DATA

38. The PPS negative response data [...] [*statement regarding interest shown by potential customers*]. Certain third parties have commented that in most cases one member of a household will complete the PPS questionnaire and the interests and spending intentions of all members of the household are unlikely to be reflected in the answers provided.
39. Several undertakings expressed their satisfaction with, and intention to continue to use, existing suppression databases such as the Mailing Preference Service. PPS estimate that [...] of their sales will in fact be derived from positive response data. Data users and list purchasers have not stated that they feel obliged to use the PPS negative response data.

TAILOR MADE INCENTIVES

40. As a result of information provided in the responses to notices under section 26 of the Act sent to Consignia and PPS, additional information was requested regarding the granting of discounts termed Tailor Made Incentives ('TMI') by Consignia to undertakings operating in the consumer lifestyle data market. TMI are incentives to customers to use a particular Royal Mail service or mailing programme which they have not used before, or in the same way before, and are awarded according to specified criteria. Having received detailed information regarding their method of award and calculation, the Director is satisfied that Consignia operates objective criteria in determining which undertakings qualify to receive a TMI and that any granted to PPS have been appropriately calculated and approved against these criteria.

CONCLUSIONS

41. The response rate recorded by the initial mailing of the PPS survey was not substantially higher than response rates typically achieved in this market. The use of the Royal Mail trade marks appears not to have markedly boosted the response rate achieved. Furthermore, there is no evidence that the data collected by PPS as a result would have a significant adverse impact on competition. Regardless of current purchasing intentions, all of the potential customers questioned said that if they had been or were persuaded to purchase PPS data they would continue to purchase consumer lifestyle data from their current suppliers.

42. There is some evidence that the PPS survey may be having an effect upon the response rates achieved by competitors, but this is unlikely to be of the magnitude suspected at the outset of this investigation. Anyway, competition naturally involves some undertakings gaining business at the expense of others, and some impact on competitors' response rates would have occurred whether the survey was launched with or without the use of Royal Mail trade marks. Their use is unlikely to significantly affect demand for other lists and available sources of data and the collection of 'negative response' data is unlikely to impact significantly upon the usage of existing suppression databases.
43. PPS's main competitors are large, well established undertakings, which are well known to purchasers. The evidence gathered in this investigation leads to the conclusion that PPS has been competing legitimately with such undertakings, not that the process of competition has been undermined.

III. NON-INFRINGEMENT

44. On the basis of the facts and for the reasons set out above, the Director has decided that in implementing an agreement to allow Postal Preference Service Limited (PPS) to use Royal Mail trade marks on its consumer lifestyle survey questionnaires Consignia has not infringed the Chapter II prohibition.

John Vickers
Director General of Fair Trading