Neutral citation [2013] CAT 7

IN THE COMPETITION APPEAL TRIBUNAL
Victoria House
Bloomsbury Place
London WC1A 2EB

Case No: 1203/6/1/12

28 March 2013

Before:

VIVIEN ROSE
(Chairman)
PETER FREEMAN CBE, QC (Hon)
STEPHEN HARRISON

Sitting as a Tribunal in England and Wales

BETWEEN:

JOHN LEWIS PLC

Applicant

- v -

OFFICE OF FAIR TRADING

Respondent

- and -

DSG RETAIL LIMITED

Intervener

Heard at Victoria House on 27 February 2013

JUDGMENT

APPEARANCES

Mr Aidan Robertson QC (instructed by Shepherd and Wedderburn LLP) appeared on behalf of the Applicant.

Miss Maya Lester (instructed by the General Counsel of the Office of Fair Trading) appeared on behalf of the Respondent.

Mr Pushpinder Saini QC and Mr Philip Woolfe (instructed by SJ Berwin LLP) appeared on behalf of the Intervener.

BACKGROUND AND INTRODUCTION

1. This case concerns a dispute about the information that should appear on a price comparison website relating to extended warranties ("EWs") for TVs, washing machines and other domestic electrical goods ("DEGs").

2. By its application dated 21 December 2012 ("the Application") under section 179 of the Enterprise Act 2002 ("the Act"), John Lewis plc ("JLP") seeks a review of what it asserts is a decision of the Office of Fair Trading ("OFT"), communicated to JLP on or about 15 November 2012, in relation to the content of a price comparison website ("the Website Decision"). The Website Decision (the relevance or even the existence of which is disputed by the other parties) relates to the implementation of undertakings given by Comet Group plc ("Comet"), Argos Limited ("Argos") and DSG Retail Limited ("Dixons") (together, "the Retailers") on 27 June 2012 in lieu of a reference to the Competition Commission ("CC") of the market for EWs on DEGs pursuant to section 154 of the Act ("the undertakings in lieu" or "UIL").

3. The UIL were given on the same date that the OFT published its decision in relation to the reference (OFT1417dec, "Extended Warranties on Domestic Electrical Goods: a Final Decision on a Market Investigation Reference", 27 June 2012) ("the EW Decision"). This followed a market study conducted by the OFT during 2011 and 2012, at the end of which the OFT published a report in February 2012 ("the Market Study Report") and then engaged in two rounds of consultation, in February 2012 and May 2012, on the UIL (see paragraphs 3.1 and 3.2 of the EW Decision). The UIL provide, *inter alia*, that the Retailers will establish, pay for, operate and publicise a price comparison website for EWs ("the Website").

4. According to JLP, the OFT, by its Website Decision, refused to allow certain of JLP's EWs, namely those EWs which are included in the price of a DEG ("bundled EWs"), to be listed on the Website. JLP seeks an order quashing the Website Decision and a direction requiring the OFT and/or the "Steering Group" established under the UIL, to make a new decision allowing all of JLP's EWs (whether standalone or bundled) to be listed on the Website or, alternatively, to refer to the provision of bundled EWs by JLP and other named providers on the Website.

5. JLP also submits that the OFT / Steering Group should be directed to include on the Website a statement that consumers should assess both the price of the EW and the price of the underlying DEG to ensure that they are receiving value for money. JLP submits that the relief it seeks is easily achievable and would not require any significant technical changes to the Website.

6. A case management conference was held on 14 January 2013, at which directions were given for a timetable to trial, and Comet (now in administration) and Dixons were given permission to intervene. Comet subsequently withdrew from the proceedings. With the strong encouragement of the Tribunal, the parties attempted, initially on a without prejudice basis, but in the end by the exchange of open letters, to resolve their differences in relation to what should appear on the Website. They were unable to reach agreement before the hearing of the Application which took place on 27 February 2013 ("the Hearing").

7. The Application is brought under section 179 of the Act, which provides that any person aggrieved by a decision of the OFT in connection with a reference or possible reference may apply to the Tribunal for a review of that decision. Section 179(4) provides that, in determining such an application, the Tribunal shall apply the same principles as would be applied by a court on an application for judicial review. The scope of the Tribunal's task when exercising a judicial review function has been discussed in a number of earlier judgments of the Tribunal and the Court of Appeal (see for example *BAA Limited v Competition Commission* [2012] CAT 3 at [20] and *British Sky Broadcasting Group plc v Competition Commission* [2008] CAT 25 at [56], where the Tribunal set out the principles that applied in an analogous context).

