



IN THE COMPETITION COMMISSION

APPEAL TRIBUNAL

Case No. 1005/1/1/01

New Court
Carey Street
London WC2A 2JT

19 March 2002

Before:

SIR CHRISTOPHER BELLAMY (The President)
PROFESSOR ANDREW BAIN OBE
PATRICIA QUIGLEY

Sitting as a tribunal in Scotland

BETWEEN:

ABERDEEN JOURNALS LIMITED

Applicant

and

THE DIRECTOR GENERAL OF FAIR TRADING

Respondent

Supported by

ABERDEEN INDEPENDENT LIMITED

Intervener

Mr Nicholas Green QC (instructed by Mr Craig Pouncey of Messrs Herbert Smith) appeared for Aberdeen Journals Limited

Mr Mark Hoskins (instructed by Ms Amanda Dadley for the Director of Legal Services, Office of Fair Trading) appeared for the Director General of Fair Trading

Mr Fergus Randolph (instructed by Mr John Hill of Messrs Shoosmiths) appeared for Aberdeen Independent Limited

Heard at the Court of Session, Edinburgh, on 11 December 2001

JUDGMENT (Non-confidential version)

Note: Excisions in this judgment relate to commercially confidential information: Section 56 and Schedule 8, paragraph 4(3) of the Competition Act 1998

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Note: For simplicity, this judgment will refer throughout to Articles 81 and 82 of the EC Treaty, whether in citations from judgments or otherwise, notwithstanding that the original citation referred to Articles 85 and 86 of the EC Treaty which were renumbered as Articles 81 and 82 by the Treaty of Amsterdam with effect from 1 May 1999.

I INTRODUCTION

The statutory framework

1. This case concerns the application of section 18 of the Competition Act 1998 (“the Act”) which provides:

“18. – (1) Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.

(2) Conduct may, in particular, constitute such an abuse if it consists in–

 - (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
 - (b) limiting production, markets or technical development to the prejudice of consumers;
 - (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

(3) In this section–

“dominant position” means a dominant position within the United Kingdom; and

“the United Kingdom” means the United Kingdom or any part of it.

(4) The prohibition imposed by subsection (1) is referred to in this Act as “the Chapter II prohibition”.
2. Section 18 of the Act is closely modelled on the corresponding provisions of Article 82 of the Treaty establishing the European Community (“the Treaty”). So far as possible, the Act is to be interpreted and applied consistently with the principles of Community law: see section 60.
3. Section 36(2) of the Act provides that on making a decision that conduct has infringed the Chapter II prohibition, the Director may require the undertaking concerned to pay him a penalty in respect of the infringement. Under section 36(3), such a penalty may be imposed only if the Director is satisfied that the infringement has been committed intentionally or negligently. By virtue of section 36(8), no penalty fixed by the Director may exceed 10 per cent of the turnover of the undertaking as determined in accordance with the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000 No. 309). Any penalty so imposed is recoverable as a civil debt following the expiry of the period for appealing to this Tribunal, or the determination of any such appeal: section 37.

4. Section 38(1) of the Act requires the Director to publish guidance as to the appropriate amount of any penalty. Under section 38(8) the Director must have regard to that guidance when setting the amount of the penalty. The Director has published such guidance entitled *Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty* (OFT 423, March 2000).
5. Any person in respect of whose conduct the Director has made a decision within the meaning of section 46(3) of the Act may appeal to this Tribunal against, or with respect to, that decision: sections 46(2) and 48(1).
6. The powers of this Tribunal to determine appeals under section 46 are set out in paragraph 3 of Schedule 8 of the Act, which provides:
 - “3.—(1) The tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.
 - (2) The tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may—
 - (a) remit the matter to the Director,
 - (b) impose or revoke, or vary the amount of, a penalty,
 - (c) grant or cancel an individual exemption or vary any conditions or obligations imposed in relation to the exemption by the Director,
 - (d) give such directions, or take such other steps, as the Director could himself have given or taken, or
 - (e) make any other decision which the Director could himself have made.
 - (3) Any decision of the tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the Director.
 - (4) If the tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based.”
7. The procedure governing appeals to this Tribunal is set out in the Competition Commission Appeal Tribunal Rules 2000, S.I. 2000 No. 261 (“the Tribunal Rules”).

Background to the appeal

8. Aberdeen Journals Limited (“Aberdeen Journals”) is a subsidiary of Aberdeen Journals Holdings Limited, which is in turn owned by Northcliffe Newspapers Group Limited (“Northcliffe”). Northcliffe is owned by Daily Mail & General Holdings Limited, which is in turn owned by Daily Mail & General Trust plc. The ultimate holding company for all of these companies is Rothermere Continuation Limited, based in Bermuda.

9. Aberdeen Journals publishes three newspaper titles: a paid-for daily morning title, the *Press & Journal*, which is available throughout the north of Scotland; a paid-for daily title, the *Evening Express*, which is focussed on Aberdeen and its outlying areas; and a free weekly title, the *Herald & Post*, which is distributed mainly in urban Aberdeen.
10. In March 1996, at the instigation of Mr Keith Barwell, Aberdeen Independent Limited (“Aberdeen Independent”) launched a free weekly newspaper in Aberdeen, the *Aberdeen & District Independent* (“the *Independent*”).
11. Aberdeen Independent submitted a complaint to the Director on 28 May 1999 alleging that the *Herald & Post* was pricing its advertising space at significantly below “market value”. The Director initially investigated this complaint under the Fair Trading Act 1973. After 1 March 2000 that investigation became an investigation under the Act to determine whether Aberdeen Journals had breached the Chapter II prohibition.
12. On 23 November 2000 the Director issued a written notice to Aberdeen Journals in accordance with Rule 14 of The Competition Act 1998 (Director’s rules) Order 2000 S.I. 2000 No. 293 (“the Director’s Rules”) stating that he proposed to make a decision that Aberdeen Journals had infringed the Chapter II prohibition by charging excessively low rates for advertising in the *Herald & Post* with a view to driving the *Independent* out of the market. On the information available to him, the Director considered that the infringement continued at least for the period from 1 March until the end of July 2000, but was likely to continue until September 2001.
13. In accordance with Rule 14(7) of the Director’s Rules, Aberdeen Journals submitted written representations to the Director on 2 February 2001 and attended an oral hearing on 15 February 2001.
14. On 16 July 2001 the Director adopted Decision No. CA98/5/2001 entitled “*Predation by Aberdeen Journals Ltd*” (“the Decision”). The Decision found that Aberdeen Journals had abused a dominant position in the market for the supply of advertising space in local newspapers (paid-for and free) in the Aberdeen area in the period from 1 March until 29 March 2000. Paragraph 116 of the Decision states that:

“Aberdeen Journals, dominant on the market for the supply of advertising space in both paid-for and free local newspapers in Aberdeen or the circulation area of the *Herald & Post*, supplied advertising space in the *Herald & Post* at below average variable cost. This raises a presumption of predation that Aberdeen Journals has failed to rebut by providing an objective justification. The Director therefore finds that Aberdeen Journals preyed for the period from 1 March until 29 March 2000”.

15. For that infringement of the Chapter II prohibition, the Decision imposed on Aberdeen Journals a penalty of £1,328,040.
16. Pursuant to section 46(2) of the Act, Aberdeen Journals appealed to this Tribunal against the Decision by an appeal lodged on 14 September 2001.

II THE DECISION

The Director's findings on dominance

17. In the Decision, the Director found that the relevant market for the purposes of his analysis was the market for the supply of advertising space in both paid-for and free local newspapers within the Aberdeen area or the circulation area of the *Herald & Post* (paragraphs 14 to 48 of the Decision). In coming to this conclusion the Director considered, contrary to the submissions of Aberdeen Journals, that advertising space in the daily paid-for *Evening Express* is in the same relevant market in the local Aberdeen area as advertising space in the weekly free local newspapers, the *Herald & Post* and the *Independent* (see paragraphs 16 to 31, 40 and 43 of the Decision). The Director further considered that the three local newspapers in question constituted a separate market from other forms of media such as the internet, local radio, recruitment agencies, property centres, direct mail, leaflets, publications such as *Exchange & Mart* or *AutoTrader*, and directories (see paragraphs 32 to 42 of the Decision). Finally the Director found the relevant geographic market for the purpose of his analysis was Aberdeen, or the circulation area of the *Herald & Post* (paragraphs 45 to 48).
18. As regards the issue of dominance, the market shares of the parties are set out in Annex 4 of the Decision. The Director found that Aberdeen Journals' market share of advertising in local newspapers in the Aberdeen area in the period from January to March 2000 was [...] [over 70] per cent by value and [...] [over 60] per cent by volume (paragraph 53 of the Decision). On the basis of those market shares, coupled with what the Director held to be significant barriers to entry, the Director considered that Aberdeen Journals had a dominant position in the supply of advertising space in both paid-for and free local newspapers in Aberdeen or the circulation area of the *Herald & Post* (paragraphs 53 to 58 of the Decision).

The Director's findings on abuse

19. As to whether Aberdeen Journals has abused that dominant position, the Director relies on the matters set out at paragraphs 59 to 116 of the Decision. He considers that the legal principles to be applied are those to be derived under Community law from Case C-62/86 *AKZO Chemie*

v Commission [1991] ECR I-3359 (“AKZO”), and Case T-83/91 *Tetra Pak v Commission* [1994] ECR II-755, confirmed on appeal, Case C-333/94P *Tetra Pak v Commission* [1996] ECR I-5951, (“*Tetra Pak II*”). Within that framework, the Director took into account the policy followed by the *Herald & Post* in relation to advertising rates, pagination and distribution; the relationship between the revenue of the *Herald & Post* and its costs; the intentions of Aberdeen Journals as disclosed in certain internal documents; and certain arguments advanced by Aberdeen Journals by way of defence.

Advertising rates, pagination and distribution of the Herald & Post

20. According to the Director, the key features that Aberdeen Journals can vary in producing the *Herald & Post* are (i) advertising rates; (ii) pagination (i.e. the number of pages in each edition); and (iii) distribution (i.e. the number of copies distributed of each edition, also known as circulation): see paragraph 71 of the Decision. According to the Director, Aberdeen Journals took the following action on each of these aspects.
21. The average advertising rate of the *Herald & Post* was cut shortly after the launch of the *Independent* from £[...] [over £3] per single column centimetre (“sscm”) in April 1996 to £[...] [less than £1.50] per sscm in May 1996. The rate was further cut in October 1998 to below £[...] per sscm. In March 2000, the average rate was £[...] [less than £1.50] per sscm. That was raised to £[...] [less than £1.75] per sscm in April 2000. The average rates for May, June and July 2000 were £[...], £[...] and £[...] [in all cases less than £1.75] per sscm. (See paragraph 72, and Annex 2, Graph 1, to the Decision.)
22. Pagination of the *Herald & Post* was increased from under 100 pages a month in the period up to April 1996, to 148 pages in May 1996. Subsequently pagination rose, until it was mainly between 350 and 480 pages per month in the period between September 1998 and October 1999 (i.e. weekly papers containing 84 to 96 pages). Between November 1999 and March 2000, pagination declined to between 300 and 380 pages per month. Pagination in March 2000 was 388 pages. Pagination was cut back in April 2000 to 220 pages per month, and remained at about that level until July 2000. (See paragraph 74 and Annex 2, Graph 2, to the Decision.)
23. From October 1995 to April 1998 the distribution of each weekly edition of the *Herald & Post* was between 80,000 and 100,000 copies. Distribution increased to above 120,000 per edition in November 1998, but between October 1999 and March 2000 distribution declined to between 100,000 and 108,000 copies. In March 2000, average distribution was 102,600 copies for each weekly edition. This was cut to 83,974 copies in April 2000, and remained at about that level until July 2000. (See paragraph 76, and Annex 2, Graph 3, to the Decision.)

Costs and revenues of the Herald & Post

24. Monthly figures for the costs and revenues of the *Herald & Post* were supplied to the Director by Aberdeen Journals for the period October 1995 to July 2000. The figures supplied were those reported in the management accounts of the *Herald & Post*, which set out the “directly attributable costs” and “directly attributable revenue” allocated to the *Herald & Post* by Aberdeen Journals. The principal costs so allocated were (i) the cost of newsprint; (ii) editorial costs; (iii) costs relating to sales of advertising; and (iv) distribution costs. The net balance between such “directly attributable costs” and “directly attributable revenue” constitutes the *Herald & Post*’s “contribution” (positive or negative) to Aberdeen Journals’ financial results, as shown in the management accounts (paragraphs 67 to 69 to the Decision).
25. On this basis, paragraph 78 of the Decision sets out the *Herald & Post*’s contribution to Aberdeen Journals’ financial results for the period October 1995 to July 2000. In summary, paragraph 78 of the Decision shows that before the launch of the *Independent*, the *Herald & Post*’s contribution was positive. However, after the launch of the *Independent*, in 1996, the *Herald & Post* incurred substantial deficits which continued throughout the period up to July 2000. According to the management accounts of Aberdeen Journals, the deficit incurred by the *Herald & Post* for March 2000 was £[...]. Further deficits were recorded in the months of April, May, June and July 2000.
26. In the Decision, the Director considered that the “losses” of the *Herald & Post* shown in the management accounts were “very significant in the context of the revenue being earned”. During the period from November 1998 to September 1999, the “losses” of the *Herald & Post* were over 75 per cent of its revenue. In March 2000 the “losses” of the *Herald & Post* represented 42 per cent of its revenue. The Director says that the “losses” of the *Herald & Post* since April 2000 have been less significant, but were still 12 per cent of revenue in July 2000. (See paragraph 78 to 81, and Graphs 4 and 5 at Annex 2, to the Decision.)
27. The Director, however, noted, at paragraphs 69 and 70 of the Decision, that certain costs, including “printing and ink/plate costs”, are not allocated to the *Herald & Post* in the management accounts of Aberdeen Journals. According to the Director, adding these costs to the “loss” (i.e. negative contribution) of the *Herald & Post* in the month of March 2000 increased the negative contribution of the *Herald & Post* from £[...] to £[...] during that month. Similarly, in the period April to July 2000 the negative contribution of the *Herald & Post* is increased when those costs are included.

28. Turning to the question of the fixed and variable costs of the *Herald & Post*, in the Decision the Director defines “fixed costs” as those that do not vary with output, whereas “variable costs” are those that do vary with output. For the purposes of this case, the Director has assessed “variable” costs as those that could be varied within the period of a single month, on the basis notably that one month is the period “over which short term planning for the *Herald & Post* might be determined”. The Director, however, avers that such a short period “errs against a finding of predation” (see paragraph 82 of the Decision).
29. On that basis, the Director accepted that, over one month, there was a fixed element to the costs of the editorial staff and the advertising team of the *Herald & Post*, but that the costs of newsprint and distribution are variable (paragraph 83 of the Decision). According to the Director, in the 45 months between July 1996 and March 2000, the revenue of the *Herald & Post* exceeded the costs of newsprint and distribution on only five occasions, most recently in April 1998. In March 2000, the revenue of the *Herald & Post* was £[...], which did not cover the newsprint and distribution costs of £[...]. However, in April, May, June and July 2000 the costs of newsprint and distribution were covered by revenue (paragraphs 83 and 84 and graph 6 at Annex 2 to the Decision).
30. In the Decision, at paragraphs 85 to 87, the Director also carried out a further analysis of costs for the months of March to July 2000, in order to determine the variable costs of the *Herald & Post* on the basis of what costs could be avoided if the *Herald & Post* were not produced for a month. On the basis of this further analysis, the Director considered that Aberdeen Journals had failed to price above average variable costs regarding the *Herald & Post* in March, May and June 2000. Specifically as regards the month of March 2000, the Director found that the revenue of the *Herald & Post* was £[...] and that its variable costs, including an allocation for common costs, were £[...], giving a deficit of £[...] for that month (see paragraphs 85 to 87 of the Decision).

Aberdeen Journals’ intentions

31. At paragraphs 88 to 90 of the Decision, the Director found that it was Aberdeen Journals’ intention to use the *Herald & Post* strategically to expel the *Independent* from the market by means of incurring heavy losses on that title. In support of that conclusion, the Director set out, at paragraph 88 of the Decision, extracts from a number of internal memoranda between staff of Aberdeen Journals and Northcliffe supplied to the Director by Aberdeen Journals. The citations in the Decision are as follows:

'Memo dated 12 July 1996, Mr Alec Davidson (Managing Director of Northcliffe) to Mr Alan Scott (Managing Director of Aberdeen Journals):

Under the heading '*Herald & Post*': 'You view the *Herald & Post* as a tactical tool in the company's armoury. Barwell's [Keith Barwell owns the *Independent*] move to Aberdeen has caused you to increase your efforts on this and if and when he goes away you will leave a three month gap between that happy event and running it down again.'

'Next year's figure [the annual budget] would include the £500,000 investment we are making against Barwell. Whilst you thought it possible that Barwell would cease publication by Christmas this cannot be built into the budget.'

