

Competition Act 1998

Decision of the Director General of Fair Trading  
No. CA98/5/2001\*

Predation by Aberdeen Journals Ltd

16 July 2001  
(Case CF/99/1200/E)

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The *Aberdeen & District Independent* newspaper complained that Aberdeen Journals Limited was predating in the pricing of advertising space in its *Herald & Post*. Aberdeen Journals is owned by Northcliffe Newspapers Group Ltd, itself part of the Daily Mail & General Trust group.

Aberdeen Journals is dominant in the market for the supply of advertising space in local newspapers (paid-for and free) within the Aberdeen area.

Aberdeen Journals has deliberately incurred losses on the *Herald & Post* in an attempt to expel the *Aberdeen & District Independent*, its only rival in the relevant market. Aberdeen Journals has therefore infringed the Chapter II prohibition by predating. A penalty of £1,328,040 is imposed.

\* Certain information has been redacted from this document to comply with the provisions of section 56 of the Competition Act 1998 (confidentiality and disclosure of information). Redactions are denoted by [...]. Where possible, following such redactions, wording has been added and this has been placed in square brackets and is in italics.

## I. INTRODUCTION

### 1. The complaint

1. The Director General of Fair Trading (the 'Director') received a complaint dated 28 May 1999 (the 'Complaint') from Aberdeen Independent Ltd. (the 'Complainant'), which publishes a free newspaper, the *Aberdeen & District Independent* (the '*Independent*'). It alleged that the *Herald & Post*, a free newspaper distributed within Aberdeen and the surrounding area published by Aberdeen Journals Ltd. ('Aberdeen Journals'), was pricing its advertising space at significantly below 'market value'. The Complainant stated that, in some cases, advertisers were being charged as little as £30 per page, and on its analysis estimated that the *Herald & Post* was losing between £500,000 and £1 million per annum. The Complainant wrote to the Director again on 2 June 1999, providing a breakdown of its estimates of the *Herald & Post*'s income and costs.
2. The Director started actively assessing these allegations in January 2000 under the Fair Trading Act 1973. This enquiry became an investigation under the Competition Act 1998 (the 'Act'), to determine if Aberdeen Journals had breached the prohibition imposed by its Section 18 (the 'Chapter II prohibition') following its entry into force on 1 March 2000. On 23 November 2000, the Director issued a notice (the 'Rule 14 Notice') according to rule 14 of the Director's procedural rules (the 'Director's rules').<sup>1</sup> Aberdeen Journals submitted written submissions responding to the Rule 14 Notice on 2 February 2001, and oral submissions on 15 February 2001.

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<sup>1</sup> The Competition Act 1998 (Director's rules) Order 2000 SI 2000 No 293.

## II. THE FACTS

### 1. The undertaking

3. Aberdeen Journals publishes two paid-for daily newspapers (the *Evening Express* and the *Press & Journal*), and one free weekly newspaper, the *Herald & Post*. For the year ending 3 October 1999, Aberdeen Journals achieved turnover of £33.9m, made a pre-tax profit of just over £4m, and employed 652 staff. Its registered office is PO Box 43, Lang Stracht, Mastrick, Aberdeen AB15 6DF.
4. Aberdeen Journals' immediate holding company is Aberdeen Journals Holdings Ltd., which is in turn owned by Northcliffe Newspapers Group Ltd ('Northcliffe'). Northcliffe is a large publisher of regional newspapers, with over 50 separate titles (listed in Annex 1). According to the Northcliffe Newspapers Group Limited Annual Report for year ending 1 October 1999, the company itself achieved turnover of £59.3m.<sup>2</sup>
5. Northcliffe is owned by Daily Mail & General Holdings Ltd, in turn owned by Daily Mail & General Trust plc, which achieved turnover of £1,620 million for the year ending 3 October 1999.
6. The ultimate holding company for Aberdeen Journals and Northcliffe is Rothermere Continuation Ltd, which is based in Hamilton, Bermuda. For purposes of the Act, Aberdeen Journals is part of the single economic entity ultimately controlled by Rothermere Continuation Ltd.