8. The time limit for bringing an application under section 179 of the Act is set out in Rule 27 of the Competition Appeal Tribunal Rules 2003 (S.I. 2003/1372) ("the Tribunal's Rules"). This provides that an application for review must be made to the Tribunal within two months of the date upon which the applicant was notified of the disputed decision or the date of publication of the decision, whichever is the earlier.

SUMMARY OF THE GROUNDS OF REVIEW

9. JLP's application is based on three grounds:-

10. **Ground 1** is an objection to the OFT's refusal to list JLP's bundled EWs on the Website, or to refer to the provision by JLP of bundled EWs on the Website, solely on the basis that it does not charge a separate price for the EWs. JLP submits this is a breach of the UIL because the UIL cover any EWs which are provided for a monetary consideration and are not limited to those where the price is unbundled from that of the underlying product. JLP submits that the OFT's active participation in facilitating such a breach, or alternatively its failure to take steps to prevent such a breach under section 167(7) of the Act, is in breach of its statutory duties set out in section 162 of the Act.

11. In relevant part, section 162 provides:-

> "(2) The OFT shall, in particular, from time to time consider –
>
> > (a) whether an enforcement undertaking... has been or is being complied with..."

12. Section 167(7) provides:-

> "Compliance with an undertaking accepted under section 157 or 159... shall also be enforceable by civil proceedings brought by the relevant authority for an injunction... or for any other appropriate relief or remedy."

13. At the Hearing, counsel for JLP explained that its case under this ground turned on the proper construction of Clause 12.1 of the UIL. This defines an EW as "a contract... entered into by a consumer... for a monetary consideration". If, as JLP maintains, bundled EWs fall within the definition in that clause, because the monetary consideration is included in the price paid for the DEG, the OFT's refusal to list bundled EWs or to refer to their providers by name or by logo is in breach of the UIL and consequently in breach of the OFT's duties under the relevant statutory provisions.

14. The OFT, in response, denies that it has breached its statutory duty under section 162 of the Act. The OFT submits that it has repeatedly stated that it will take JLP's views into account in its continuing review of the effectiveness of the UIL.

15. The OFT maintains that the terms of the UIL do not allow for the admission to the Website of specifically identified bundled EWs or named providers of bundled EWs. In any event, the Website is not yet operational, so the OFT cannot review the UIL's effectiveness in the way demanded by JLP. Similarly, the OFT cannot enforce compliance with the UIL under section 167(7) of the Act as no breach of the UIL has occurred.

16. Dixons, intervening, supports the OFT's position on the construction of the UIL. Since, they say, the UIL properly construed exclude bundled EWs from the Website, there has been no breach of the UIL by their exclusion from the Website.

17. **Ground 2** is that the OFT has unreasonably and unlawfully exercised its discretion under section 154(2) and 154(3) of the Act by rejecting JLP's proposal and deliberately excluding EW providers that structure their product offering in a particular way.

18. Section 154(2) gives the power to the OFT, in order to deal with any adverse effect on competition it has found, to accept undertakings, in lieu of a reference to the CC, "from such persons as it considers appropriate… to take such action as it considers appropriate."

19. Section 154(3) provides:-

> "In proceeding under subsection (2), the OFT shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition concerned and any detrimental effects on customers so far as resulting from the adverse effect on competition."

20. JLP argued at the Hearing that the OFT had identified in its market study that the adverse effect on competition arose from a lack of information for consumers (see paragraph 4.21 of the Market Study Report) but was now claiming, paradoxically,

that the Website should not carry comprehensive information. JLP claimed that its proposals would give more comprehensive relevant information to consumers.

21. The OFT's primary response to this ground is that it exercised its discretion under section 154 of the Act when it decided to accept the UIL, so that JLP's application is brought out of time. The EW Decision was adopted and published on 27 June 2012, so the two month time limit set by Rule 27 of the Tribunal's Rules had expired by the end of August 2012. The OFT also submits that the EW Decision, which provides for an online comparison of the prices of standalone EWs, is a reasonable, practicable and proportionate way of addressing the problem identified by the OFT in its Market Study Report and in the EW Decision itself, namely the point of sale ("POS") advantage enjoyed by retailers of DEGs in the market for standalone EWs. It would be disproportionate to compare the features of named bundled EWs along with standalone EWs on the Website, as this would involve a different comparison exercise, namely comparing the prices of DEGs themselves, which is not justified by the consumer harm the OFT was trying to remedy.