Memo dated 1 April 1997, Mr Davidson to Mr Ian Lovett (Commercial Systems Manager at Aberdeen Journals):

After references to whether the *Independent* is making a profit, or loss, 'Finally, please keep your foot on their neck!'

Memo dated 12 May 1998, Mr Davidson to Mr Scott:

'You perceive the *Independent* to be less of a threat to you and therefore propose to fight it with the *Herald & Post*, not the paid-for titles. We authorise an additional £50,000 to be invested into that and this will be taken into account when calculating your strive payments at the end of the year. I would be tempting fate if I recorded that you think the *Independent* may cease publishing by the end of this financial year but here goes anyway!'

'You also proposed to place greater separate focus on the *Herald & Post* so that it is our only title pitched against the *Independent*. Again, this is agreed for this could be an area where we could make substantial profit progress over the next 18 months to 2 years, given that we are successful in closing them down.'

Memo dated 29 July 1998, Mr Michael Pelosi (Deputy Managing Director at Northcliffe) to Mr Scott:

'the closure of the *Aberdeen Independent* would allow you to reduce gradually investment in the *Herald & Post*, resulting in additional profits of between £0.5 m and £1m.'

Memo dated 6 December 1999 from Mr Davidson to Mr Scott:

'You agree to produce 2 scenarios as far as the *Independent* is concerned. The first assumes that we acquire them. The second assumes that you are given a sum of money to neutralise them.'

Memo dated 5 January 2000 from Mr Davidson to Mr Taymour Ezzat (then Northcliffe's London Financial Controller):

'The purpose of your visit is to help Aberdeen construct three operational and financial scenarios relating to the *Aberdeen Independent*. These can be summarised as: 2.1 To continue with the existing policy 2.2 To purchase the *Aberdeen Independent*; and 2.3 To considerably enhance our existing activity with a view to denying the *Independent* all commercial oxygen.'

Review of Aberdeen Independent by Mr Ezzat (undated, but responsive to Memo dated 5 January 2000 from Mr Davidson to Mr Ezzat):

After reviewing competition between Aberdeen Journals and *Independent*: 'The current position is one of stalemate' (page 2). Recommendation (page 5): 'to purchase the *Independent* from Barwell and merge the title with our own free title ... Unfortunately Barwell is currently on a roll and may feel that he can demand a higher price. NNG will therefore need to move forward by developing

the Herald & Post and increasing the pressure on Barwell. ... Our response to Barwell was very vigorous and most publishing entrepreneurs would not have been able to fund these losses over four years.

Assuming the OFT risk is minimal, open negotiations with Barwell as we need to bring his price expectations down. On the basis that he will not accept our views, we need to continue with the development of the Herald & Post at the same time.

NNG have to be prepared to maintain this approach for a sustained period (6 to 12 months) in order to convince Barwell that we will not allow the Independent to break even.

I believe that maintaining the pressure on Barwell by attacking the Independent more aggressively and satisfactorily resolving the OFT queries will eventually ensure he will accept our offer.'

32. On the above evidence, the Director presumed what he describes as “predation” by Aberdeen Journals in March, May and June 2000, contrary to the Chapter II prohibition. The *Herald & Post*'s revenue was below average variable cost during that period (see paragraph 30 above), even taking into account only costs which were regarded as variable over a reference period as short as one month (paragraph 91 of the Decision).

Aberdeen Journals' arguments before the Director

33. According to paragraphs 93 to 112 of the Decision, Aberdeen Journals raised three counter arguments to rebut the Director's presumption of predatory conduct. Those arguments were that: (i) Aberdeen Journals was merely meeting competition; (ii) by 1 March 2000 Aberdeen Journals had changed its strategy, so no predation could be established after that date; and (iii) in any event, there was no predation in May and June 2000 by Aberdeen Journals since extra costs were incurred in those months because the threat of industrial action in Aberdeen compelled it to print the *Herald & Post* in Leicester.
34. As to those arguments, the Director considered (i) that Aberdeen Journals did not react proportionately to the *Independent*'s entry, but rather initiated and maintained a strategy designed to expel the *Independent* from the relevant market, using the *Herald & Post* as a “fighting title” (paragraphs 93 to 96 of the Decision); (ii) that there was no significant change in the situation after 1 March 2000 so as to rebut the presumption of predation during the month of March (paragraphs 97 to 111); but (iii) that the cost increase in May and June 2000, resulting from the printing of the *Herald & Post* in Leicester, as a result of the threat of industrial action in Aberdeen, amounted to an objective justification displacing the presumption of predation in those two months (paragraph 112 of the Decision). On that basis, there remained only one month in which predation was found, namely March 2000.

The Director's conclusion on infringement

35. On the basis of the evidence before him, the Director found, at paragraph 114 of the Decision, that there was “a clear, unbroken chain of conduct” linking Aberdeen Journals’ predatory conduct before 1 March 2000 with its conduct once the Chapter II prohibition had entered into force on that date. There was no objective justification for that conduct. In particular, there was insufficient evidence to rebut the presumption that Aberdeen Journals had engaged in predatory conduct by its failure to cover its average variable costs from 1 to 29 March 2000 (paragraphs 114 to 116 of the Decision). The Director further considered that trade within the United Kingdom was likely to be appreciably affected by Aberdeen Journals’ conduct (paragraphs 117 and 118). Accordingly, the Director concluded that Aberdeen Journals had infringed the Chapter II prohibition (paragraph 119 of the Decision).

The penalty

36. The Director further held that the infringement had been committed intentionally or negligently and imposed a penalty of £1,328,040, pursuant to his powers under section 36 of the Act. The Director’s calculations of the penalty are set out at paragraphs 126 to 133 of the Decision. At paragraph 121 of the Decision the Director found that no directions were necessary under section 33 of the Act “[s]ince Aberdeen Journals has provided evidence to the Director that it has ceased predating.”

III THE PROCEDURE BEFORE THE TRIBUNAL

37. Aberdeen Journals’ application to the Tribunal was lodged at the Registry on 14 September 2001. Notice of the appeal was published in the London, Edinburgh and Belfast Gazettes on 21 September 2001 and also on the Tribunal’s website, www.competition-commission.org.uk, pursuant to Rule 13 of the Tribunal Rules.
38. By a request lodged at the Registry on 12 October 2001, Aberdeen Independent requested permission to intervene in support of the Director pursuant to Rule 14 of the Tribunal Rules. That application was granted at the case management conference held on 16 October 2001.
39. At the case management conference of 16 October 2001 the Tribunal also considered, in accordance with Rule 16 of the Tribunal Rules, whether these proceedings were before a tribunal in England and Wales, in Scotland or in Northern Ireland. After hearing argument, the Tribunal ruled, in its judgment of 16 October 2001, that the proceedings were proceedings

before a tribunal in Scotland and that, pursuant to Rule 16(3), it was appropriate to hold the oral hearing in Scotland.

40. At the case management conference on 16 October 2001 it was also agreed that certain documents for which confidentiality was claimed would be disclosed by Aberdeen Journals to the legal advisers of Aberdeen Independent. It appears that difficulties later arose as to the scope of the confidentiality claimed by Aberdeen Journals in respect of certain documents upon which the advisers to Aberdeen Independent wished to take their clients' instructions. In such circumstances, the correct course is to make an application to enable the Tribunal to settle the principles applicable and the application of those principles in the particular case. In the present case, however, no application was made to the Tribunal to resolve this dispute, and Aberdeen Independent did not pursue the matter at the oral hearing.
41. The Director's defence was lodged on 29 October 2001. Aberdeen Independent's statement of intervention was lodged on 7 November 2001. Aberdeen Journals lodged a short reply on 14 November 2001. Copies of the *Evening Express*, *Herald & Post* and *Independent* were supplied by the parties following the Tribunal's request of 1 November 2001.
42. By various letters dated 19, 23 and 29 November and 3, 6 and 7 December 2001 passing between the Tribunal and the parties, the Tribunal sought to establish how far the printing costs associated with the production of the *Herald & Post*, other than ink, plate and film costs, notably staff costs had been taken into account in the Decision, and asked for details of such costs. The outcome of these exchanges was that Aberdeen Journals identified certain additional costs and the Director accepted that staff printing costs had not been investigated. Aberdeen Independent questioned both the appropriateness and the reliability of the cost allocations made by Aberdeen Journals and provided data on its own costs. We take no view on these matters in this judgment.
43. Skeleton arguments were exchanged in accordance with an agreed timetable shortly before the oral hearing. Aberdeen Journals' skeleton annexed some 40 US and Australian cases. The oral hearing took place on 11 December 2001 at the Court of Session in Edinburgh.
44. A note on the US and Australian case law was lodged by Aberdeen Journals on 19 December 2001. Further letters to the Tribunal on the issue of printing costs were lodged by Aberdeen Journals on 18 December 2001, the Director on 8 January 2002 and Aberdeen Independent on 11 January 2002.

45. Aberdeen Journals requests:
- that the Decision be set aside in whole or in part;
 - that the penalty be set aside or reduced;
 - a declaration that Aberdeen Journals' conduct in the period 1 to 29 March 2000 did not infringe section 18 of the Act;
 - that the Director pay Aberdeen Journals' costs; and
 - such further and other relief as the Tribunal may consider appropriate.
46. The Director requests the Tribunal:
- to dismiss Aberdeen Journals' appeal; and
 - to order Aberdeen Journals to pay interest on the penalty from 17 October 2001 at a rate consistent with the rate at which a commercial lender would have loaned an equivalent sum to Aberdeen Journals for the period in question.
47. Aberdeen Independent submits that the Tribunal should:
- dismiss Aberdeen Journals' appeal; and
 - order Aberdeen Journals to pay its costs.
48. In his defence the Director reserved his position on costs. By letter of 7 February 2002 he sought to be heard on the issue of costs in the light of the Tribunal's judgments on costs in *The Institute of Independent Insurance Brokers and Association of British Travel Agents Limited v Director General of Fair Trading* (29 January 2002) and *Napp Pharmaceutical Holdings Limited and subsidiaries v Director General of Fair Trading* (6 February 2002).

IV THE ISSUES

49. In the light of the arguments of the parties, the issues in this case concern principally (i) whether the Director has correctly defined the relevant market; (ii) if so, whether Aberdeen Journals is dominant in that market; (iii) if so, whether Aberdeen Journals' pricing policy in relation to the *Herald & Post* in March 2000 constituted an abuse of that dominant position; (iv) whether any such abuse may affect trade within the United Kingdom; and (v) if so, whether any, and if so what, penalty should be imposed on Aberdeen Journals.
50. In this case, as in others under the Chapter II prohibition, these issues are interrelated and should not be compartmentalised in a formal way. However, we address first the parties' submissions on the interrelated issues of the definition as to the relevant market and Aberdeen Journals' alleged dominance.

V THE RELEVANT MARKET AND DOMINANCE

51. In the Decision, the Director held that the relevant market is the market for the supply of advertising space in both paid-for and free local newspapers in Aberdeen or the circulation area of the *Herald & Post* (paragraphs 14 to 48).
52. Alternatively, said the Director, the alleged abuse of predation “is not sensitive” to the submission made by Aberdeen Journals to the Director, in the course of the administrative procedure, to the effect that advertising in paid-for newspapers, and in free newspapers, respectively, constitute different markets. Even on that view, said the Director, Aberdeen Journals would be dominant in the narrower market of advertising space in paid-for newspapers in Aberdeen, since it was the only supplier of paid-for newspapers in that area. On that analysis, Aberdeen Journals would still have abused its dominant position in the supply of advertising space in paid-for newspapers in Aberdeen by its predatory conduct on the closely associated market of advertising space in free newspapers in Aberdeen (paragraphs 49 to 52 of the Decision).
53. As to dominance in the Director’s primary market – the supply of advertising space in paid-for daily and free weekly newspapers in the Aberdeen area – the Director held that Aberdeen Journals had a market share of [...] [over 70] per cent by value and [...] [over 60] per cent by volume in the first quarter of 2000. In addition, according to the Director, competition against Aberdeen Journals was weak. Its only direct competitor, the *Independent*, was subject to an aggressive strategy of predation. Moreover, significant barriers to entry existed, not least Aberdeen Journals’ strong reputation for fighting potential entrants seeking to establish competing titles (paragraphs 53 to 58 of the Decision).

A. ARGUMENTS OF THE PARTIES

Aberdeen Journals’ submissions

54. Aberdeen Journals submits that the Director should establish his case to the criminal standard of “beyond all reasonable doubt” or some proxy thereof. In this case the Director has not sufficiently proved the relevant market relied on in the Decision. In particular, it is not established that the relevant market in the Aberdeen area includes both advertising space in the daily paid-for *Evening Express* and advertising space in the free weekly titles, the *Herald & Post* and the *Independent*. According to Aberdeen Journals, the correct relevant market in this case is that for free newspapers in Aberdeen. In that market, Aberdeen Journals has no dominant position.

55. Aberdeen Journals draws attention to the fundamental importance of correct market definition in competition cases (see the Director’s Guideline on *Market Definition* (OFT 403) and Case 31/80 *L’Oréal* [1980] ECR 3775), notably in order to ensure that the “special responsibility” imposed on a dominant undertaking is not imposed in relation to markets in which the undertaking does not hold a dominant position (Case 322/81 *Michelin v Commission* [1983] ECR 3461, paragraph 10; *Claritas (U.K.) Limited v the Post Office and Postal Preference Service Limited* [2001] ECC 12, paragraph 44).
56. According to Aberdeen Journals, in order to define the relevant market (a) there must be a detailed description and assessment of the characteristics of the products in question and (b) account must be taken of the competitive conditions, of the structure of supply and demand on the market, and of the views of customers and consumers (Case 6/72 *Continental Can v Commission* [1973] ECR 215, paragraphs 35 and 37; *Michelin*, cited above, at paragraph 37; Case T-83/91 *Tetra Pak v Commission* [1994] ECR II-755 at page 793; Case T-9/93 *Schöller v Commission* [1995] ECR II-1611 at paragraph 40; and OFT 403, paragraph 3.1). In this case, says Aberdeen Journals, the Director has failed to fulfil those requirements.
57. Firstly, the Decision makes almost no mention of the “particular characteristics” of the products concerned. The Director’s descriptions of the newspapers in question are inadequate. In particular, there is no description at all of the advertising base of either the *Independent*, or the *Evening Express*, nor any proper comparison of those products, in demand terms, with the *Herald & Post*.
58. Secondly, as regards the “competitive conditions on the market”, Aberdeen Journals points out that the Director has not included an analysis of the reaction of advertisers in Aberdeen to the “hypothetical monopolist test” set out in the Director’s own guidance (OFT 403, paragraph 2.8) in order to assess the product market on the demand side. Moreover, the Director has not used the monthly volume and revenue figures submitted by Aberdeen Journals and Aberdeen Independent to examine how a relative price increase in one newspaper leads or might lead to advertisers switching to another newspaper.
59. Indeed, submits Aberdeen Journals, the Director has included no evidence in the Decision on the substitutability of paid-for daily newspapers for free weekly newspapers, or vice versa. The Director’s various assertions in the Decision as to advertisers seeing “scope for switching between advertising in the free and paid-for local titles” (paragraph 25) or as to “the overlap in advertisers using the papers” (paragraph 30) are unsupported by evidence. Such evidence as

does exist suggests that the *Herald & Post* and the *Independent* are the closest substitutes in the Aberdeen area, as the Director himself finds in paragraph 22 of the Decision.