### 2. The product concerned

7. The Complaint relates to Aberdeen Journals' competitive conduct in its production of the *Herald & Post*, a free weekly newspaper distributed within Aberdeen and the surrounding area, principally funded by revenues from advertising. The product concerned is therefore the supply of advertising space in the *Herald & Post*.

### 3. Previous investigation of Aberdeen Journals

8. The Director has twice previously investigated Aberdeen Journals' conduct relating to discounts offered in the *Herald & Post* to certain advertisers, in

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<sup>2</sup> No consolidated group accounts are produced. Accordingly the turnover given for Northcliffe does not include the turnovers of its subsidiaries, including Aberdeen Journals.

return for their agreement not to advertise in other free weekly publications (by implication, the *Independent*), culminating in formal undertakings to the Director under the Competition Act 1980. The undertakings did not address predation and focussed solely on agreements providing discounts in return for exclusivity. They lapsed with the Act's entry into force on 1 March 2000.

#### 4. The conduct

9. The Complaint alleged that Aberdeen Journals attempted to expel the *Independent* from the market by means of predation. The specific conduct alleged to comprise predation is illustrated by the graphs in Annex 2, based on data provided by Aberdeen Journals.<sup>3</sup> They show Aberdeen Journals' reaction to the launch of the *Independent* in March 1996.
- Graph 1 [*Redacted*] illustrates how the *Herald & Post's* average advertising rates were cut from approximately £[...] per single column centimetre ('sscm') to approximately £[...] per sscm in June 1996. From April 2000, these rates increased gradually to approximately £[...] per sscm in July 2000.
  - Graph 2 illustrates how pagination increased from under 100 pages per month gradually up to approximately 350 pages per month in 1999. From April 2000, monthly pagination fell to approximately 200 pages.
  - Graph 3 illustrates the increase in distribution from slightly over 80,000 copies per month to reach a peak exceeding 120,000 copies per month between November 1998 and September 1999. Distribution was then cut in October 1999 to around 100,000 and from April 2000, distribution fell to approximately 84,000.
10. The compatibility of this conduct with the Act is assessed below.

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<sup>3</sup> The Director has used the financial data produced by Aberdeen Journals without modification for factors such as inflation. If advertising rates had been shown in real terms the decline in rates between 1996 and 1999 would have been greater.

### **III. LEGAL AND ECONOMIC ASSESSMENT**

11. The Chapter II prohibition came into force on 1 March 2000,<sup>4</sup> and applies to abusive conduct which dominant undertakings engage in on or after that date.

#### **A. ASSESSMENT OF DOMINANCE**

##### **1. Definition of dominance**

12. The European Court has defined a dominant position as:

‘a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.’<sup>5</sup>

It has also held that

‘such a 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 competition will develop, and in any case to act largely in disregard of it so long as such conduct does not act to its detriment.’<sup>6</sup>

13. In assessing dominance, the Director considers the constraints on an undertaking’s ability to behave independently. Those constraints might comprise:
- (i) existing competitors, according to their strength in the market, possibly indicated by market shares;
  - (ii) potential competitors: having regard to entry barriers and the existence of other undertakings that might rapidly enter the market; and
  - (iii) other constraints, such as significant buyer power exercised by the

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<sup>4</sup> Competition Act 1998 (Commencement No. 5) Order 2000, SI 2000/344

<sup>5</sup> Case 27/76 *United Brands v EC Commission* [1978] ECR 207, paragraph 65 of the judgment.

<sup>6</sup> Case 85/76 *Hoffman La Roche v Commission* [1979] ECR 461, paragraph 39.

undertaking's customers.<sup>7</sup>

## 2. The relevant product market

14. 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.<sup>8</sup>

### 2.1 Different newspaper types

15. Newspapers may be classified by: (i) whether they are sold or given away; (ii) distribution (local /regional/ national); and (iii) whether they are published daily or weekly. The competitive constraint these types of paper exercise on free weekly newspapers is considered below.