22. Dixons submits that, having accepted the UIL pursuant to the EW Decision in terms that exclude named bundled EWs from the Website, the OFT exercised its discretion under section 154 of the Act in June 2012 and has no further discretion to vary the UIL to allow for their inclusion.

23. **Ground 3** is that the Website, as established, will mislead customers and thus will distort trade in goods and services and lead to the distortion of competition between different types of competitors within the EU. The OFT's participation via the Steering Group established under the UIL involves a breach of its EU law duties under Article 4(3) TEU read in conjunction with Articles 3(1)(b), 34, 56 and 101 TFEU.

24. Article 4(3) TEU provides in particular that "The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which shall jeopardise the attainment of the Union's objectives."

25. Article 3(1)(b) TFEU provides for the European Union to have exclusive competence in the "establishing of the competition rules necessary for the functioning of the internal market". Article 34 TFEU prohibits quantitative restrictions on imports between Member States and all measures having equivalent effect. Article 56 TFEU similarly prohibits restrictions on the free movement of services within the Union. Article 101 TFEU prohibits agreements affecting trade between Member States that prevent, restrict or distort competition.

26. JLP argues in particular that Articles 34 and 56 TFEU preclude the OFT from "adopting measures or engaging in conduct liable to constitute an obstacle to trade". JLP referred the Tribunal to Case C-265/95 *Commission v. France (Spanish Strawberries)* [1997] ECR I-6959 where the Court of Justice held that by failing to adopt all necessary and proportionate measures in order to prevent the free movement of products being obstructed by the actions of private individuals the French Government had failed to fulfil its obligations under the corresponding provisions of the EU Treaty. As regards Article 101, JLP relied on (Case 267/86 *Van Eycke v. ASPA* [1988] ECR 4769 at [16] in support of the submission that the OFT will breach Article 4(3) TEU if it requires "the adoption of agreements... contrary to Article [101] or to reinforce their effects".

27. The OFT's primary response is that, as with Ground 2, JLP is in reality challenging the UIL not the Website Decision and that the claim is consequently time-barred. Nevertheless, the OFT denies that the Website will mislead consumers: it has been designed carefully to avoid consumers being misled into thinking it includes every type of EW. There is no discrimination amounting to a restriction on free movement of goods or services, a measure having equivalent effect or a quantitative restriction or an anti-competitive agreement contrary to EU law. The Website is open to any EW provider (including JLP) that meets the minimum terms for admission and offers a "paid for" EW, not just the Retailers involved in establishing and paying for the Website. The OFT maintains further that the harm claimed by JLP to be caused by the Website is unsubstantiated and is not consistent with the evidence received by the OFT in the course of its market study.

28. Dixons agrees with the OFT's submissions both on the timing of the challenge and on its substance. If JLP believed the Website or the UIL were in breach of Article 101 TFEU it should have complained to the OFT rather than to the Tribunal. As regards any breach of EU law on free movement of goods or services, JLP has failed to establish any direct or indirect discriminatory treatment between national providers of DEGs or EWs and providers from elsewhere in the EU.

THE KEY QUESTIONS ARISING FROM THE GROUNDS OF REVIEW

29. These submissions and responses raise a number of inter-related questions. There are two particular, inter-linked, questions that run through the parties' submissions and which, once answered, are sufficient to address most of the grounds of review. First, what decision or decisions of the OFT is JLP in reality challenging? Secondly, when was that decision or were those decisions taken? A related but subsidiary question is whether it was still open to the OFT, having taken the EW Decision on 27 June 2012, subsequently to take the kind of decision JLP claims was taken on 15 November 2012, namely the Website Decision. Only if it was open to the OFT to insist that bundled EWs be mentioned on the Website in the way requested by JLP could a refusal so to insist constitute a separate decision capable of challenge before the Tribunal. The questions of construction, context and timing are thus closely inter-related, and the OFT's submission that the Application is time-barred does not apply with the same force in relation to each of the grounds of review. In order to decide whether all or part of the Application is time-barred we must first find what "decision" or "decisions" are, in reality, at issue (for the purposes of section 179 of the Act).