60. Aberdeen Journals notes that the only evidence from advertisers on which the Director relied in the Rule 14 Notice, namely a survey of Aberdeen advertisers, has not been referred to in the Decision. Aberdeen Journals considers that this survey was unrepresentative and did not address the correct questions. However, in so far as any conclusions can be drawn, this survey provides virtually no support for the Director's proposition that free and paid-for newspapers formed a single market at the material time.
61. According to Aberdeen Journals, the Director's market definition is further flawed since he has made no analysis of the market during the period of the infringement – 1 to 29 March 2000 – as he is bound, as a matter of law, to do. According to Aberdeen Journals, it is unlawful for the Director to rely on facts and matters arising before 1 March 2000 in order to establish his case after that date. The Director relies on no evidence from advertisers relating to March 2000, nor has he attempted to include an analysis of the extent to which the same advertisers used both the *Evening Express* and the free weekly titles in the period 1 to 29 March 2000.
62. In particular, Aberdeen Journals submits that the Director cannot rely on the letter to the Director of 10 February 2000 from Mr Scott, the Managing Director of Aberdeen Journals, as he does in paragraph 23 of the Decision. That letter merely records Mr Scott's perception of what Aberdeen Independent's strategy was in 1996, and does not express agreement with that strategy. That letter further indicates Mr Scott's view that the distribution area of the *Evening Express* and the *Herald & Post* are different; that the response of Aberdeen Journals to the launch of the *Independent* was to lower the advertising rates of the *Herald & Post*, not those of the *Evening Express*; that the paid-for and free newspapers operate in different "layers" of the market; that there are differences between the *Evening Express* and the *Independent* in respect of quality, news coverage, editorial content, readership and target audience. In any event, the letter of 10 February 2000 does not show a competitive relationship between the paid-for and the free titles in March 2000, by which time the quality of the *Herald & Post* had deteriorated sharply and its advertising rates had risen. Other citations from the letter of 10 February 2000, relied on by the Director in paragraph 23 of the Decision, are taken out of context.
63. Aberdeen Journals further argues that the Director has not rebutted its case that the free weekly and paid-for daily newspapers in Aberdeen form two separate markets since they have very different characteristics, and a very different appeal to advertisers. In support of this, Aberdeen Journals relies on a witness statement from Mr Scott. In that statement Mr Scott emphasises,

notably, that readership per copy for the paid-for titles in Aberdeen is as much as double that of the free titles; readers spend less than half the time reading the free titles as they do the paid-for titles; 27 per cent of the *Evening Express*'s distribution is outside urban Aberdeen; the demographic targets of the *Evening Express* and the *Herald & Post* are different, the former being directed more towards those aged between 15 and 44 with a lower proportion of AB readers; unlike the free newspapers, the paid-for newspapers depend on long term credibility in their editorial coverage; and the paid-for daily titles provide advertisers with a more focussed platform than do the weekly free newspapers. ■

64. According to Aberdeen Journals, the Director counters this very specific evidence regarding the characteristics of the titles concerned with only very general assertions. His reliance (at paragraph 19 of the Decision) on reports of the reporting panels of the Competition Commission (namely *Johnston Press plc and Home Counties Newspapers Holdings plc*, June 1998, Cmnd 3962, paragraph 2.9, and *Portsmouth & Sunderland Newspapers plc and Johnston Press Plc/Newsquest (Investments) Limited/News Communications and Media Plc*, June 1999, Cmnd 4358, paragraph 2.22) is an inadequate basis for concluding that free and paid-for newspapers compete. In particular the *Portsmouth & Sunderland* report concludes merely that “paid-for and free newspapers *may* directly compete for readers and advertisers” and makes it clear that a *specific* analysis is required in each case (paragraph 4.23). Moreover, the report of the reporting panel of the Competition Commission on *News Communications & Media plc and Newsquest (Investments) Limited/Johnston Press plc/Trinity Mirror plc*, April 2000, Cmnd 4680 (paragraph 2.24) shows that a detailed analysis of specific titles’ editorial content and readership profiles is required. The Director also omits to mention the most recent report of the reporting panel of the Competition Commission, *Regional Independent Media Limited and Gannett UK Limited/Johnston Press Plc/Guardian Media Group plc*, November 2000, Cmnd 4887, which concluded (at paragraph 4.34) that advertisers view advertising in daily and weekly titles as complements, rather than substitutes.
65. Aberdeen Journals also criticises as unsubstantiated the Director’s contention that “the geographic targeting of the *Evening Express* is not sufficiently different” to justify its exclusion from the relevant market (paragraph 28 of the Decision), and his failure to take into account the difference in frequency of publication between the daily *Evening Express* and the two weekly free newspapers (paragraph 30 of the Decision) as a relevant factor.
66. In oral argument Aberdeen Journals emphasised that it would be artificial to take into account any “gravitational pull” there may be for advertisers from the paid-for *Evening Express* to the free newspapers in a period when the latter were at their most attractive in terms of rates,

pagination and distribution because of the competitive battle between them. According to Aberdeen Journals, what the Director needs to demonstrate is a significant amount of substitution between the titles concerned in normal market conditions, and not just some switching at the margins in atypical conditions.

67. Moreover, according to Aberdeen Journals the Managing Director of the *Independent*, Mr Robins, supports Aberdeen Journals' view of the market. In his letter to the Director of 8 March 2000 Mr Robins stated, after consulting Mr Barwell:

“The relevant product market that the *Herald & Post* competes in is the local newspaper market, and more specifically the local free newspaper market...We are their only direct competitor within both these markets. Both the other newspapers within Aberdeen are daily, paid-for titles owned by Aberdeen Journals”

68. Furthermore, according to Aberdeen Journals, the Director's conclusions (at paragraphs 32 to 42 of the Decision) that other advertising media are not close substitutes for advertising in newspapers, is not supported by any evidence from advertisers in Aberdeen. Aberdeen Journals identifies a number of instances of what it considers to be evidence demonstrating that advertisers in Aberdeen are in fact using, or would potentially use, the internet, local radio, or directories as substitutes for newspapers, and that media such as *AutoTrader* and direct mail are viable, potential substitutes given appropriate market conditions. According to Aberdeen Journals, the Director's arguments that other media are considered by advertisers as complements, not substitutes, for newspapers, applies equally to the relationship between paid-for daily newspapers and weekly free newspapers. Moreover, the Director's own survey suggests that the internet is and was viewed by advertisers as a substitute for newspapers.
69. According to Aberdeen Journals, the Director's alternative argument (at paragraphs 49 to 52 of the Decision) that, even if he accepted Aberdeen Journals' submissions on market definition, Aberdeen Journals would be dominant on the market for the supply of advertising space in paid-for newspapers in Aberdeen, and would have abused that dominant position on an associated market for free titles, cannot be taken into account as it was not put to Aberdeen Journals in the course of the administrative procedure. In any event, there is no analysis in the Decision which could enable the Director to conclude that there were “strong associative links” between the titles and markets in question, in the period 1 to 29 March 2000.
70. Aberdeen Journals, in its reply, denies that the Director is entitled to rely on any fact or matter other than that which is contained in the Decision. According to Aberdeen Journals, the Director has improperly embellished the Decision by relying in the defence on extracts from documents not referred to in the Decision, namely Appendix 2 to the Aberdeen Journals' letter

of 10 February 2000; a memorandum from Mr Pelosi to Mr Davidson dated 21 May 1999; the memorandum dated 20 July 1999 from Mr Davidson to Mr Scott; and the summary of a meeting with Mr Barwell which took place on 5 August 1999. At the oral hearing Aberdeen Journals maintained that, as a matter of law, the Director was not entitled to rely on this evidence.

71. Finally, as regards “dominance”, even if the Director has correctly defined the relevant market, Aberdeen Journals submits that the *Herald & Post* had no ability to behave independently of its advertisers, and of the *Independent* in the period 1 to 29 March 2000. In particular, as a result of the changes in advertising rates, pagination and distribution which took place at the *Herald & Post* during March 2000, a number of advertisers ceased advertising in the *Herald & Post*. That shows that the *Herald & Post* was not “behaving independently” of its advertisers.
72. In any event, in this case, the Director cannot establish dominance on the basis of the market shares alone. First, having defined the relevant market as “Aberdeen or the circulation area of the *Herald & Post*” the Director wrongly proceeds to include the total sales of the *Evening Express* in the calculation of Aberdeen Journals’ market share. Secondly, the circumstances during 1 to 29 March 2000, when Aberdeen Journals was increasing advertising rates for a product which was of less value to advertisers constitute “exceptional circumstances” displacing the presumption in *Case 85/76 Hoffman-La Roche v Commission* [1979] ECR 461, paragraph 41, that dominance can be established by market share alone. In the present case, the remaining market share is taken by the *Independent*, which has progressively increased its market share at the expense of the *Herald & Post*. The Decision does not analyse whether the *Herald & Post* in fact held a “position of economic strength” in March 2000. As regards free newspapers in Aberdeen, in March 2000, the *Independent’s* share was between 65 and 72 per cent by value whereas that of the *Herald & Post* was between 35 and 28 per cent. Accordingly Aberdeen Journals was not dominant during that period.

The Director’s submissions

73. The Director submits, in the defence, that the standard of proof he has to meet on the issues in the case, including the issue of market definition, is the civil standard of the balance of probabilities.
74. According to the Director, in defining the relevant product market, the starting point is to identify the product concerned. In this case, that required examination of the nature of the advertising which appears in the *Herald & Post*. Paragraph 35 of the Decision amounts to a

detailed assessment of the objective characteristics of that product. Thereafter, the Decision concludes (at paragraphs 21-25) that the *Herald & Post*, *Independent* and *Evening Express* are reasonable substitutes for each other from the point of view of the type of advertisers who advertise in the *Herald & Post*. As a result, the relevant product market encompasses advertising space in all three titles.

75. The justification for this conclusion is provided in the Decision (at paragraphs 23 and 24) by reference to the written submissions sent by Aberdeen Journals to the Office of Fair Trading (“the Office”) dated 10 February 2000. Those submissions recognise that the *Independent*, both historically and until at least February 2000, posed a significant threat to both the *Herald & Post* and the *Evening Express*.
76. In addition, the Director refers to a number of further statements contained in Appendix 2 to Aberdeen Journals’ submissions of 10 February 2000 to the effect that the *Independent* is or was seen by Aberdeen Journals as competing with the *Evening Express*.
77. The Director also refers to a number of other documents supplied by Aberdeen Journals to the Director, including memoranda from senior figures in both Northcliffe and Aberdeen Journals, namely a memorandum of 21 May 1999 from Mr Pelosi (Deputy Managing Director of Northcliffe) to Mr Davidson (Managing Director of Northcliffe); a memorandum of 20 July 1999 from Mr Davidson to Mr Scott (the Managing Director of Aberdeen Journals); a “summary of a meeting with Keith Barwell” which took place on 5 August 1999; and a “Review of Aberdeen Independent” prepared by Mr Ezzat (the London Financial Controller of Northcliffe) in January 2000. (The Director no longer relies on a document concerning a customer referred to in paragraph 25 of the defence).
78. According to the Director, the weight of this direct evidence, indicating the shared view of the main protagonists as to the scope of the relevant product market, and their conduct on that market, was sufficient to determine what the relevant market was in this case.
79. In relation to the specific arguments raised by Aberdeen Journals on the relevant market, the Director responds as follows:
 - the Director did not include an analysis of the reaction of advertisers in Aberdeen to the “hypothetical monopolist test” since (i) it is not obligatory as a matter of law, (ii) it is questionable whether such an analysis is meaningful where predatory conduct has suppressed prices below normal competitive levels and it is unclear what such levels

- would be; and (iii) in any event the conduct of the parties provides powerful, direct evidence as to the relevant market;
- given the existence of direct evidence of the substitutability of the *Herald & Post* and *Independent* (free weeklies) and the *Evening Express* (paid-for daily) there was no need to adopt an abstract analysis of potential competition between paid-for daily newspapers and free weekly newspapers;
 - there was no need to rely on the evidence from advertisers which was referred to in the Rule 14 Notice, given the direct evidence as to the relevant product market provided by the participants' conduct in that market;
 - the evidence (and specifically Aberdeen Journals' written submission of 10 February 2000) establishes that the relevant market in 2000 remained the supply of advertising in paid-for and free local newspapers. There is nothing to suggest that the position changed between February and March 2000;
 - Aberdeen Journals' case that in March 2000 there were two separate markets in Aberdeen, i.e. for free weekly and paid-for daily, newspapers respectively, is sufficiently rebutted by the contemporaneous documents;
 - nothing in the reports of the reporting panel of the Competition Commission cited by Aberdeen Journals contradicts the Director's market definition which is based on specific and direct evidence of the operation of the market;
 - the statement made by Mr Robins in his letter dated 8 March 2000 to the Director that "the relevant product market that the *Herald & Post* competes in is the local newspaper market, and more specifically the local free newspaper market" is ambiguous and is not inconsistent with a conclusion that the *Herald & Post* competes in the local newspaper market. In addition, the summary of the meeting of 5 August 1999 makes it clear that Mr Barwell believes that the *Independent* competes with both the *Herald & Post* and the *Evening Express*;
 - in relation to whether other advertising media provide substitutes for advertising in local newspapers in Aberdeen, the Decision, at paragraphs 32 to 40, sufficiently demonstrates that other media are not "close substitutes" for advertising in newspapers in Aberdeen;
 - the Decision is not based on, and does not depend upon, the alternative analysis of the relevant market contained in paragraphs 49 to 52. The Director does not rely on those paragraphs in the context of this appeal.

80. As regards the additional documentary evidence referred to in the defence but not in the Decision, the Director submitted that the Decision refers to, and quotes from, Aberdeen Journals' submission dated 10 February 2000; paragraph 43 of the Decision relies generally on

“the submissions” made by Aberdeen Journals; the passages relied on are taken from that submission and the documents provided as part of that submission; Aberdeen Journals cannot be prejudiced, since the submission of 10 February 2000 was made by Aberdeen Journals itself and is referred to in the Decision; the documents concerned raise no new issues; and the material was before the Director when he took the Decision.

81. As to “dominance”, the Director considers that the market shares and other factors relied on in the Decision suffice to establish dominance in accordance with *Hoffman-La Roche*, cited above, and Case T-30/89 *Hilti v Commission* [1991] ECR II-1439, paragraph 92, upheld on appeal, Case C-53/92P *Hilti v Commission* [1994] ECR I-667. There are no exceptional circumstances here to rebut the presumption that flows from Aberdeen Journals’ high market shares. The few customers lost by the *Herald & Post* when advertising rates were increased in March 2000 is not inconsistent with dominance, and did not prevent that publication from returning to “profitability”. In any event, the changes in advertising rates, pagination and distribution made at the *Herald & Post* were as a result of pressure from the Office, not market circumstances. Finally, Aberdeen Journals’ challenge to the definition of the relevant geographical market is purely formal, no facts being advanced to support it.

Aberdeen Independent’s submissions

82. Aberdeen Independent submits that Aberdeen does have a separate market for local newspapers due to its somewhat isolated geographical position from the rest of the United Kingdom which allowed advertising rates to be up to 10 times the national average. According to Aberdeen Independent, this fact and the lack of competition encouraged Mr Barwell to enter the market. Moreover, there is clear demand substitution between all three newspapers in the relevant market. Advertisers, especially those in the property and motor trade, will swap readily between the free and paid-for newspapers or use both types in which to advertise their goods or services. As regards dominance, Aberdeen Journals relies on the Director’s submissions and refers to barriers to entry faced by the *Independent*.
83. Aberdeen Independent relies on a witness statement submitted by Mr Barwell. Mr Barwell states his view that the Director has correctly defined the relevant market. Advertisers advertise in all three of the publications in issue, particularly in the property and motors sections.
84. In oral submissions, Aberdeen Independent emphasised that the fact that advertisers advertise in both free and paid-for newspapers in Aberdeen shows that there is interchangeability on the

demand side: if the free newspapers did not exist, advertisers would have no choice except the *Evening Express*.

85. Aberdeen Journals considers that Mr Barwell's evidence is inadmissible and should not be relied upon by the Tribunal.

B. THE RELEVANT LAW

86. We first set out the relevant law. In order to fall within the Chapter II prohibition, it must be established that the undertaking in question has a dominant position. As traditionally defined, a dominant position is:

“a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by allowing it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.”

See Case 85/76 *Hoffman-La Roche v Commission* [1979] ECR 461, paragraph 38; Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, paragraph 70.

87. However, as the Director points out at paragraph 12 of the Decision:

“such a [dominant] position does not preclude some competition ... but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.”

Hoffman-La Roche v Commission, cited above, at paragraph 39.

88. In order to determine whether, in any given case, an undertaking has the necessary degree of economic strength or, to use the more modern term, market power, so as to give rise to dominance, it is self-evidently necessary to define the market in which that market power is said to exist. As the Commission of the European Communities (“the Commission”) has put it in paragraph 2 of its *Notice on the definition of relevant market for the purposes of Community competition law* (“the Commission's *Notice on Market Definition*”) OJ 1997 C372/5:

“Market definition is a tool to identify and define the boundaries of competition between firms ... The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure.”

89. The Director's Guideline on *Market Definition* OFT 403, March 1999, follows the same approach:

“The approach described in this guideline is not mechanical, it is a conceptual framework within which evidence can be organised. The Director General will not follow every step described below in every case. Instead, he will look at the areas of evidence which are relevant to the case in question – and will often be constrained by the extent to which evidence is available. Market definition is not an end in itself, but rather a step which helps in the process of determining whether undertakings possess, or will possess, market power.” (paragraph 1.5)

90. As both the Commission’s *Notice on Market Definition*, and the Director’s *Guideline on Market Definition*, cited above, make clear, the concept of the relevant market includes both the *relevant product market*, i.e. those products which compete with each other to a sufficient extent to exercise a competitive constraint, and the *relevant geographic market* i.e. the geographic area in which competition between the relevant products takes place.

91. As far as the relevant product market is concerned, the Court of Justice said in *Hoffman-La Roche*, cited above,

“The concept of the relevant market in fact implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned.” (paragraph 28).