#### 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

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<sup>7</sup> OFT Guideline 402 'The Chapter II prohibition' (March 1999), paragraph 3.11.

<sup>8</sup> See OFT Guideline 403 'Market Definition' (March 1999).

(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.<sup>9</sup>

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:<sup>10</sup>

- 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.

#### 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.<sup>11</sup> It found:

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<sup>9</sup> Aberdeen Journals' Response to the Rule 14 Notice dated 2 February 2001, paragraph 3.36.

<sup>10</sup> Aberdeen Journals Response to the Rule 14 Notice dated 2 February 2001, Appendix 1, section 1.

<sup>11</sup> Johnston Press plc and Home Counties Newspapers Holdings plc, Monopolies and Mergers Commission Report, June 1998, paragraph 2.9.

'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.'<sup>12</sup>

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.<sup>13</sup> 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

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<sup>12</sup> 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

<sup>13</sup> Aberdeen Journals Response to the Rule 14 Notice dated 2 February 2001, Appendix 1, section 1, page 6.

pagination of the *Herald & Post* and cut in advertising rates following the launch of the *Independent*. To explain its strategy, Aberdeen Journals stated:<sup>14</sup>

'[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)<sup>15</sup> 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*.
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

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<sup>14</sup> Submission to OFT dated 10 February 2000.

<sup>15</sup> 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.

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.<sup>16</sup> The *Press & Journal* is therefore a regional paper, while the *Evening Express* is local, focussed on the Aberdeen area and its outlying commuter areas.<sup>17</sup>

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*'.<sup>18</sup> It concluded that to '*the extent that there is a regional advertising market, therefore, it should be seen as distinct from local advertising markets*'.<sup>19</sup>
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)

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<sup>16</sup> Statement of Mr. Alan Scott, Aberdeen Journals' Response to Rule 14 Notice dated 2 February 2001, Appendix 1, page 2, paragraph 2.

<sup>17</sup> Aberdeen Journals' submission dated 10 February 2000, paragraph 2.1.

<sup>18</sup> Johnston Press plc and Home Counties Newspapers Holdings plc, Monopolies and Mergers Commission Report, June 1998, paragraph 4.21

<sup>19</sup> New Communications & Media plc and Newsquest (Investments) Ltd/Johnston Press plc/Trinity Mirror plc, Competition Commission Report, April 2000, paragraph 4.34

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*.

## 2.2 Newspapers vs. other media

### 2.2.1 Segmentation by advertiser type

32. The Director considers that the extent to which alternative media provide substitutes for advertising in local newspapers may vary between types of advertiser, as submitted by Aberdeen Journals in a letter dated 10 March 2000, setting out its views at that time concerning market definition.<sup>20</sup>
33. Aberdeen Journals distinguished between 'Classified' and 'Display' advertising.<sup>21</sup> 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.*'<sup>22</sup> 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

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<sup>20</sup> Aberdeen Journals appeared to be inconsistent in seeking to distinguish the markets for advertising in paid-for papers from that for advertising in free papers, having previously claimed that certain other media are in the same market as newspapers.

<sup>21</sup> Letter from Mr. Craig Pouncey of Herbert Smith to Mark Bethell of the Office dated 10 March 2000, enclosing paper prepared by Aberdeen Journals.

<sup>22</sup> Letter from Mr Craig Pouncey of Herbert Smith to Mark Bethell of the Office dated 10 March 2000, Introduction.