THE DECISION(S) UNDER REVIEW AND THE OFT'S SUBMISSION THAT THE APPLICATION IS OUT OF TIME

30. The EW Decision of 27 June 2012 includes the following paragraphs referring to how bundled EWs were to be treated in the UIL and on the Website:-

> "3.7 Another interested party welcomed the fact that, under the modified UIL, the EW Comparison website will alert consumers, alongside the search results, to the availability of EW products whose price is included within the overall price of the DEG. However, the same party said that the EW Comparison website should be

more explicit in naming the EW providers who supply an EW whose price is included in the overall price.

3.8 The OFT has considered this latter point in detail and considers that making such a modification to the UIL would not be necessary to ensure the overall effectiveness of the EW Comparison website. The OFT considers that the effectiveness of the EW Comparison website is not dependent on having all types of EW product specifically represented, so long as consumers are made aware of their existence and the EW Comparison website is open to a range of EW providers, both of which the OFT has taken action to secure in the UIL. In addition, there is potential for consumers to be misled if such EWs are represented as having no cost, when in fact their price is included within the overall price of the DEG."

31. The UIL include the following provisions:-

(a) Clause 2.2, in so far as relevant, reads as follows:-

> "…The OFT, acting reasonably, shall approve in advance the initial format of the EW Price Comparison Website in writing… Any further changes to the format…shall be approved by the OFT in advance, such approval not to be unreasonably withheld or delayed."

(b) Clause 2.3 reads as follows:-

> "As regards price, if a Retailer offers a Pay As You Go EW product, the Website Manager shall be instructed to show the prices for Pay As You Go EW products on the EW Price Comparison Website on a monthly and annual equivalent basis and the relevant Retailer will provide the relevant information to the Website Manager on an ongoing basis. The Website Manager will also be instructed to include the following statement on the search results page of the EW Price Comparison Website: 'These results do not include those extended warranties where there is a single price which combines the price of the electrical good and the price of the extended warranty, which may be available on certain electrical goods from some retailers and manufacturers.'"

(c) Clause 2.4 provides for the notification of any changes in the information on the Website.

32. These provisions are in part 2 of the UIL which, taken as a whole, sets out the terms on which the Website is to be established and operated. In particular, Clause 2.5 provides for other EW providers (i.e. other than the founding Retailers) to be admitted to the Website and allowed to "publish and maintain the information in accordance with clauses 2.2 to 2.4".

33. Clause 12.1 of the UIL, relied on by JLP, outlines the definitions used for the purposes of the UIL, and defines "Extended Warranty" as "a contract… for cover… against the cost of repairing or replacing a domestic electrical good in the event of a breakdown… entered into by a consumer for monetary consideration". The OFT said that this definition had been amended in the course of the consultations prior to 27 June 2012 to conform to the terms of the corresponding definition in the Supply of Extended Warranties on Domestic Electrical Goods Order 2005 ("the 2005 Order"). The 2005 Order in turn gave effect to the recommendations of the CC in its 2003 report on an earlier reference of the market for EWs.[1]

34. The main issue for decision is whether the OFT decided on 27 June 2012 that JLP and its bundled EWs would not be mentioned specifically on the Website or whether that decision was only taken later, as the format of the Website was developed pursuant to Clause 2.2 of the UIL. If the OFT did so decide on 27 June 2012, we also need to consider whether it was open to the OFT subsequently to change or amend that decision in the manner requested by JLP.

35. In our view, JLP's case on these points clearly fails. This is in part because of the construction of the UIL and in part because of the evidence from contacts and correspondence between the OFT and JLP and JLP's own internal communications both before and after the date of the EW Decision.

36. On the point of construction, we agree with the OFT that the terms of the EW Decision reflect the OFT's conclusion that bundled EWs would be referred to only in general terms and that the OFT's purpose was clearly to create a website that would enable the prices of standalone EWs to be compared. Paragraphs 3.7 and 3.8 of the EW Decision show that the OFT had considered, and rejected, JLP's request that bundled EW providers should be named explicitly on the Website.