92. In its judgement in *Tetra Pak II* [1994] ECR II-755, the Court of First Instance held at paragraph 63:

“A preliminary point to note is that, according to settled case-law, the definition of the market in the relevant products must take account of the overall economic context, so as to be able to assess the actual economic power of the undertaking in question. In order to assess whether an undertaking is in a position to behave to an appreciable extent independently of its competitors and customers and consumers, it is necessary first to define the products which, although not capable of being substituted for other products, are sufficiently interchangeable with its products, not only in terms of the objective characteristics of those products, by virtue of which they are particularly suitable for satisfying constant needs, but also in terms of the competitive conditions and the structure of supply and demand on the market (see the judgment of the Court of Justice in Case 322/81 *Michelin v Commission* [1983] ECR 3461, paragraph 37).”

93. In Case T-9/93 *Schöller v Commission* [1995] ECR II-1611 the Court of First Instance emphasised that

“it is settled law that account must also be taken of the consumer’s point of view” (paragraph 40)

94. The overall effect of the above case law is summarised in the judgment of the Court of First Instance in Case T-504/93 *Tiercé Ladbroke v Commission* [1997] ECR II-923 at paragraph 81:

“According to settled case-law, for the purposes of applying Article 82 of the Treaty, the relevant product or service market includes products or services which are substitutable or sufficiently interchangeable with the product or service in question, not only in terms of their objective characteristics, by virtue of which they are particularly suitable for satisfying the constant needs of consumers, but also in terms of the conditions of competition and/or the structure of supply and demand on the market in question (Case 31/80 *L’Oréal* [1980] ECR 3775, paragraph 25; Case 322/81 *Michelin v Commission* [1983] ECR 3461, paragraph 37; Case C-62/86 *AKZO Chemie v Commission* [1991] ECR I-3359, paragraph 51; Case T-30/89 *Hilti v Commission* [1991] ECR II-1439, paragraph 64, and Case T-83/91 *Tetra Pak v Commission* [1994] ECR II-755, paragraph 63).”

95. Decisions of the Court of Justice or the Court of First Instance on specific issues concerned with demand side substitution in defining the relevant market include Case 27/76 *United Brands v Commission* [1978] ECR 207 at paragraphs 12 to 35, (bananas distinct from the wider market for fresh fruit), *Hilti*, cited above, [1991] ECR II-1439 at paragraphs 64 to 78 (powder activated fastening systems a distinct market from other fastening systems, upheld on appeal [1994] ECR I-693) and *Tetra Pak II*, cited above, [1994] ECR II-755, paragraph 72, and [1996] ECR I-5931 paragraph 19 (longer term substitutability between plastic cartons and other packaging materials insufficient to establish a wide relevant market for packaging materials for liquid foods).
96. The foregoing cases indicate that the relevant product market is to be defined by reference to the facts in any given case, taking into account the whole economic context, which may include notably (i) the objective characteristics of the products; (ii) the degree of substitutability or interchangeability between the products, having regard to their relative prices and intended use; (iii) the competitive conditions; (iv) the structure of the supply and demand; and (v) the attitudes of consumers and users.
97. However, this check list is neither fixed, nor exhaustive, nor is every element mentioned in the case law necessarily mandatory in every case. Each case will depend on its own facts, and it is necessary to examine the particular circumstances in order to answer what, at the end of the day, are relatively straightforward questions: do the products concerned sufficiently compete with each other to be sensibly regarded as being in the same market? Are there other products which should be regarded as competing in the same market? The key idea is that of a competitive constraint: do the other products alleged to form part of the same market act as a competitive constraint on the conduct of the allegedly dominant firm?
98. In cases where the products concerned have similar objective characteristics, and cater for similar groups of consumers, there will be no particular difficulty in finding that the products

fall within the same market (e.g. that bananas from different Caribbean islands all form part of the market for bananas). But if the question is more complex (e.g. whether the relevant market is not limited to bananas but also includes fresh fruit) a number of approaches exist for identifying the products which form part of the relevant market. These may include an assessment of “demand side substitution” (namely how far it would be open to customers to switch to alternative products, notably in the event of a price increase by the allegedly dominant company) as well as an assessment of “supply side substitution” (namely how far and how quickly other suppliers might enter the market, again in the event of a price increase by the allegedly dominant company).

99. In dealing with these issues, both the Commission’s *Notice on Market Definition* and OFT 403 mention various economic techniques for determining whether products may properly be regarded as substitutable with each other. One such technique is the so-called “SSNIP test”, namely whether in normal competitive circumstances a Small but Significant and Non-transitory Increase in relative Prices (say 5 to 10 per cent) would result in customers switching to an alternative supplier, and if so whether such substitution would be enough to make the price increase unprofitable because of the resulting loss of sales (see e.g. the Commission’s *Notice on Market Definition*, paragraphs 15 to 19; OFT 403, paragraphs 3.1 to 3.6). This test is also part of the “hypothetical monopolist” test, under which it is assumed that the allegedly dominant firm is the only supplier of the products in question (say advertising space in a daily paid-for newspaper). One then asks whether such a monopolist would be constrained in setting its prices by the possibility that it might lose customers to an alternative product (say a weekly free newspaper offering advertising at cheaper rates). If the number of customers who might switch to the alternative product is large enough to constrain the hypothetical monopolist from setting prices above the competitive level as it wishes, then the two products may be regarded as being in the same market (see OFT 403, 2.6 to 2.11).

100. Similar questions arise when delineating the relevant geographic market, which is essentially the area over which substitution takes place:

“Under the scheme of Article 82 of the Treaty, definition of the relevant geographical market, like that of the product market, calls for an economic assessment. The geographical market can be defined as the territory in which all the traders concerned are exposed to objective conditions of competition which are similar or sufficiently homogenous.”

(See *Tiercé Ladbroke*, cited above, paragraph 102).

101. These issues may overlap to a considerable extent with the assessment of the closely related question of whether an undertaking is dominant in a particular market: see OFT 415,

Assessment of Market Power at pp 6 et seq. In general, the definition of the relevant market should not be an abstract exercise detached from the question of dominance.

102. On the other hand, the economic or econometric techniques mentioned above may in particular circumstances be of limited value, for example because the conditions of competition in the particular market place may already be atypical (see the Commission's *Notice on Market Definition*, paragraph 19), or because no or insufficient reliable data is available. Survey data, if any, may be inconclusive because of the hypothetical nature of the question (see OFT 403, paragraph 3.6) or the difficulty of obtaining sufficiently informed responses. In addition, the particular market circumstances may themselves create their own dynamics. For example, a product which might not appear, in the abstract, to be directly substitutable for another product, may turn out on closer examination to be in fact a significant competitor because of the particular circumstances of the local market at the time in question.

103. In general, evidence as to how the undertakings in question themselves see the market is likely to be particularly significant. As the Director points out at paragraph 2.6 of OFT 403:

“The idea of a market is familiar. Annual reports, business plans and other documents often refer to the market in which the undertaking operates. This will normally include other undertakings which the undertaking views as its competitors.”

104. In the Tribunal's view, contemporary evidence as to how the allegedly dominant undertaking itself views its competitors, and vice versa, may, depending on the particular circumstances, be of decisive importance when it comes to defining the market in any given case.

105. As to the standard of proof which the Tribunal expects the Director to meet on the issue of market definition (and indeed as regards other elements of the infringement alleged) this issue is discussed, by another panel, at paragraphs 91 to 112 of the Tribunal's judgment of 15 January 2002 in *Napp Pharmaceutical Holdings v Director General of Fair Trading* (“*Napp*”). That panel heard submissions on both English and Scots law. The Tribunal held at paragraph 109:

“In those circumstances the conclusion we reach is that, formally speaking, the standard of proof in proceedings under the Act involving penalties is the civil standard of proof, but that standard is to be applied bearing in mind that infringements of the Act are serious matters attracting severe financial penalties. It is for the Director to satisfy us in each case, on the basis of strong and compelling evidence, taking account of the seriousness of what is alleged, that the infringement is duly proved, the undertaking being entitled to the presumption of innocence, and to any reasonable doubt there may be.

106. We propose to apply that standard in this case.

C: THE TRIBUNAL'S FINDINGS

107. The question whether in this case the Director has defined the relevant market correctly and adequately presents two distinct issues:

1. Was the Director entitled to find in the Decision that the relevant market in the Aberdeen area comprised the advertising space offered by the three local newspapers, i.e. the paid-for daily *Evening Express*, the weekly free *Herald & Post*, and the weekly free *Independent*, or is the advertising space offered by the *Evening Express* to be regarded as being in a separate market from that offered by the *Herald & Post* and *Independent* for the purposes of assessing dominance?
2. Was the Director entitled to exclude from the relevant market other advertising media, notably the internet, local radio, recruitment agencies, property centres, direct mail, leaflets, niche publications and directories?

Is it established that the relevant market for the purposes of assessing dominance in this case comprises advertising space supplied by the *Evening Express*, *Herald & Post* and *Independent*?

108. To address this question it is necessary to identify the matters relied on by the Director in the Decision to support his conclusion (at paragraph 44) that

“the relevant product market is therefore the supply of advertising space in both paid-for and free local newspapers”.

The Director's findings in the Decision

109. At paragraph 14 of the Decision, the Director said:

“The Director has assessed possible substitutes for advertising in the *Herald & Post* to define the relevant market, including: other types of newspaper, television, radio, Internet, posters and direct mail.”

His analysis of competition between newspapers is set out in paragraphs 16 to 31 of the Decision, which we cite in their entirety, including the footnotes where relevant in the text:

“2.1.1 *Paid-for vs free*

2.1.1(i) *Aberdeen Journals' submission*

16. Aberdeen Journals, in its written and oral submissions responding to the Rule 14 Notice, stated that the free weekly titles, the *Herald & Post* and the *Independent*, are not in the same market as its paid-for daily newspapers, the *Evening Express* and the *Press & Journal*.

17. As evidence to support a narrow market definition comprising just advertising space in its *Herald & Post* and the rival *Independent*, Aberdeen Journals referred to the different characteristics of the titles, in particular, differences in the editorial content, demographic profile of the readership and how they are read. Aberdeen Journals concluded that:
- (a) In terms of readership profile, geographic and demographic focus and editorial credibility, paid-for titles play a substantially different role to free titles, enabling advertisers to communicate their message on a targeted basis;
 - (b) The paid-for and free titles in Aberdeen attract, because of their different focus, different types of advertising;
 - (c) Advertising yields for different categories of advertising vary widely between paid-for and free titles in Aberdeen; and
 - (d) Increases in advertising rates (since March 2000) in the *Herald & Post* have had little effect on the volumes of advertising placed through the paid titles: similarly advertisers in the paid-for titles did not switch their advertising to the *Herald & Post* or the *Independent* when the advertising rates in those titles were very low.’ (Aberdeen Journals’ Response to the Rule 14 Notice dated 2 February 2001 paragraph 3.36.)
18. Mr Alan Scott, Managing Director of Aberdeen Journals, supported the conclusion that paid-for daily and weekly free papers are complements rather than substitutes because, in his experience:
- The readership per copy sold for paid-for newspapers is as much as double that of the free newspapers and readers of free newspapers spend, on average, less than half the time reading the newspaper compared with the paid-for title.
 - The *Herald & Post* has a much narrower distribution than the paid-for titles, being focussed on the urban areas.
 - The demographic profiles of the readership of the paid-for titles differs from that of the *Herald & Post*.
 - The credibility of the paid-for titles which is derived from its editorial coverage is said to be important to advertisers as it gives them a ‘*better publication in which to communicate their message.*’
 - Daily titles provide advertisers with the ability to reach their target audiences at the time that is best suited to them, during the course of the week.
- (Aberdeen Journals’ Response to the Rule 14 Notice dated 2 February 2001, Appendix 1, section 1.)

2.1.1(ii) *Competition Commission precedent*

19. Contrary to Aberdeen Journals’ submissions, the Competition Commission has concluded in several recent investigations that free and paid-for newspapers compete (Johnston Press plc and Home Counties Newspapers Holdings plc, Monopolies and Mergers Commission Report, June 1998, paragraph 2.9). It found:

‘Competition between newspapers for readers and advertisers depends largely on the degree of editorial content. Usually, but not invariably, free newspapers have a lower quality and proportion of editorial content than paid-for newspapers. Advertisements are, however, read as a source of information and interest and, to this extent, paid-for and free newspapers may directly compete for

readers and advertisers.’ (Portsmouth & Sunderland Newspapers plc and Johnston Press plc/Newsquest (Investments) Ltd/News Communications and Media plc, Monopolies and Mergers Commission June 1999, paragraph 2.22.)

20. Accordingly, the Commission recognised the different characteristics of these titles and their complementary nature from the perspective of the publisher and readers, but concluded that free and paid-for newspapers were in the same market.

2.1.1(iii) *Director’s finding*

21. The information on the characteristics of the paid-for and free newspapers and their readership provided by Aberdeen Journals does not provide conclusive evidence of a narrow market definition separating free from paid-for titles. Two newspapers need not share identical characteristics to be in the same market. Some advertisers may have strong preferences to advertise in one paper while others may regard the newspapers as complements. Some advertisers may consider the choice between the ‘better’ quality paid-for paper and the lower quality free paper to be a close one.

22. Aberdeen Journals’ statement that advertisers did not switch from the *Herald & Post* to the paid-for *Evening Express* when its relative advertising rates increased after 1 March 2000 also does not demonstrate separate ‘free’ and ‘paid-for’ markets (Aberdeen Journals’ Response to the Rule 14 Notice dated 2 February 2001, Appendix 1, section 1, page 6). While the *Independent’s* rates remain low, the closest substitute for the *Herald & Post* is the *Independent*. Advertisers are therefore more likely to switch to the *Independent* in response to an increase (from what had been a very depressed level) in the *Herald & Post* rates than the paid-for titles.

23. That advertising space in the paid-for daily *Evening Express* and free weekly titles (*Independent* and the *Herald & Post*) are in the same market is supported by Aberdeen Journals’ commercial rationale for the increased pagination of the *Herald & Post* and cut in advertising rates following the launch of the *Independent*. To explain its strategy, Aberdeen Journals stated (Submission to OFT dated 10 February 2000):

‘[2.4] the *Independent* was launched as a title specifically targeted at our paid-for *Evening Express* title and its distribution area was focused squarely on the principal circulation area of our evening paper...

[W]e needed to respond to the launch of the *Independent* by lowering the advertising rates of the *Herald & Post* to what advertisers told us was necessary to enable us to retain their business. We had and have no wish to exit this layer of the advertising market and to do so would have made the *Evening Express* vulnerable.

[2.6] The Aberdeen market has now seen, for a period of four years, an effective war of attrition between our *titles* and the *Independent*.

[3.1] [T]he *Independent* poses a real threat to the advertising revenues of both our evening title [i.e., the *Evening Express*] and the *Herald & Post*.’

(Emphasis added)

24. This submission demonstrates (notwithstanding Aberdeen Journals’ subsequent oral submissions to the contrary) that Aberdeen Journals expected, in deciding

to cut rates for advertising in the free *Herald & Post*, that advertisers in the paid-for *Evening Express* would switch to the *Independent* if it did not do so. Aberdeen Journals therefore considered that the *Independent* would be a threat to at least one of its paid-for titles as it expected that advertisers would consider the *Independent* to be a substitute for advertising in the *Evening Post* [sic]. (While an undertaking's views of certain competition law concerns may credibly change once it has sought qualified advice, in this instance, Aberdeen Journals' original explanation for its actions is more persuasive than its subsequent explanation.)

25. The Director therefore concludes that on the demand side advertisers see scope for switching between advertising in the free and paid-for local titles.

2.1.2 *Distribution area*

26. Advertising in the free *Herald & Post* is largely by local businesses, events, attractions and people. Aberdeen Journals states that the circulation areas for Aberdeen Journals' paid-for daily titles the *Press & Journal* and the *Evening Express* are wider than those of the *Herald & Post* and the *Independent*. In particular, Aberdeen Journals states that while the free newspapers are heavily focussed on the urban area, 73% of the circulation of the *Press & Journal* and 27% of the circulation of the *Evening Express* is outside the urban area of Aberdeen (statement of Mr. Alan Scott, Aberdeen Journals' Response to the Rule 14 Notice dated 2 February 2001, Appendix 1, page 2, paragraph 2). The *Press & Journal* is therefore a regional paper, while the *Evening Express* is local, focussed on the Aberdeen area and its outlying commuter areas (Aberdeen Journals' submission dated 10 February 2000, paragraph 2.1).
27. The Competition Commission has found in relation to newspapers that the '*extent of choice enjoyed by advertisers will depend on whether they wish to reach a purely local readership, a wider regional market or achieve national coverage*' (Johnston Press plc and Home Counties Newspapers Holdings plc, Monopolies and Mergers Commission Report, June 1998 paragraph 4.21.). It concluded that to '*the extent that there is a regional advertising market, therefore, it should be seen as distinct from local advertising markets.*' (New Communications & Media plc and Newsquest (Investments) Ltd/Johnston Press plc/Trinity Mirror plc, Competition Commission Report, April 2000, paragraph 4.34.)
28. The geographic targeting of the *Evening Express* is not sufficiently different from that of the relevant product to justify its exclusion from the relevant market on this ground, particularly in light of the fluctuating distribution areas of the *Independent* and *Herald & Post* since 1996.
29. However, the *Press & Journal* is not focussed on the Aberdeen area, and accordingly is not an efficient substitute for advertisers in the local papers. It therefore does not compete in the relevant market. Similarly, national papers do not sufficiently constrain the pricing of local papers to be included in the same market: they are not an efficient method of reaching Aberdeen consumers.