37. These passages in the EW Decision were then effectively incorporated in the provisions in part 2 of the UIL governing the establishment of the Website. The UIL contain an express requirement (at Clause 2.3) to include on the search results page of the Website

[1] *Extended warranties on domestic electrical goods: A report on the supply of extended warranties on domestic electrical goods within the UK*, Competition Commission report published on 18 December 2003.

a statement that bundled EWs are not listed but may be available from some retailers and suppliers. In our judgment, this was intended to set out exhaustively the extent of reference to bundled EWs on the Website.

38. JLP drew attention to the suggestion by the OFT that JLP should ascribe a token price of 1p to its bundled EWs in order to qualify for inclusion on the Website. JLP argued that this showed how misleading the Website would be, and how irrational was the OFT in making such a suggestion. We express no view on this. However, whether rational or not, it is in our view a further confirmation that the Website was going to list only standalone EWs and not EWs where the price was included in the price of the DEG.

39. We do not think that the definition of Extended Warranty in Clause 12.1 affects this issue. Whether or not the definition could be read as extending to bundled EWs, as argued by JLP, or excluding them, as argued by the OFT and Dixons, in our view the terms of part 2 of the UIL as a whole, and in particular Clauses 2.2-2.4 read in conjunction with Clause 2.5 (covering admission to the Website) make it abundantly clear that the Website is essentially concerned with standalone EWs and their prices and conditions.

40. We therefore agree with the OFT's (and Dixons') argument on construction and find that, having accepted the UIL, it was not open to the OFT to meet JLP's requests for specific naming or listing. The power conferred on the OFT by the UIL did not allow it to try to insist on changes to the Website that were inconsistent with what was specified in the UIL and the OFT could not amend the undertakings itself.

41. We also agree with the OFT's contention that it had made its position perfectly clear and that JLP understood, or at the least ought to have understood, that it had not succeeded, by 27 June 2012, in persuading the OFT to change its position on incorporating specific reference to bundled EWs on the Website.

42. JLP submits that it was informed of this decision, for the first time, at a meeting on 15 November 2012 and that this was subsequently confirmed on 16 November 2012 when a "mock-up" of the Website was first supplied to JLP by the OFT. JLP submits that the

Website Decision was contrary to the impression given by the OFT in a telephone conversation with JLP on 29 June 2012, when JLP had been told that bundled EWs would "be described in a separate part of the Website". JLP also submits that the OFT's view that Clause 2.3 of the UIL precludes any reference on the Website by name or logo to JLP or other named providers of bundled EWs, unless approved by the Steering Group, was not communicated until a conference call on 20 December 2012.

43. In our judgment, this submission is not borne out by the contemporaneous documents. An internal email from Ms Amy Holt (an in-house commercial lawyer at JLP) to Mr Richard Ambler (JLP's Electricals Home and Technology Product Services Manager) dated 29 June 2012 (that is after the EW Decision and after receiving the OFT's explanatory letter of 27 June 2012) states (in relevant part) as follows:-

> "…(t)he main section of the OFT's proposed price comparison website will not include warranties which are included in the price of the product. These types of products will instead be described in a separate part of the website.
>
> …I do not agree with the OFT's approach to this but I'm afraid it seems to be a done deal…"

44. If it were thought that this reference to "types of products" still left room for doubt in the minds of those involved at JLP, the formal letter sent by Mr Peter Reis (Buying and Brand Director of JLP) to Mr Clive Maxwell (the OFT's Chief Executive) on 8 August 2012, which sets out JLP's objections in law to the OFT's position, and the reply sent by email on 24 August 2012 from Ms Ann Pope (the OFT official responsible for the EW case) strongly suggest that JLP at the latest on receipt of the OFT's letter of 24 August, knew or ought to have known what the OFT had decided.

45. In the letter Mr Reis notes first that "the final version of the relevant comparison website which forms a very important part of the [UIL] has yet to be finalised". He then further states, having first described how JLP sells its bundled EWs:-

> "…we simply do not understand your unwillingness, as witnessed by your letter of 27 June 2012, to allow such a manner of "selling extended warranties" to be shown in the proposed price comparison website… It is clear that the omission of John Lewis's selling method from the website would not allow for a neutral comparison…"

46. In her reply, Ms Pope explains why the OFT considers that the Website will include a sufficiently wide range of products and would not therefore lessen competition. She goes on to state:-

> "The OFT carefully considered John Lewis's response to the OFT's first public consultation on the proposed UIL and obtained a specific and clear commitment in the UIL that the Website would refer to the availability of EW providers when the price is combined with the price of the DEG…".