2.1.3 *Daily vs. weekly titles*

30. In light of the evidence above (in particular paragraph 23) concerning competition between the *Evening Express* and the free titles, the overlap in advertisers using the papers and in distribution areas, the difference in frequency (between the daily *Evening Express*, and the weekly free papers) is not a factor sufficiently compelling to place the *Evening Express* in a separate economic market.

2.1.4 Conclusion on newspapers in the relevant market

31. Accordingly, the relevant market comprises at least advertising space in the free local weekly *Herald & Post* and the *Independent*, and the daily local paid-for *Evening Express*.”

110. It is also relevant to cite those parts of the Decision which deal with competition between newspapers and other forms of media, to the extent that they bear, at least indirectly, on whether the *Evening Express* should be included in the same relevant market as the *Herald & Post* and the *Independent* for the purposes of this case. At paragraphs 33 to 37 of the Decision the Director said, with reference to the submissions made to him by Aberdeen Journals in a letter from its solicitors dated 10 March 2000:

“33. Aberdeen Journals distinguished between ‘Classified’ and ‘Display’ advertising. Classified advertising comprises listings of businesses or items for sale in well established classifications including ‘Motor’, ‘Recruitment’ and ‘Property’. Display advertisements promote or raise awareness of particular suppliers, events, offers or brands. Aberdeen Journals argued that ‘*these markets operate separately and are subject to quite different competitive forces.*’ It argued that it competed against rival media as follows:

- Classified. Aberdeen Journals argued that in Classified advertising, niche publications (e.g. *Exchange & Mart*) have been the main competition to newspapers, but that the Internet with its powerful search facility and immediacy, presents a significant threat to all forms of classified advertising.
- Property. Aberdeen Journals argued that in Property advertising, newspapers also compete with solicitors who it alleged hold tight control over the property market in the North of Scotland and have Property Centres in each of the main towns/cities within Aberdeen Journals’ circulation area. Properties then appear in the weekly Property Register, a magazine that lists all the properties for sale at the Property Centre. Larger firms of solicitors may also have their own in-house monthly magazine.
- Recruitment. In Recruitment advertising, Aberdeen Journals argued that newspapers also compete with recruitment agencies and that the Internet is expanding rapidly.
- Motors. Aberdeen Journals argued that the Motors advertising market is delineated between new and used cars. Motor manufacturers, through their London advertising agencies, increasingly determine how new cars are advertised. The used car market is more fragmented and much of it is still supplied (and advertised) by smaller local dealers. Aberdeen Journals alleges that competition for car advertising is intense with radio and TV competing with newspapers and niche publications. The Internet is also growing in importance with the likes of www.autobytel.co.uk, www.autotrader.co.uk, etc.
- Display/Retail. Aberdeen Journals argued that the Display advertising market is distinct from the Classified market in that it is more relevant to several media – radio, TV, direct mail and leaflets as well as newspapers.

2.2.2 Constraints exercised by various media

34. The extent to which these other media provide close substitutes for advertising in local newspapers depends in part on how cost effective they are in conveying a similar image or message to a similar target audience. These media may be complementary, so that advertisers would generally use a wide portfolio of different media.
35. With few exceptions, the demand for advertising space in the *Herald & Post* is from local businesses, events, attractions and people. In the Property and Motor sections the advertisers are local car dealers and estate agents, and in the Recruitment section the vacancies are in the Aberdeen area. The other Classified advertising is by local businesses, such as shops, builders, decorators and financial advisers, or by local people with items for private sale. The display advertising is largely by local retailers, restaurants or leisure attractions.
36. Accordingly, national media, including television and radio and printed publications, are not efficient in reaching this local community of businesses or individuals, but are principally suited to national or regional campaigns. Further, the cost of targeting the local community via such national media is prohibitive. Rates charged by national media do not therefore constrain the rates charged by Aberdeen Journals sufficiently to be within the same relevant market.
37. Each other medium identified by Aberdeen Journals has different characteristics and, accordingly, advantages and disadvantages over newspaper advertising:
 - While the Internet is expanding in the provision of advertising, it currently has characteristics that limit its substitutability for newspaper advertising. For many consumers the Internet is not as accessible as the press: they do not have easy access to a computer and many are insufficiently computer literate to use the Internet. Further, although a website may hold ample information, a potential customer may have difficulty finding the relevant site (or knowing it exists) unless it has previously been advertised elsewhere (e.g. in a newspaper). This means that newspaper advertising remains significantly more effective in targeting a certain group of potential customers. The number of businesses that have websites but continue to advertise in the press, often giving the address of the website in their advertisements, supports this. The website can be visited subsequently for more detailed information and a greater range of services than can be provided in a newspaper.
 - Local radio is not suitable for conveying detailed or visual information (especially where a significant amount of information requires repeated consultation). It is more suited to repetitive brand promotion and image creation. Local radio is not therefore suitable for Classified or Property advertising. Much Display advertising also contains detailed information including addresses and telephone numbers.
 - Recruitment agencies serve a different role and reach a different audience from newspaper advertising. The newspaper advertisement will reach far more people, as people will read it who may not be actively job seeking. As with the Internet, recruitment agencies offer a much fuller service than a job advertisement in a newspaper. Indeed, many recruitment agencies advertise in newspapers.

- Although Property Centres may produce their own magazines, they continue to advertise in the local newspapers, indicating that they are complements to, rather than substitutes for, local newspapers.

...”

111. In the Decision, the Director then went on to reject competition from direct mail, leaflets, niche publications such as *AutoTrader* or *Exchange & Mart*, directories such as *Yellow Pages* and *Thomson*, posters, outdoor advertising and billboards as insufficiently close substitutes for newspapers (paragraphs 37 and 38). The Director then stated at paragraphs 39 and 40 of the Decision:

“39. The different characteristics of the different forms of media indicate that they are not close substitutes for advertising in newspapers. Aberdeen Journals stated [in its solicitor’s letter of 10 March 2000] that the *Herald & Post* may serve ‘as a means of “topping up” existing advertising by larger local, regional and national advertisers who will often include advertising in a free newspaper as a low cost part of their marketing mix.

40. This conclusion is supported by the strong evidence that Aberdeen Journals has targeted the *Independent* (both in the context of previous complaints relating to ‘solus’ agreements and in more recent documents, see paragraph 88 below) intending to expel it from the market. This indicates that the strongest competitive threat to Aberdeen Journals stems from rival newspaper publishers in the same geographic area, not producers of other forms of media. It also shows that Aberdeen Journals (by its consistent conduct) considers local newspapers to be a separate market from other forms of media.”

112. The forward reference, in paragraph 40 of the Decision, to paragraph 88, is a reference to the internal memoranda of Aberdeen Journals referred to in paragraph 31 above. According to the Director, the documents there cited show that Aberdeen Journals intended “to expel the *Independent* from the market, by means of incurring substantial losses on the *Herald & Post*” and “to use the *Herald & Post* strategically to expel the *Independent* from the market” (paragraphs 88 and 90 of the Decision). The Director also found, on the basis of the documents cited at paragraph 88, that Aberdeen Journals

“initiated and maintained a strategy designed to expel [the *Independent*] from the relevant market, using the *Herald & Post* as a ‘fighting title’.” (paragraph 96 of the Decision)

113. At paragraphs 41 and 42 of the Decision, the Director referred to the report of the reporting panel of the Competition Commission *News Communications & Media plc and Newsquest (Investments) Limited/Johnston Press plc/Trinity Mirror plc*, April 2000, at paragraph 2.28, to support his conclusion that other media, notably the Internet, were not, or not yet, a significant competitive threat to local newspapers.

114. At paragraphs 43 and 44 of the Decision, the Director stated his conclusions on the relevant product market in these terms:

“43. The Director, for the reasons set out above, does not accept the case that Aberdeen Journals proposed in response to the Rule 14 Notice, that paid-for and free titles are in separate markets. He is persuaded by the evidence of Aberdeen Journals’ own persistent conduct, and the submissions it made during the course of his investigation, together with his Office’s analysis of the product market, taking into account several recent Competition Commission reports.

44. The relevant product market is therefore the supply of advertising space in both paid-for and free local newspapers. Current evidence does not show that there has been a sufficient switch away from newspaper advertising in favour of the Internet to include this in the relevant product market.”

115. At paragraphs 49 to 52 of the Decision the Director contended that, even if Aberdeen Journals was correct on its narrow market definition, it would still be dominant in the market for advertising space in paid-for newspapers in Aberdeen and would have abused *that* dominant position by behaving abusively on the neighbouring or associated market for advertising space in free newspapers in Aberdeen. The Director stated:

49. “Aberdeen Journals, in its written and oral submissions responding to the Rule 14 Notice issued to it, stated that the free weekly titles, the *Herald & Post* and the *Independent*, are not in the same market as its paid-for daily newspapers, the *Evening Express* and the *Press & Journal* (see paragraphs 16-18 above). However, the alleged abuse of predation is not sensitive to the different market definition proposed by Aberdeen Journals. If the Director had accepted Aberdeen Journals’ submissions on market definition, Aberdeen Journals would be dominant on the narrower market it proposed of advertising in the supply of advertising space in paid-for newspapers in Aberdeen: there are no local or regional paid-for titles circulating in the relevant geographic market other than Aberdeen Journals’ own.

50. It is well-established that a dominant undertaking may abuse its position by predating in an associated market (see *Tetra Pak II*). Even if the supply of advertising space in free and paid-for local titles were in separate markets, those ‘markets’ have strong associative links. Aberdeen Journals has a strong position in both markets, whether separate or combined. There is a large overlap in customer base. Production methods are identical. Aberdeen Journals’ own conduct, of reducing prices in the free segment to protect its position in the paid-for segment, reinforces the link. Accordingly, Aberdeen Journals would be in a situation comparable to that of holding a dominant position on the ‘markets’ in question as a whole.

51. Aberdeen Journals is part of a major newspaper group that has the funds required for predation in an associated market to be feasible. That Aberdeen Journals (supported financially by Northcliffe) could fund for more than four years the losses made by the *Herald & Post* demonstrates this.

52. Accordingly, given his findings set out below, the Director would find Aberdeen Journals to have predated on the associated, but (in this hypothesis)

separate market for free titles. Therefore, Aberdeen Journals would still have infringed the Chapter II prohibition, even if the Director had accepted its final submissions concerning market definition, which he does not.”

Analysis

116. We start by reminding ourselves that the issue of the definition of the relevant market is not a self-contained issue but arises in the context of the wider question of whether Aberdeen Journals had, in March 2000, a dominant position for the purposes of the Chapter II prohibition.

The alternative bases set out in the Decision

117. The Decision alleged two bases for finding that Aberdeen Journals did have such a dominant position. The first basis was that Aberdeen Journals had a market share of [...] [over 70] per cent by value and [...] [over 60] per cent by volume in a market comprising advertising space in the three local newspapers in the Aberdeen area, namely the *Evening Express*, *Herald & Post* and *Independent* (paragraphs 16 to 31, and 53 of the Decision). The second basis was that Aberdeen Journals would, in any event, be dominant on the narrower market of the supply of advertising space in paid-for newspapers in Aberdeen, since the *Evening Express* is the only local paid-for newspaper circulating in the Aberdeen area (paragraph 49).
118. As the Decision points out (paragraph 50) it is well established that an undertaking with a dominant position in one market may abuse that position by engaging in predatory conduct on a neighbouring or associated market: see *Tetra Pak II* [1994] ECR II-755 at paragraphs 112 to 122 (Court of First Instance) and [1996] ECR I-5951 at paragraphs 21 to 31 (Court of Justice). We would have thought that, at first sight, an analysis of that kind could be potentially relevant, at least in the alternative, in exploring the issues that arise in this case: see also *AKZO*, cited above, [1991] ECR I-3359, at paragraphs 35 to 45 and Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389, at paragraphs 92 to 97.
119. However, it has emerged in the course of these proceedings that this alternative analysis of the relevant market was not put to Aberdeen Journals during the course of the administrative procedure, either in the Rule 14 Notice or subsequently. In those circumstances, the Director has decided not to seek to support the Decision at this stage on the basis of the alternative hypothesis set out in paragraphs 49 to 52 of the Decision.
120. Although paragraph 3 of Schedule 8 of the Act (see paragraph 6 above) gives this Tribunal wide powers, in the particular circumstances of this case we do not think it would be right for this Tribunal to embark upon an examination of a market definition which is contained in the

Decision but was not put in the administrative procedure. In addition, for this procedural reason, the Director has not sought to rely on this alternative market definition before the Tribunal. The end result is, however, unsatisfactory because it means that the Tribunal is unable to consider, in the alternative, what may be a potentially relevant hypothesis suggested in paragraphs 49 to 52 of the Decision.

The local newspapers in Aberdeen

121. Turning then to the relevant market contended for by the Director, namely local newspapers (paid-for and free) in the Aberdeen area, it is common ground that, prior to the launch of the *Independent* in 1996, Aberdeen Journals owned the only two local newspapers circulating in that area, namely the daily paid-for *Evening Express* and the weekly free *Herald & Post*. There would appear to be little doubt that, however the market is defined, Aberdeen Journals had a monopoly in the supply of advertising space in local newspapers in the Aberdeen area prior to 1996, since an advertiser wishing to advertise in a local newspaper in that area would have had no choice but to advertise in one of Aberdeen Journals' two publications.
122. It appears from the figures at Annex 4 to the Decision that, prior to the launch of the *Independent*, the *Evening Express* accounted for around 90 per cent by value of local newspaper advertising, with the *Herald & Post* accounting for around 10 per cent.
123. Into this situation of local monopoly, the *Independent* was launched in 1996. It appears from Annex 4 to the Decision that the total amount of advertising carried in local newspapers in the Aberdeen area increased with the launch of the *Independent* and the expansion of the *Herald & Post* which took place in response to that launch. By the end of 1999, the *Evening Express* appears to have accounted for under 70 per cent by value of advertising in local newspapers in the Aberdeen area, with the *Independent* accounting for around [...] per cent by value and the *Herald & Post* around [...] per cent by value. As between the *Independent* and the *Herald & Post*, the former seems to have outsold the latter, in terms of advertising revenue, ever since it was launched. In terms of advertising volume measured in sscm, the amount of advertising carried by the two free papers has ebbed and flowed, with periods of "level pegging", but in the period from around mid-1999 onwards the *Independent* has carried more advertising space than the *Herald & Post*. Since 1998 the two free titles, taken together, have carried more advertising space per quarter than the *Evening Express*, despite the fact that the latter is a daily publication and the former are weekly publications (see generally, Annex 4 to the Decision). Since the middle of 1997 the volume and value of advertising in the *Evening Express* seems at first sight

to have been on a downward trend, while that of the *Independent* seems at first sight to have been on a rising trend.

124. Nonetheless, the *Evening Express* and the *Herald & Post*, taken together, still maintained a market share by value of [...] [over 70] per cent and [...] [over 60] per cent by volume in the first quarter of 2000, roughly equivalent to the market shares they had enjoyed during 1999.
125. Against that background, our first task is to determine whether the Director has sufficiently established that the three newspapers in question formed part of the relevant product market in the period to which the Decision relates, namely March 2000, or whether, as Aberdeen Journals submits, the *Evening Express* is to be excluded from the relevant product market.
126. Having regard to the case law to which we have already referred (paragraphs 86 to 103 above) we formulate the question to be addressed at this stage as follows: has the Director established that in March 2000 the activities of the *Independent* in the supply of advertising space in the Aberdeen area constituted a sufficient competitive constraint, or brought sufficient competitive pressure to bear, on the advertising business of the *Evening Express*, for those two newspapers sensibly to be regarded as both competing in the market for advertising space in local newspapers in Aberdeen? If the answer to that question is in the affirmative, then in our view the Director's approach to the relevant market is correct.