47. Whilst the language of this statement could perhaps have been more precise (Ms Pope may be presumed to have meant also to refer to the availability of the EWs themselves), it is clear to us that Ms Pope is repeating the sense of paragraphs 3.7 and 3.8 of the EW Decision and the terms of Clause 2.3 of the UIL. The letter goes on to state, under the heading of "Further Action", that "in addition to the Website explicitly highlighting the availability of [bundled] EWs the OFT is considering further steps to help facilitate consumer awareness of this option...". These are described as "The precise prominence of the message regarding [bundled EWs] on the Website" and "Publicity for key messages in the market study". These further steps do not include any suggestion of specific listing of bundled EWs or the naming of their providers.

48. In our view these statements, taken together with the remainder of the correspondence and communications from February to 24 August 2012 relied on by the OFT, including in particular the OFT's letter of 27 June 2012 accompanying the EW Decision, make it abundantly clear that the OFT had explained to JLP what the Website would say in relation to bundled EWs and that JLP cannot reasonably claim not to have understood this. They did not of course agree with it, and spent several months attempting to undo the "done deal". But they brought no application for review, not even when they had received Ms Pope's reply of 24 August 2012 to Mr Reis' letter, at a time when the two month period for bringing an application against the EW Decision had still not expired. Counsel for the OFT confirmed to us at the Hearing, and counsel for JLP did not demur, that there had been no reference to a possible application for review of the UIL in any of the contacts between JLP and OFT.

49. We therefore find that the OFT had decided the terms of the UIL in the EW Decision on 27 June 2012, on which date it formally accepted the UIL from the Retailers. Those terms set the limits of the contents of the Website with regard to bundled EWs and

provided explicitly for a reference to their availability in general terms only. In consequence, whatever was or was not approved by the OFT in pursuance of the requirement in the UIL to establish the Website, it was in our judgment not open to the OFT to give or to withhold its approval to particular aspects of the Website's format to meet JLP's repeated requests on the sole ground that the Website included only a generic reference to the availability of bundled EWs and did not list them or mention JLP by name or logo. We further find that JLP either knew or ought to have known that to be the case at the latest by the time it had received the OFT's letter of 24 August 2012.

50. JLP argues that if it were held that the Application was time-barred, the Tribunal should nonetheless extend time for the bringing of its claim pursuant to Rule 8(2) of the Tribunal's Rules. That Rule allows for an extension of time only if there are exceptional circumstances. JLP argues that the exceptional circumstance here is the existence of issues of general public importance. These are that it is harmful to consumers for a misleading and confusing website to be established. By barring its claim on grounds of time, where JLP and the OFT had continued to engage in constructive dialogue, the Tribunal would be discouraging settlement of disputes and encouraging litigation, contrary to public policy.

51. We are not convinced that the matters referred to by JLP are sufficient for us to make an exception in this case. We believe that the terms of JLP's letter to the OFT of 8 August 2012 were quite clear and robust in setting out JLP's position at law, and that the OFT's reply of 24 August 2012 made it equally clear that JLP's position was not accepted by the OFT. At that point there remained sufficient time for an application for review to be lodged, even if only as a precaution. We agree with Dixons' concern for third party interests in general terms, but doubt very much that either their interests or those of any other third party have been prejudiced in this case.

52. In our view, the need for legal finality and certainty (*Fish Holdings Limited v Office of Fair Trading* [2009] CAT 34 at [21]) is of over-riding importance. Respect for the deadline for commencing appeals and applications for review is crucial given the importance and urgency of the matters which are in issue in many such cases (*British Sky Broadcasting Group plc v Competition Commission* [2008] CAT 1 at [27]). These

interests would be prejudiced if we granted an extension of time in this case. For the reasons set out at paragraphs 34 to 49 above, we find that JLP knew, or ought to have known, at the latest on receipt of the OFT's letter of 24 August 2012 that a decision capable of review had been taken by the OFT on 27 June 2012. We therefore reject the application for an extension of time.

THE TRIBUNAL'S CONCLUSIONS IN RELATION TO JLP'S GROUNDS OF REVIEW

53. We turn now to consider how our findings as to the construction of the UIL and nature of the decision under challenge affect the three grounds of review.