The reports of the reporting panels of the Competition Commission

127. In support of his view, the Director refers first to various reports by the reporting panels of the Competition Commission, or its predecessor the Monopolies and Mergers Commission, reporting on various proposed newspaper mergers under Part V of the Fair Trading Act 1973 (paragraphs 19 and 20 of the Decision). Aberdeen Journals contends that these reports do not support the Director's case or are, at best, inconclusive. In the reports cited below, we italicise the sentences that seem to us to be most relevant.
128. In its report on the proposed transfer of newspapers between Johnston press plc and Home Counties Newspaper Holdings plc, in June 1998, ("the *Johnston/Home Counties*" report), the Monopolies and Mergers Commission said at paragraph 2.9:

"2.9. Our inquiry concerns, exclusively, weekly paid-for and free newspapers and their 'slip editions'. These are primarily aimed, in both their editorial and advertising content, at local markets. As we note in paragraph 4.20, weekly paid-for newspapers tend to have a higher editorial content than free weekly newspapers. They have a significantly lower penetration (in terms of households reached) than free newspapers but are more likely to be read. Because they can be purchased at a

variety of outlets, they may also be the only printed source of local news for people living in less densely populated areas where it is uneconomic to distribute free newspapers. Free weekly newspapers typically reach a very high proportion of the households in the areas in which they are distributed but will not necessarily be read to the same extent as paid-for titles. *Some publishers therefore publish both free and paid-for weekly titles as complementary parts of an overall strategy. Nonetheless paid-for and free weekly newspapers are also in competition in particular as far as advertisers are concerned and for the purposes of this inquiry we see them as part of the same market.*”

129. At paragraph 4.20 of the same report the Monopolies and Mergers Commission said:

“4.20. Newspaper publishers compete for readers and for advertising. The extent of competition for readers between national and local newspapers, between morning and evening newspapers, between daily and weekly newspapers and between weekly paid-for and free newspapers depends to a large degree on the editorial content of the newspapers, where editorial content is taken to be everything in the newspaper except advertisements. Usually, free newspapers have a much lower proportion of editorial content (20 to 30 per cent) than paid-for newspapers (30 to 50 per cent). *Advertisements are, however, read by many people as a source of information and interest and, to this extent, paid-for and free newspapers may compete directly for readers and advertisers. ...*”

130. In its report on the proposed transfer of the newspapers of Portsmouth & Sunderland Newspapers plc to Johnston Press PLC, Newsquest (Investments) Limited/News Communications and Media plc, June 1999, (“the *Portsmouth & Sunderland* report”) the reporting panel of the Competition Commission said at paragraph 2.22:

“2.22. Competition between newspapers for readers and advertising depends to a large degree on their editorial content. Usually, but not invariably, free newspapers have a lower quality and proportion of editorial content than paid-for newspapers. *Advertisements are, however, read as a source of information and interest and, to this extent, paid-for and free newspapers may compete directly for readers and advertisers.*”

(see also paragraph 4.23 of this report, which in effect repeats paragraph 4.20 of the *Johnston/ Home Counties* report).

131. In the report of the reporting panel of the Competition Commission on the proposed transfers of newspapers between News Communications & Media plc and Newsquest (Investments) Limited/Johnston Press plc/Trinity Mirror plc, April 2000, (“the *Trinity Mirror* report”) the reporting panel of the Competition Commission stated at paragraph 2.24:

“2.24. There are two major constituencies for the local and regional press: readers and advertisers. Their readership is fragmented, with many different markets, defined both by geography, and by type of newspaper. Of the almost 1,200 local and regional newspapers that are published at least once a week, only a few compete directly with each other. *The fact that in many areas the same company will publish weekly free and paid-for titles shows that in a local market there may*

be room for products which are more complementary than competing. Most newspapers operate in limited, or very limited, localities. Even when they do overlap, they often have very different editorial content, attracting a distinct readership profile for morning dailies, evening dailies, Sundays, and paid-for and free weeklies. To that extent, they cannot normally be regarded as substitutes, one for another. There are, of course, elements of overlap between local and regional newspapers of different types, and between them, the national press (particularly their regional editions) and other media, but in most cases, regional and local newspapers occupy a separate market from other newspapers.”

132. At paragraph 4.52 of the *Trinity Mirror* report the reporting panel of the Competition Commission said:

“4.52. Paid-for and free weeklies may represent reasonably close substitutes for both readers and advertisers where they operate in the same or overlapping geographic areas. On the readership side some paid-for weeklies contain a substantial amount of editorial and free titles usually (but by no means always) carry a much lower proportion of editorial content. In terms of advertising, paid-for and free weeklies are largely in direct competition with one another.”

133. At paragraph 4.60 of the same report the reporting panel of the Competition Commission stated:

“It would seem, therefore, that barriers to entry for free newspapers are relatively low and for certain advertising-only publications lower still. Although the barriers to entry for paid-for titles (especially paid-for dailies) are higher than for free newspapers, we feel that the threat of new entry (most probably by a free newspaper or advertising-only publication) may be considered as a competitive restraint on the commercial activities of incumbent newspaper publishers.”

134. Finally, in the report on the proposed transfers of newspapers between Regional Independent Media Limited and Gannett UK Limited/Johnston Press plc/Guardian Media Group plc, November 2000, (“the *RIM* report”) the reporting panel of the Competition Commission said at paragraph 2.25:

“2.25. We heard evidence that publishers of local newspapers fought hard to protect their markets from new entry and would, on occasion, maintain a loss-making free newspaper where this supported a paid-for title as part of a layered or segmented market.”

135. At paragraph 4.34 of the *RIM* report the reporting panel said:

“4.34. In terms of the distinction between daily and weekly newspapers, it would again appear that the opportunities for substitution by advertisers between the media are relatively limited, for essentially two reasons. First, daily titles offer advertisers more flexibility than weekly titles in that advertisements can be placed or changed at more frequent intervals. Second, the two types of newspaper tend to be read and used in different ways, with weekly newspapers more likely to be retained by the household over a number of days for reference, compared with dailies whose impact

is more short-lived. *This suggests that advertisers will tend to view the two forms of advertising as complements rather than substitutes, with advertising in dailies being used for immediate impact on the reader, and advertising in weeklies being used to reinforce the advertising message through more detailed information provision.*”

136. The admissibility of evidence before this Tribunal is not governed by the rules of evidence as traditionally applied in court proceedings: Rule 20(2) of the Tribunal Rules. In our view, reports of the reporting panel of the Competition Commission of the kind cited above provide useful background material to the issues which we have to decide in the present case.
137. It seems to us to emerge from the reports cited above that, in the view of the reporting panels of the Competition Commission, paid-for and free newspapers may compete directly for the business of advertisers where they operate in largely overlapping geographic areas: see *Johnston/Home Counties* at paragraphs 2.9 and 4.20; *Portsmouth & Sunderland* at paragraphs 2.22 and 4.23 and *Trinity Mirror* at paragraphs 4.52 and 4.60.
138. As a general proposition, we see little reason to disagree with that view. It seems to us plausible that, for certain advertisers, the possibility of advertising in a weekly free newspaper may well be a viable alternative to taking advertising space in a paid-for daily, depending on the nature of the advertisement, the comparative advertising rates, the number of copies distributed, the target audience and the catchment area to be covered. For example, a higher distribution to a larger number of households at cheaper advertising rates might influence an advertiser to substitute, either wholly or partly, advertising in a free weekly newspaper for advertising in a more expensive paid-for title with a lower circulation, notwithstanding differences in the ‘quality’ and readership of the newspapers concerned.
139. We accept, however, Aberdeen Journals’ submission that in a case of alleged abuse under the Chapter II prohibition, the market concerned must be identified and verified according to the particular facts of the case in question. The reports of the reporting panels of the Competition Commission cited above, while indicative of how advertisers behave in general, do not deal with the specific facts of the present case. In addition, those reports have generally concerned competition for advertising between paid-for local weekly newspapers and free local weekly newspapers, whereas in this case we are concerned with a daily paid-for title and weekly free titles. Reliance on previous reports of the reporting panels of the Competition Commission is not, in itself, sufficient to establish the Director’s case.

Complements and substitutes in advertising

140. It is also true that, in the *RIM* report, the reporting panel of the Competition Commission expressed the view that the opportunities for substitution by advertisers between daily and weekly newspapers were relatively limited and that advertisers might tend to view daily and weekly titles “as complements rather than substitutes” (paragraph 4.34). In a number of other reports the reporting panels of the Competition Commission have suggested that, in particular circumstances, paid-for and free newspapers, or weekly and daily newspapers, may be viewed as “complementary parts of an overall strategy” (*Johnston/Home Counties*, at paragraph 2.9) or “more complementary than competing” (*Trinity Mirror*, at paragraph 2.24).
141. This is, in effect, Aberdeen Journals’ argument, namely that the *Evening Express* and the free titles are complements, not substitutes. We note also that in the Decision itself, the Director uses the notion that products may be “complements rather than substitutes” in order to exclude other media, for example, Property Centres, from the relevant market (paragraphs 34, 37 and footnote 25 of the Decision). He does not, however, apply this distinction to advertising in the *Evening Express*, on the one hand, and the free titles on the other hand. Nor does the Director clarify exactly what is meant in the Decision by “complements rather than substitutes”.
142. In our view, in order to address this part of the argument, the terms “complements” and “substitutes” require further clarification. Strictly speaking, we would regard a product as a “complement” to another when their respective uses or consumption may be interrelated, but there is little or no substitutability between them. Thus in strict terms milk may be a complement to breakfast cereal. A rise in the price of cereal may reduce the consumption of cereal, and thus the consumption of milk which goes with it, but in normal circumstances there is no substitutability between cereal and milk.
143. More loosely, however, the word ‘complement’ may be used simply to mean ‘additional’. If we take, for example, property advertising in the Aberdeen area, we understand from the material before us (p. 426 of the bundle) that solicitors in Scotland are also engaged in the buying and selling of houses and have an interest in the local Property Centre, which publishes an advertising-only publication known as the Property Register. All solicitors in Aberdeen active in the property market advertise in the solicitors’ Property Register for that area. In addition, some solicitors also advertise in the local press. Estate agents who are not solicitors advertise exclusively in the local press and have no access to the solicitors’ Property Register. In this example, if one poses the question whether a rise or fall in charges for advertising in local newspapers would affect the amount of property advertised in the Aberdeen Property

Register, the answer would appear to be in the negative. Since all solicitors advertise in the Property Register as a matter of course, and since estate agents cannot do so, it would appear at first sight that a change in advertising rates in newspapers would have little effect on the volume of property advertised in the Property Register, i.e. there would be little switching between the two. These two media would appear, therefore, at first sight, to be relatively poor substitutes. To the extent that solicitors advertise additionally in the press, such advertising may properly be regarded as a ‘complement’ rather than as a substitute, assuming that it is not plausible to imagine local solicitors abandoning their own Property Register in favour of advertising in the press.

144. However, depending on the circumstances, the idea that two products are, loosely speaking, “complements” does not necessarily exclude the possibility that they are also substitutes. Thus, a particular advertiser may have an advertising budget that he chooses to divide between different means of communication in the hope of reaching slightly different audiences, so that the different media in question are, in a loose sense, ‘complementary’. On the other hand, depending on the products in question, changes in relative advertising rates may still lead to switching between the different means of communication as advertisers choose to devote a greater proportion of their advertising budget to one product rather than another. Thus the comments of the reporting panels of the Competition Commission, cited above, notably in the *RIM* Report, to the effect that in some circumstances daily and weekly newspaper titles or free and paid-for newspapers might be viewed as ‘complements rather than substitutes’ do not exclude the possibility that advertisers might switch a proportion or even perhaps all their advertising between a daily and weekly title (or between a free and paid-for title) if the changes in the advertising rates made it sufficiently attractive to do so. This decision by advertisers would equally be influenced by such matters as changes in pagination or distribution area, which might make advertising in one kind of newspaper rather than another relatively more attractive.
145. How the matter is to be analysed depends on the facts of the particular case. The issue in the present case, so it seems to us, comes down to how far the Director has established in the Decision that the advertising activities (and in particular the advertising rates) of the paid-for daily *Evening Express* were in March 2000 subject to competitive constraints or competitive pressure from the advertising activities of the free weekly *Independent*, so that those newspapers may sensibly be regarded as forming part of the same relevant market. That in turn largely depends on how far advertising in the *Independent* or the *Herald & Post* in fact represents, in whole or part, a substitute for advertising in the *Evening Express*, or whether the degree of switching between them by advertisers is so minor that they may be properly treated

as complements which do not compete with each other to any significant extent. That issue must be determined first and foremost by reference to the specific facts relied on by the Director.

The specific facts relied on by the Director

146. At this stage of the analysis, we encounter the difficulty that the Decision contains hardly any factual description by the Director of the characteristics of the *Evening Express*, as compared to the *Herald & Post* and *Independent*, nor the extent to which the observable circumstances of the market show that the *Independent* competes not only with the *Herald & Post*, but also with the *Evening Express*.
147. In order to lay the factual foundation for the definition of the relevant market, we would have expected the Decision to contain a brief factual description, at least in outline, of the objective characteristics of the products concerned – for example the content of each of the three newspapers in question, the kinds of advertisements carried (e.g. display advertisements, recruitment, property, motors, other trade advertisements, classified, notices, etc), the advertising rates offered by the paid-for and free titles respectively, details of their respective circulations, target audiences and geographical distribution areas.
148. In our view, such a description of the objective characteristics of the products in question is almost always necessary in cases of disputed market definition, because it is on that foundation that the discussion of the relevant product market must rest. In *Continental Can*, cited above, the Court of Justice held that a sufficient description of the markets concerned, and in particular sufficient data on the particular characteristics of the products in question, are essential elements in appraising whether a dominant position exists: [1973] ECR 215 at paragraphs 32 to 37.
149. In the present case, section II of the Decision, entitled “The Facts”, contains no description of the three newspapers concerned. Section III, part A of the Decision entitled “Assessment of Dominance” again sets out no findings as to the particular characteristics of the three newspapers concerned.
150. It is true that, in the context of the discussion of competition from media other than newspapers, there is at paragraph 35 of the Decision a brief description of the advertising carried by the *Herald & Post*. A passing mention is also made at paragraph 26. However, leaving aside the inconvenient place in the Decision where such a description is to be found, the

fact is that there is no description of the other two products said to constitute the relevant market, namely advertising carried by the *Evening Express* and the *Independent*.

151. At paragraph 14 of the Decision, it is stated that “The Director has assessed possible substitutes for advertising in the *Herald & Post* to define the relevant market”. That in our view is not a sufficient statement of the exercise the Director had to carry out. What it was necessary for the Director to do was to assess not just possible substitutes for advertising in the *Herald & Post*, but whether advertising in the *Independent* was a possible substitute for advertising in the *Evening Express*. Similarly, the Director’s submission to the Tribunal (paragraph 74 above) that it was sufficient to describe the *Herald & Post* since that was “the relevant product” overlooks the fact that, for the purpose of the market analysis, the *Herald & Post* was only one of three relevant products. In this case it is necessary to consider not just the characteristics of the *Herald & Post* but those of the *Evening Express* and the *Independent* as well.
152. In paragraphs 17 and 18, the Decision sets out Aberdeen Journals’ arguments as to the differences between the paid-for and free titles in Aberdeen, which are to the effect that the *Evening Express* on the one hand, and the *Herald & Post* and the *Independent*, on the other hand, are complements rather than substitutes, for the reasons given in Mr Scott’s statement (paragraph 18 of the Decision). At paragraphs 21 and 22 of the Decision the Director seeks to rebut those arguments. However, because there are virtually no facts set out in the Decision as to the extent to which the newspapers in question in fact overlap, in terms of potential advertisers, target audience, type of advertisements carried, and so on, the rebuttal of Aberdeen Journals’ arguments, at paragraphs 21 and 22 of the Decision, is not backed by factual elements specific to the present case. The Tribunal does not find it satisfactory that there should be no findings, or even description, in the Decision, as to the objective characteristics of the three newspapers concerned taken into account by the Director in reaching his Decision.
153. As regards the competitive conditions in the market, it is true that, at paragraph 22 of the Decision, the Director explains why, in his view, advertisers in the *Herald & Post* would have been more likely to switch to the *Independent*, rather than to the *Evening Express*, when the *Herald & Post* raised its prices after March 2000, on the grounds that “while the *Independent*’s rates remain low, the closest substitute for the *Herald & Post* is the *Independent*.” Paragraph 22 does not, however, explain the factual basis on which the Director might consider advertising in the *Independent* to be a sufficient substitute, for the purposes of market definition, with advertising in the *Evening Express*, which is the relevant issue. In particular, as Aberdeen Journals points out, there is no analysis in paragraph 22 of the Decision of the extent to which advertisers in the *Evening Express* switched or considered switching to the *Independent* or the

Herald & Post after the launch of the *Independent* in 1996, nor whether the advent of the *Independent* in fact constrained or brought competitive pressure to bear on the advertising rates of the *Evening Express* during the relevant period.

154. According to the Director, however, the fact that advertising space in the *Evening Express* and the free weekly titles is in the same market is nonetheless amply demonstrated by the commercial strategy pursued by Aberdeen Journals, after the launch of the *Independent*, in cutting rates and increasing pagination on the *Herald & Post*. That was done, says the Director in paragraphs 23 to 25 of the Decision, because Aberdeen Journals feared that, if it did not do so, advertisers in the paid-for *Evening Express* would switch to the *Independent*. According to the Director, a letter from Mr Scott, Managing Director of Aberdeen Journals to Mr Bethel of the Office dated 10 February 2000 establishes that

“Aberdeen Journals ... considered that the *Independent* would be a threat to at least one of its paid-for titles as it expected that advertisers would consider the *Independent* to be a substitute for advertising in the *Evening Post* [sic].” (paragraph 24 of the Decision)

155. We accept in principle that an economic assessment of substitutability between products, whether based on survey evidence or otherwise, is not necessary as a matter of law in defining the relevant market, provided that the matter is sufficiently established from other evidence, for example the undertaking’s internal documents. Nonetheless the letter of 10 February 2000, cited at paragraph 23 of the Decision and footnote 14, is the only concrete evidence relied on in the Decision to establish the competitive relationship between the *Independent* and the *Evening Express*. We therefore consider that letter in more detail.

Aberdeen Journals’ letter of 10 February 2000

156. We set out the letter of 10 February 2000 as fully as necessary, showing in italics the passages at paragraphs 2.4, 2.6 and 3.1 relied on by the Director at paragraph 23 of the Decision:

“Dear Mr Bethel

Re: Aberdeen Herald & Post

1. Introduction

- 1.1 I am writing in response to your letter of 10 January 2000 which concerned an allegation of predatory pricing made by Aberdeen & District Independent Newspapers Limited (“Independent Newspapers”). This allegation is taken particularly seriously by us and our parent company, Northcliffe Newspapers Group Limited (“Northcliffe”) given that it follows closely on the heels of an earlier complaint in relation to a discriminatory advertising policy. As you know, this latter complaint culminated in us giving undertakings to the Secretary of State on 23 December last year.

- 1.2 We have put together the responses to the questions raised in your letter and these are attached as Appendix 1. You will note that we have in some respects provided you with more detail regarding the background to the position in Aberdeen than you have strictly asked for. We have done this so as to give you the clearest possible picture of the difficult situation currently facing us.
- 1.3 The fact is that we find ourselves faced in Aberdeen with a very different competitor (i.e. Independent Newspapers) to the standard new market entrant; this competitor has traded at a significant loss in each of the last 4 years and, according to our calculations, is still loss-making. Mr Barwell, the owner of Independent Newspapers, appears to have entered the Aberdeen market in 1996 specifically “to open a free sheet, cause disruption, and sell it to Northcliffe” (see memorandum of 21 December 1998 at Appendix 2). His subsequent behaviour is certainly consistent with this view. Mr Barwell is a man of very substantial financial means and he has on a number of occasions shown a willingness to enter new markets and subsequently sell the title he has set up.
- 1.4 The approach of the *Independent* in this instance is clearly evidenced by proposals made to Mr Andrew Blair of Aberdeen Journals by the *Independent*'s local managing director, Paul Robins, at a meeting which took place (at Mr Robins' request) on 7 February 2000 (see attendance note attached at Appendix 2). The options presented by Mr Robins at this meeting were that Aberdeen Journals should cut back the distribution of the *Herald & Post* and increase its advertising rates in co-ordination with the *Independent*; or that this complaint to the Office would be pursued at a difficult time for Aberdeen Journals (by which he meant the new competition law entering into force on 1 March).
- 1.5 The background facts are set out more fully in the following paragraphs and the Appendices.

2. The Aberdeen Market

- 2.1 The Aberdeen market for regional newspapers, and other regional advertisement-bearing publications, closely resembles markets for such products elsewhere in the UK. First, there is our paid-for daily morning *Press & Journal* title which is available throughout the north of Scotland, roughly in the area north of a line from Oban in the west to Montrose on the east coast (which encompasses Aberdeen), with sales extending northwards to Shetland. Second, our paid-for *Evening Express* focuses its circulation more squarely on Aberdeen and its outlying travel-to-work areas. Third, there are two free titles, the *Independent* and *Herald & Post*, and finally, a series of small niche publications. The free and niche categories, unlike the evening and morning titles, focus mainly on densely-populated areas and targeted socio-economic groupings and typically contain less or no editorial.
- 2.2 This “layering” of the market, gives advertisers access to lower cost advertising media, which do not bear editorial responsibilities and costs to the same extent as paid-for titles. It is quite normal, therefore, to find a free title, such as the *Herald & Post*, operating “beneath” a paid-for evening title in its urban heartland.
- 2.3 By way of example, of approximately 280 pages published every week by the *Evening Express*, around 210 pages comprise editorial content, whereas the 70 pages published weekly by the *Independent* include only around 20 editorial pages. The *Herald & Post* contains a similar proportion of editorial to that contained in the *Independent*. This obvious difference in editorial approach is

reflected in employment numbers: there are 65 journalists on the *Evening Express* title, but only 4 on the *Herald & Post* and only 6 on the *Independent*.

2.4 The figures attached at Appendix 1 show that the *Herald & Post* has been a loss-making title for four years now, since the introduction of the *Independent*. It is, however, important to look at the level of prices over this period in its proper context:

— *first, the Independent was launched as a title specifically targeted at our paid-for Evening Express title and its distribution area was focused squarely on the principal circulation area of our evening paper. We believe that, coupled with the advertising rates charged by the Independent, this was an inherently unprofitable prospect for a free newspaper, particularly given the distribution and printing costs involved in reaching some of the Evening Express' extended circulation areas outside Aberdeen. The Independent has been and continues to be loss-making (according to published results and our own internal estimates) thus supporting this point further;*

— *second, we needed to respond to the launch of the Independent by lowering the advertising rates of the Herald & Post to what advertisers told us was necessary to enable us to retain their business. We had and have no wish to exit this layer of the advertising market and to do so would have made the Evening Express vulnerable; the Evening Express is a highly reputable evening title committed to the production of high quality, local news coverage (a commitment which Mr Barwell did not, and does not, offer with his free title). It was inappropriate for us to respond to this threat using the Evening Express itself (although this was the apparent target of Mr Barwell's launch) because the title plays an entirely different role for readers and advertisers; a paid-for title is specifically chosen by its readers (which enables advertisers to be certain of their target audience), whereas free titles (such as the Independent) are unsolicited (and are therefore less valuable from the advertisers' perspective).*

2.5 The *Herald & Post* reduced its distribution levels in September 1999 to a more sustainable level from a costs perspective (from 123,000 to 107,000). Mr Barwell has not responded similarly, although the attendance note of Mr Blair's meeting with Paul Robins, managing director of the *Independent*, on 7 February 2000 suggests that, acting in concert, they would be prepared to do so.

2.6 *The Aberdeen market has now seen, for a period of four years, an effective war of attrition between our titles and the Independent. Quite apart from failing to cover his own title's costs, Mr Barwell has adopted aggressive in-paper tactics to dissuade readers and advertisers from reading or placing advertisements in our titles (our subsequent complaints to the Audit Bureau of Circulation and the Advertising Standards Authority have been upheld, see Appendix 2). These tactics include making incorrect claims about the circulation of our Evening Express and making misleading comparisons between the performance of our Evening Express and the Independent. If the Office has from Mr Barwell similar information to that supplied by us in this letter, this might explain his overall strategy for the Independent.*

2.7 The fact is, the two titles are competing vigorously. Our *Herald & Post* is able to do so because of its place in a larger regional newspaper grouping. Likewise, the *Independent* is benefiting from the fact that it is owned by a proprietor who appears to have access to substantial financial resources and who is willing to see his own title continue on a significant loss-making basis for as long as it

might take to persuade Aberdeen Journals to exit the market, purchase the *Independent* or enter into a market-sharing arrangement with it.

3. Aberdeen Journals Dilemma

- 3.1 We currently face a serious dilemma: *the Independent poses a real threat to the advertising revenues of both our evening title and the Herald & Post*. If matching this competition is indeed to be characterised as predatory the only obvious solution would be for us forthwith to increase the rates for advertising in the *Herald & Post* (and possibly to cut back on our distribution area even further) so as to enable us to cover our costs. If we do so, Mr Barwell's demonstrable ability to continue to fund his loss-making title in the long term poses a real commercial threat to the future both of our free and evening titles. Quite apart from this, if we were to respond in the manner suggested by Mr Robins at the meeting on 7 February, we would no doubt be exposed to a claim that we were participating in an agreement which was unlawful under the new UK competition legislation. If, on the other hand, we continue to price our advertising at current levels, Mr Barwell will seek to argue that we are abusing a position of dominance in Aberdeen which also amounts to an infringement of UK competition legislation.
- 3.2 Alec Davidson, Northcliffe's managing director, mentioned to me that he met you on 17 January and had told you that he was very confused as to the position our company should adopt in these circumstances. To attempt to revert to profitability within the *Herald & Post* at a time when the *Independent* continues to run at a loss may amount to commercial suicide and certainly risks damaging the quality of our titles. It also raises the question of whether we would be exposing ourselves to the risk of sanctions under the new competition legislation as of 1 March. If, on the other hand, we continue to respond to this competition that also raises the question of infringement and sanctions under the new law. The *Independent's* awareness of this dilemma is clear from the terms of the note of Mr Blair's meeting of 7 February and the "resolution" proposed by Mr Robins.
- 3.3 You will note from some of the internal memoranda which we have attached at Appendix 2 that some of the terms used to describe our (and our parent company's) strategy could be regarded as extremely robust. Obviously, you will draw your own conclusions in relation to this, but you should appreciate that extreme and unusual circumstances such as those which have confronted us for so long now will occasionally engender unmeasured turns of phrase. The fact is, however, that those same internal memoranda also paint a clear picture of a newspaper publisher who is committed to providing a valuable public service through the publication of high quality titles in Aberdeen, to the benefit both of readers and advertisers. As Mr Davidson, for example, stated in his memorandum dated 20 July 1999 (see Appendix 2) "we will continue the battle but become competitive and super efficient so that whatever happens our business will grow".
- 3.4 Overall, what the Aberdeen marketplace is witnessing is an unfortunate and protracted commercial dispute. It may in fact well be the case that, when the full context of this dispute is appreciated, the Office finds that an attempt is being made to use it as just another weapon in Mr Barwell's armoury: again, Mr Robins' comments at Mr Blair's recent meeting are consistent with such a strategy.

In the light of the information contained in this letter and its Appendices, we believe that it would be useful to have a short meeting with the Office to discuss the

issues further along with our lawyers and representatives of Northcliffe. I shall telephone you soon with a view to arranging this.

Yours sincerely

ALAN SCOTT
Managing Director”

157. This letter is written, apparently on advice, as a formal response to an allegation of predatory pricing made to the Director by Aberdeen Independent. As we have already stated (paragraphs 103 and 104 above), documents emanating from the undertaking concerned showing how that undertaking saw the market and the commercial strategy it had adopted in that market *may* be decisive evidence of what the market is. (See also, as to the importance of contemporary documents in lieu of abstract economic analysis, the judgment in *Napp*, cited above, at paragraphs 251 and 252). Mr Scott’s letter of 10 February 2000 seems on its face to show that, in the view of Aberdeen Journals, the *Evening Express* was vulnerable to competition from the *Independent*, notwithstanding the “layering” of the market to which Mr Scott refers. The letter itself refers to the fact that the distribution area of the *Independent* “was focused squarely on the principal circulation area of our evening paper”.
158. In at least three places the letter of 10 February 2000 seems to describe the contemporary situation in February 2000 e.g. “The Aberdeen market has *now* seen, for a period of four years, an effective war of attrition between our *titles* (plural) and the Independent”; “The Independent *poses* a real threat to the advertising revenues of *both* our evening title and the *Herald & Post*”; “Mr Barwell’s [strategy] *poses* a real commercial threat to the future *both* of our free and evening titles”.
159. The following extracts from the letter of 10 February 2000, are cited in the Decision, as evidence that in the Director’s view Aberdeen Journals saw the *Independent* as a commercial threat to the *Evening Express*:
- “[2.4] the Independent was launched as a title specifically targeted at our paid-for Evening Express title and its distribution area was focused squarely on the principal circulation area of our evening paper...
- [W]e needed to respond to the launch of the Independent by lowering the advertising rates of the Herald & Post to what advertisers told us was necessary to enable us to retain their business. We had and have no wish to exit this layer of the advertising market and to do so would have made the Evening Express vulnerable.
- [2.6] The Aberdeen market has now seen, for a period of four years, an effective war of attrition between our *titles* (emphasis added) and the Independent.
- [3.1] [T]he Independent poses a real threat to the advertising revenues of both our evening title [i.e. the Evening Express] and the Herald & Post.”

160. In addition we note:

“3.1 If we do so [i.e. increase rates for advertising in the Herald & Post and possibly cut back its distribution area even further] Mr Barwell’s demonstrable ability to continue to fund his loss-making title in the long term *poses a real commercial threat to the future both of our free and evening titles*”. (Emphasis added)

161. Aberdeen Journals’ letter of 10 February 2000 appears to us on a fair reading to be evidence capable of supporting the relevant market contended for by the Director.

The further documents relied on in the defence

162. In addition to the letter of 10 February 2000, the Director relies in his defence on various other documents which accompanied that letter to support his conclusion that Aberdeen Journals saw the *Independent* as a competitive threat to the *Evening Express* as well as the *Herald & Post* (see paragraphs 70 and 77 above). Aberdeen Journals objects to the Director being allowed to rely on those documents, since they formed no part of a Rule 14 Notice during the administrative procedure and are not mentioned in the Decision.

163. The first question that rises, therefore, is how far the Tribunal can or should take these further documents into account. To answer that question we recapitulate briefly the procedural framework in which decisions under the Act are taken.

164. Section 31 of the Act provides that, before taking a decision that the Chapter I or Chapter II prohibition has been infringed, the Director must give written notice to the person or persons likely to be affected and give that person or those persons an opportunity to make representations. Rule 14 of the Director’s Rules (cited at paragraph 12 above) provides that, before taking an infringement decision, the Director shall give the undertaking concerned a written notice stating “the facts on which the Director relies, the matters to which he has taken objection, the action he proposes and his reasons for it”: Rule 14(3). Under Rule 14(7) and (8) the undertaking may make written and oral representations in response to that notice (already colloquially known as “the Rule 14 Notice”) and may also inspect the documents in the Director’s file: Rule 14(5).

165. These procedures constitute important safeguards for the rights of the defence. In the analogous context of proceedings by the Commission of the European Communities against an undertaking for infringement of Articles 81 and 82 of the Treaty, it has been held that the Commission is not entitled to rely in its decision on documents on which the undertaking has

had no chance to comment during the administrative procedure: see e.g. Case T-4/89 *BASF v. Commission* [1991] ECR II – 1523, paragraph 36; Case C-310/93P *BPB v Commission* [1995] ECR I–865, paragraph 21. This obligation applies equally to documents emanating from the undertaking in question: Case 107/82 *AEG v Commission* [1983] ECR 3151, paragraphs 26 to 27. As the Court said in that case at paragraph 27:

“In this connection it must be observed that the important point is not the documents as such but the conclusions which the Commission has drawn from them. Since these documents were not mentioned in the statement of objections AEG was entitled to take the view that they were of no importance for the purposes of the case. By not informing the applicant that these documents would be used in the decision, the Commission prevented AEG from putting forward at the appropriate time its view of the probative value of such documents. It follows that these documents cannot be regarded as admissible evidence for the purposes of this case.”

166. In addition, when the Director takes a decision as to whether or not the Chapter I or II prohibitions have been infringed, he must give written notice and state in the decision “the facts on which he bases it and his reasons for making it”: Rule 15(1)(a) of the Director’s Rules. Where the Director makes a direction or imposes a penalty he must inform the undertaking in writing of “the facts on which he bases” the direction or penalty, and his reasons for giving the direction, or requiring the undertaking to pay the penalty, as the case may be: Rule 17(1) and (2) of the Director’s Rules.

167. If there is an appeal to the Tribunal, then under paragraph 3 of Schedule 8 of the Act (see paragraph 6 above) the Tribunal must determine the appeal “on the merits by reference to the grounds of appeal set out in the notice of appeal”: paragraph 3(1). Rule 20(2) of the Tribunal Rules provides:

“The tribunal may admit or exclude evidence, whether or not the evidence was available to the respondent when the disputed decision was taken and notwithstanding any enactment or rule of law relating to the admissibility of evidence in proceedings before a court.”

168. In the Tribunal’s judgment in *Napp* of 15 January 2002, cited above, the Tribunal accepted that it had a discretion under Rule 20(2) of the Tribunal Rules, to permit the Director to rely on new evidence that was not contained in the Decision, but that such discretion should be exercised sparingly, so as not to jeopardise the safeguards provided by Rule 14 of the Director’s Rules (paragraphs 114 to 119, 128 to 130, 133 and 134, and 314 of that judgment). The Tribunal envisaged, in particular, that the Director might be allowed to adduce such new evidence where the latter consisted, in essence, of matters going to rebut allegations made in the notice of appeal (paragraph 114). At paragraph 119 of that judgment the Tribunal said:

“As we have already said in our judgment of 8 August 2001, if, at the judicial stage, an applicant launches an attack which places under close scrutiny particular aspects of the Decision, in principle we do not think that the Director should be denied a reasonable opportunity to reply by adducing rebuttal evidence in support of the points already made in the Decision. Thus we do not accept Napp’s principal submission that nothing may be relied on before the Tribunal unless it was relied on in the administrative procedure.”