Ground 1: Breach of the OFT's duties under sections 162 and 167(6) of the Act

54. We do not see how the OFT's duties under sections 162 and 167(7) of the Act can come into play. Although the UIL contain a condition requiring the establishment of the Website and that condition is taking some time to fulfil, this does not mean that the UIL are not at present "being complied with". Rather, it would appear that they are being implemented in accordance with their terms.

55. As we have found, the outer limit of those terms in respect of bundled EWs was decided on 27 June 2012, so it cannot be said that the development of the Website within those limits is in that respect non-compliant. We therefore consider that as a matter of law there has been, or would be, no breach by the OFT of its duties under section 162 and no call for it to intervene under section 167(7) by reason solely of a refusal to list bundled EWs or to refer to their providers by name or by logo.

Ground 2: Unreasonable exercise of the OFT's discretion under section 154 of the Act

56. In our view this ground of review also falls away in the light of our findings on the identity and timing of the relevant decision. If, as we have found, the decision to include on the Website only a reference in general terms to the availability of bundled EWs was made in June 2012, the subsequent elaboration of the detailed format of the Website (including the position and prominence of the generalised reference) cannot give rise to any further relevant decision or decisions with new and separate

consequences under section 154 of the Act. The OFT duly exercised its discretion under that section when it took the EW Decision and accepted the UIL and, therefore, the time for challenging that decision expired on 28 August 2012.

57. JLP invited us to consider the need to have regard to the specified factors in section 154(3) as continuing until such time as the format of the Website was decided in terms that met JLP's requests for individual mention of providers of bundled EWs. But that cannot be correct. The decision taken on 27 June 2012 may or not have been fully in accordance with the requirements of section 154(3) (we are not required to decide that question) but taken it was and once taken could only be attacked by application to this Tribunal within the prescribed time. We do not accept that the requirements of section 154 remain applicable to the implementation of the UIL in respect of the Website's treatment of bundled EWs, and we agree with counsel for Dixons that the discretion exercised by the OFT under Clause 2.2 of the UIL is subject to a general requirement to act reasonably rather than the specific requirements of section 154(3).

58. We find that this ground is in reality a challenge to the EW Decision and to the UIL and is time-barred under the Tribunal's Rules.

Ground 3: Breach of the OFT's EU law duties not to distort trade and competition

59. In our view this ground falls to be considered in the same way as Ground 2. If, as JLP maintains, the OFT's actions in allowing the Website to develop without explicit reference to bundled EWs and to JLP by name or logo constitute a breach of its duties under section 154 (in essence to remedy the adverse effect on competition that it has identified), then it could also be in breach of EU free movement and competition rules if the breach affects trade between Member States in the manner described by JLP.

60. However, if that were the case, we agree with the OFT and Dixons that this is in reality a complaint against the terms of the EW Decision and the terms of the UIL rather than against its subsequent implementation with respect to the Website. We do not accept that the OFT's actions in relation to the development of the Website, within the limits set by the UIL for bundled EWs, can in themselves give rise to any possible breach of EU law that is not already inherent in the decisions taken on 27 June 2012. For the

reasons we have already given above we find that any application made by JLP against that decision is time-barred.

61. We therefore find that JLP fails on this ground also.

THE TRIBUNAL'S ORDER

62. For the reasons set out above, the Tribunal unanimously finds that the Application fails. In particular we find that the decision at issue in Grounds 2 and 3 of the Application is in reality the EW Decision made by the OFT on 27 June 2012 and reflected in the UIL accepted on the same date not to make specific reference on the Website to bundled EWs or to JLP by name or by logo, and that those grounds of review are brought outside the time permitted under Rule 27 of the Tribunal's Rules. We do not consider this to be a case of exceptional circumstances such as would permit or justify our extending the time for bringing these claims. In relation to JLP's claim under Ground 1, we find this to be wrong as a matter of law, as we do not find there is any non-compliance with the UIL from the development of the Website so far by reason of the matters claimed by JLP.

63. Finally, the Chairman and Mr Harrison wish to thank our colleague Mr Freeman for taking on the primary role in the drafting of this judgment, which is unanimous. All members of the Tribunal would like to thank the parties and their respective solicitors and counsel for the prompt and efficient way in which this case has been prepared, presented and argued before us.

Vivien Rose Peter Freeman CBE, QC (Hon) Stephen Harrison

Charles Dhanowa OBE, QC (Hon) Date: 28 March 2013
Registrar