169. However, it seems to us that the situation in the present case is not identical to the situation with which the Tribunal was concerned in *Napp*. The additional evidence adduced by the Director in *Napp* was primarily directed to rebutting various detailed allegations made by the appellants in that case (see paragraphs 121 to 126 of that judgment), or concerned material that came to light after the Director had taken his decision which went to rebuttal issues and completed the evidential picture (paragraphs 307 et seq of that judgment).
170. In the present case, by contrast, the documents on which the Director relies in the defence go directly to an essential part of the case on relevant market which it is up to the Director to establish in the Decision and to put in the course of the administrative procedure. Aberdeen Journals did not know the Director was relying on these documents until the stage when the Director’s defence was lodged before the Tribunal.
171. It is true that, as the Director submits, the material upon which he now seeks to rely was provided by Aberdeen Journals themselves, as an appendix of, or as attachments to, the letter of 10 February 2000. It is also true that, in paragraph 4.5 of the notice of appeal, Aberdeen Journals encouraged the Tribunal “to read carefully through the correspondence, which is attached in the Bundle at pages 1-905”. However, the fact that the Director wished to rely on these documents was not drawn to Aberdeen Journals’ attention in the Rule 14 Notice, or at any subsequent stage of the administrative procedure, and Aberdeen Journals did not know, during the administrative procedure, what interpretation or weight the Director attached to the documents, or to the underlying facts to which the documents refer: see *AEG v Commission*, cited above. We do not accept that the reference in paragraph 43 of the Decision to “the submissions” of Aberdeen Journals is sufficient to draw attention to the documents in question or to the underlying facts to which they refer. Nor do we accept the Director’s argument that decisions would be ‘inordinately long’ if the Director had to cite every document on which he relied. In this case it is a matter of some five further documents, at first sight material to the issue of the relevant market which, for whatever reason, were not included in the Decision.
172. We accept therefore Aberdeen Journals’ submission that, if they were to be relied upon, these documents should have been put to Aberdeen Journals in the course of the administrative

procedure. The Director was aware that Aberdeen Journals was strongly contesting the inferences to be drawn from the letter of 10 February 2000, since that was made clear by Aberdeen Journals during the administrative hearing which took place on 15 February 2001. At that stage, it would have been open to the Director to allow Aberdeen Journals an opportunity to comment on these documents without necessarily serving an entirely new Rule 14 Notice: see *AEG v Commission*, cited above, at paragraph 29, but that was not done.

173. These factual circumstances distinguish this case from *Napp*, where it was not found by the Tribunal that the material admitted as further evidence should have been put during the administrative procedure. The situation in this case is that Aberdeen Journals has not had the opportunity to comment, during the administrative procedure, on additional documents on which the Director now relies to support a primary finding in the Decision to establish his case on the relevant market. As the Tribunal said in *Napp*, at paragraph 116 “it is of obvious importance that, in the administrative procedure, the provisions of Rule 14 of the Director’s Rules are properly observed”. Moreover, the documents have not been included in the Decision either, so could not have been addressed by Aberdeen Journals in framing its notice of appeal.
174. On the face of Rule 20(2) of the Tribunal Rules, there is nonetheless a discretion to take this additional material into account, notwithstanding that it was not relied on in the Decision or referred to in the Rule 14 Notice. The Director urges us to do so, avoiding an unduly formalistic approach to our function. Such an approach is also suggested by the statement made in the House of Commons by the Minister for Competition and Consumer Affairs (Mr Griffiths) during the passage of the Competition Bill in 1998 (Hansard Col 496) which was cited in *Napp*, at paragraph 118 of that judgment, and which we cite again:

“It is our intention that the tribunal should be primarily concerned with the correctness or otherwise of the conclusions contained in the appealed decision and not with how the decision was reached or the reasoning expressed in it. That will apply unless defects in how the decision was reached or the reasoning make it impracticable for the tribunal fairly to determine the correctness or otherwise of the conclusions or of any directions contained in the decision. Wherever possible, we want the tribunal to decide a case on the facts before it, even where there has been a procedural error, and to avoid remitting the case to the director general. We intend to reflect that policy in the tribunal rules.

This is an important aspect of our policy, and I shall explain the rationale behind our approach. The Bill provides for a full appeal on the merits of the case, which is an essential part of ensuring the fairness and transparency of the new regime. It enables undertakings to appeal the substance of the decision including in those cases where it is believed that a failure on the part of the director general to follow proper procedures has led him to reach an incorrect conclusion. The fact that the tribunal

will be reconsidering the decision on the merits will enable it to remedy the consequences of any defects in the director general's procedures.”

175. We do not entirely rule out the possibility that, in an appropriate case, it would be sufficient to safeguard the “rights of the defence” if a party has an opportunity to comment on a document during the course of an appeal. Generally speaking, however, we think that would be the exception, rather than the rule. In general, it is at the stage of the administrative procedure, when the Director is marshalling his evidence, that the defendant should be afforded the opportunity to comment, as envisaged by section 31 of the Act and Rule 14 of the Director's Rules.
176. We bear in mind, in that connection, that the Act involves the imposition of severe penalties and that proceedings under the Act are “criminal” for the purposes of Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms (“ECHR”) (*Napp*, at paragraphs 92 et seq). The administrative procedure required by section 31 of the Act and established under Rule 14 of the Directors' Rules, is there for a purpose, which is to enable the “right to be heard” to be exercised. If we, at the level of the Tribunal, accept that material matters forming part of the Director's essential case need not be put at the administrative stage, whether in the Rule 14 Notice or otherwise prior to the Decision, but can be raised for the first time at the stage of the appeal, the statutory right to be heard during the administrative stage would be materially weakened. In addition, the Director's duty to set out the facts on which he relies and to give reasons in his decisions under Rules 15(1), 17(1) and 17(2) of the Director's Rules would be materially weakened if we were to permit the Director to support an essential part of his case by further facts at the stage of his defence to an appeal, even if the facts emanate from the undertaking in question.
177. Perhaps more importantly, such an approach could give rise to a tendency to transform this Tribunal from an essentially appellate Tribunal to a court of trial where matters of fact, or the meaning to be attributed to particular documents, are canvassed for the first time at the level of the Tribunal when they could and should have been raised in the administrative procedure and dealt with in the decision. We do not think that such a development would be conducive to appropriate rigour in administrative decision making, or to a healthy and fair system of appeals under the Act.
178. Aberdeen Journals has decided to take a formal objection to the documents in question. In those circumstances, for the reasons given above, we do not think we should take the documents in question into account for the purpose of upholding an essential element in the Decision, namely

the definition of the relevant market, in circumstances where (i) the documents are not referred to in the Decision nor in a Rule 14 Notice or equivalent document; and (ii) no convincing reason is advanced for that omission.

Other evidence from conduct

179. In support of his definition of the relevant market, the Director also contended that Aberdeen Journals' whole commercial strategy as regards the *Herald & Post* was carried out principally because of the competitive threat posed by the *Independent* to the advertising revenues of the *Evening Express*, as is shown notably by the documents cited at paragraph 88 of the Decision. The only plausible explanation for the prolonged loss making activities of the *Herald & Post* was, according to the Director, a desire to protect the *Evening Express* from competition from the *Independent*, which in his view showed the three products to be in the same market.
180. It is true that, according to the unchallenged facts found in paragraphs 78 to 80 of the Decision the *Herald & Post* made a substantial negative contribution from 1996 onwards. Moreover, the inference which the Director seeks to draw from the documents cited at paragraph 88 of the decision (paragraph 31 above) is that, in reality, the *Herald & Post* was being used as a 'fighting title' to protect the *Evening Express*.
181. On the other hand, apart from the statements by Aberdeen Journals made in the letter of 10 February 2000 which we have already mentioned (paragraphs 156 to 161 above) neither the documents referring to the commercial strategy pursued by Aberdeen Journals in relation to the *Herald & Post*, nor the losses made by that title, are referred to as a factor in the Director's assessment of the competitive relationship between the free weekly titles and the daily paid-for *Evening Express* set out in paragraphs 14 to 31 of the Decision. The forward reference, in paragraph 40 of the Decision, to the documents cited at paragraph 88, occurs only briefly in the context of the Director's consideration of the competitive relationship between newspapers and other forms of media at paragraphs 32 to 42 of the Decision. That reference comes after the Director has come to his conclusion, at paragraph 31, about the relationship between the newspapers in question, and is not linked back to the matters considered at paragraphs 14 to 31 of the Decision. Although there is a reference, at paragraph 43 of the Decision, to Aberdeen Journals' "own persistent conduct", again that is not linked back to paragraphs 14 to 31 of the Decision. Nor is there any discussion of the inferences to be drawn from particular documents mentioned at paragraph 88 as regards the correct definition of the relevant market in March 2000.

Overall assessment

182. We turn, in the light of the above, to an overall assessment of the Decision on the question whether the paid-for daily *Evening Express* is in the same market as the free weeklies *Herald & Post* and *Independent* also circulating in Aberdeen.
183. First, the statements made by *Aberdeen Journals* in its letter of 10 February 2000 are evidence which goes to support the Director's case. However, the sentences from that letter quoted in paragraph 23 of the Decision are virtually the only specific evidence of the competitive relationship between the paid-for and free titles relied on under the heading "Director's finding" at paragraphs 21 to 25 of the Decision.
184. In assessing the significance of that letter, the Tribunal has been placed in an unsatisfactory position. First, there is no description in the Decision of the three newspapers in question or the advertising they carry. Hence, there is no solid basis set out in the Decision upon which to assess how far different advertisers (classified, property, motors, display etc.) might regard advertising in the free weekly *Herald & Post* or *Independent* as interchangeable or substitutable for advertising in the paid-for *Evening Express*.
185. That omission, standing alone, could perhaps have been overcome in the context of the Tribunal's procedures since all three parties are well aware of the kinds of advertisements carried and the Tribunal itself has been supplied with copies of the three newspapers concerned. More fundamentally, however, the Tribunal is aware, from the defence, and because it has been encouraged by *Aberdeen Journals* to read the appeal bundle, that there is considerable additional material in the case file which appears, at first sight, relevant to the present issue. However, the Tribunal does not feel it should take this material into account, essentially because those documents have not been put to *Aberdeen Journals* in the administrative procedure (see paragraphs 162 to 178 above).
186. The fact that the Decision contains no supporting economically based assessment of substitutability on the demand-side means that the Director has to rely very heavily on the single letter of 10 February 2000. In the light, in particular, of the unsatisfactory circumstances just mentioned, we have difficulty in persuading ourselves that that letter, standing alone, represents a satisfactory foundation on which to rest the definition of the relevant market in this case.

The procedure now to be followed

187. That raises the question of what procedure the Tribunal should now follow. Schedule 8, Part I, paragraph 3(2) of the Act provides:

“(2) The tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may –

(a) remit the matter to the Director”

Schedule 8, part II, paragraph 9(1)(f) provides that:

“9(1) Rules may make provision –...

(f) for enabling the tribunal to refer a matter back to the Director if it appears to the tribunal that the matter has not been adequately investigated.”

188. Rule 17 of the Tribunal Rules provides:

“(1) The tribunal may at any time, on the request of a party or of its own motion, at the pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) below or such other directions as it thinks fit to secure the just, expeditious and economical conduct of the proceedings.

(2) The tribunal may give directions –

...

(j) to enable a disputed decision to be referred back (or in Scotland, remitted) to the person by whom it was taken.”

189. In the circumstances we have explained we feel we have no alternative but to set aside the Decision under paragraph 3(2) of Schedule 8 of the Act on the grounds that the treatment in the Decision of the relevant product market is inadequate. Although, strictly speaking, that applies only to paragraphs 16 to 31 of the Decision, those paragraphs constitute the foundation upon which the rest of the Decision is based. In our view it follows that the Decision as a whole falls to be set aside.

190. However, paragraph 3(2)(a) of Schedule 8 of the Act gives the Tribunal power to remit the matter back to the Director. A further such power is to be found in paragraph 9(1)(f) of Schedule 8, and Rule 17(2)(j) of the Tribunal Rules, but we do not for present purposes need to explore the precise relationship between these provisions. The power to remit is clearly established under the Act. In that respect, it seems to us that there is a “relevant difference”, for the purposes of section 60 of the Act, between our powers and those of the Court of Justice and Court of First Instance where there is no power to remit: see Cases T-305/94 etc *Limburgse Vinyl Maatschappij v Commission* [1999] ECR II-931, at paragraph 96. Nor are we aware of any overriding principle of domestic law, including the Human Rights Act 1998, that would preclude the Director from reconsidering the matter and arriving at a further decision.

191. Notwithstanding that these are “criminal” proceedings for the purposes of Article 6(1) of the ECHR the various statutory provisions governing the circumstances in which, following a criminal appeal, the relevant appellate court in Scotland, England & Wales or Northern Ireland (in this case Scotland) may authorise a new criminal prosecution, or order a retrial in a criminal case, do not apply to proceedings by the Director under the Act (see the Tribunal’s judgment in *Napp*, cited above, at paragraph 95 and *Han v Commissioners of Customs & Excise* [2001] 4 All ER 687 CA). However, it seems to us that, in infringement proceedings potentially involving a penalty under section 36 of the Act, we should not exercise the power to remit with a view to the matter being further considered by the Director unless we are satisfied that the proceedings should continue in the interests of justice.
192. In this case we are so satisfied. There is an important public interest in seeing that the Chapter II prohibition is respected. As it turns out, the issues canvassed in this judgment turn largely on matters of due process. The main purpose of remitting to the Director is to ensure that due process is respected at the administrative stage rather than left to the appeal stage. At this early point in the operation of the Act (this is only the second decision imposing a penalty) the parties had no prior guidance from the Tribunal on the extent to which relevant matters should be put during the administrative procedure, or the extent to which the Tribunal would itself be prepared to admit further evidence. That procedural issue having been clarified, we see no basis for preventing the Director from reconsidering the matter.
193. From Aberdeen Journals’ point of view, the documents in question are already in existence, emanate from Aberdeen Journals itself and appear to be material to the issues. We see no unfairness or oppression if the proceedings continue against Aberdeen Journals. Moreover it is in the general interests of the newspaper industry, including the Northcliffe Group, that the ambit of the Chapter II prohibition in circumstances such as these should be fully explored. The interests of the complainant, Aberdeen Independent, go in the same direction. In the light, notably, of its wider ramifications for the newspaper industry, and for the issue of predatory pricing under the Act, we do not think that the present case can be regarded as in any way insignificant, albeit that the penalty relates to an infringement of only one month in the Aberdeen area. On the contrary, in our view this case raises a number of serious issues upon which an authoritative adjudication – whatever that may ultimately be – remains highly desirable.
194. The matter, namely the issue of the definition of the relevant product market, in particular, which newspapers constitute the relevant product market, will therefore be remitted to the Director for further consideration. We direct that any further Rule 14 Notice that the Director

considers appropriate be issued at most within two months of the notification of this judgment, and that any further decision be issued at most within two months from the completion of the procedure envisaged by that Rule.

195. If, the Director having adopted a further decision, there is then an appeal to this Tribunal, it seems to us that the efforts that have already been made in this appeal should not be allowed to go to waste. As at present advised, the Tribunal would see scope, within the wide flexibility accorded by the Tribunal Rules, for dealing with any new appeal in a way that allowed the existing record to stand, or be consolidated with, any new appeal, so as to minimise duplication in any future proceedings.
196. In those circumstances our present view, subject to any further submissions that may be made, is that the question of costs should be reserved for the time being until it is known what further course the Director proposes to take.
197. We wish to emphasise that this judgment does not imply any finding by the Tribunal as to whether Aberdeen Journals has, or has not, a dominant position in any relevant market, and still less whether any such dominant position has been abused. Our position simply is that we regard the treatment of the relevant product market in the present Decision as unsatisfactory and that the appropriate course is to remit the matter to the Director.

VI ORDERS MADE

198. On these grounds the Tribunal unanimously orders:
 - (1) Decision no. CA 98/5/2001 entitled “Predation by Aberdeen Journals Ltd” adopted by the Director General of Fair Trading on 16 July 2001 is set aside
 - (2) The matter set out at paragraph 194 above is remitted to the Director
 - (3) Any further notice pursuant to Rule 14 of The Competition Act 1998 (Director’s rules) Order 2000 is to be issued within two months of the notification of this judgment. Any further decision the Director decides to take shall be adopted no later than two months from the completion of the procedure pursuant to that Rule.

- (4) The costs are reserved for further argument
- (5) The parties have liberty to apply to the Tribunal for any further necessary directions

Christopher Bellamy

Andrew Bain

Patricia Quigley

Delivered in open court

19 March 2002

Charles Dhanowa

Registrar