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](http://www.autobytel.co.uk), [www.autotrader.co.uk](http://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.
  - Direct mail has advantages where an advertiser wishes to target a campaign at certain individuals or provide materials that could not be reproduced in, or circulated with, local newspapers. To reach a similar number of people, however, the cost is significantly higher than advertising in local newspapers.
  - Leaflets available in public places may be an alternative to local newspapers for advertisers wishing to target identifiable groups of people and may be cost effective for long running campaigns. Generally, however, leaflets are unlikely to reach the same number of people as an advertisement in the *Herald & Post* and are not suitable if the content of an advertisement needs to change regularly or at short notice.
  - Generally, niche publications such as *Autotrader*, or *Exchange & Mart*, are more likely to compete with newspapers. These are, however, unlikely to be substitutes for advertisers in the *Herald & Post*. *Autotrader* is a national publication in Scotland. *Exchange & Mart* has only two editions (the Northern Edition covers Scotland). To the extent that they do compete with local newspapers this is likely to be limited to items with a sufficiently high value for prospective buyers to be prepared to travel long distances.
38. Other forms of local media include *Yellow Pages* and *Thomson* printed directories, posters or outdoor advertising, and billboards, but these have not been mentioned by Aberdeen Journals. For completeness, however:
- Directories are not an option where the content of advertisements needs to change frequently, and are more suited to reaching people actively searching for a contact.
  - Outdoor advertising is not a media used for Display advertising, but mainly as part of national campaigns.

- Billboards do not reach the same number of people as advertising in local newspaper, but may be effective where the target audience is associated with a particular location.
39. The different characteristics of the different forms of media indicate that they are not close substitutes for advertising in newspapers. Aberdeen Journals stated 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.'<sup>23</sup>
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.

### 2.2.3 Competition Commission precedents concerning constraints exercised by other media

41. In its most recent relevant report,<sup>24</sup> the Competition Commission concluded that the local press was competing for large scale display advertising with radio and television, and that the new electronic means of communication are beginning to establish themselves as credible advertising media (paragraph 2.28). The Competition Commission did not state what 'large scale display advertising' comprises, but virtually all display advertising in the *Herald & Post* is local, making broadcast media less suitable for targeting local consumers. With regard to the Internet, the Competition Commission does not state that this is in the same market but concludes that there are signs that it will grow as a competitive force.
42. At paragraph 2.16 of its report, the Competition Commission stated that local newspapers receive most of their income from Classified

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<sup>23</sup> Letter from Mr Craig Pouncey of Herbert Smith to Mark Bethell of the Office dated 10 March 2000.

<sup>24</sup> News Communications & Media plc and Newsquest (Investments) Limited/Johnston Press plc/Trinity Mirror plc, April 2000, paragraph 2.28

advertisements which have been relatively impervious to competition from other media. Only advertising-only publications,<sup>25</sup> and the Internet were identified as new sources of competition likely to have direct implications for local newspapers. The Internet was not, however, seen to be a threat in the immediate future.

### **2.3 Conclusion on the relevant product market**

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 Offices'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.

### **3. Relevant geographic market**

45. To determine the geographic market, on the demand side the relevant question is whether newspapers in other areas constrain the advertising rates set by papers circulating within the Aberdeen area. The extent of such constraint depends on the target audience. If an advertiser aims to maximise the size of the audience, but is indifferent to its location, then papers circulating outside Aberdeen may be substitutes for those papers circulating within Aberdeen. However, for an advertiser wishing to target readers in Aberdeen (as will be the case for a large proportion of those advertising in a local newspaper), papers circulating in other areas are not substitutes.
46. Some firms advertise nationally, others target north-east Scotland, and others focus on Aberdeen itself. Much of the advertising in the local

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<sup>25</sup> These are publications with a similar appearance and format to newspapers. They may be free or paid-for titles and some are dedicated to Property or Recruitment advertising. The Director accepts that, on the demand side, these might, if available to advertisers in an area, act as substitutes for a local newspaper. The Director is not aware of any such publications in the relevant geographic market, with the exception of those publications produced by Property Centres, which he (as discussed above) considers comprise complements to, rather than substitutes for, advertising in local newspapers.

newspapers is for motoring, property and recruitment, all of which is mainly targeted at a local audience. This indicates a narrow geographic market on the demand side.

47. On the supply side, other papers should be included in the market definition if they would likely expand production into Aberdeen if advertising rates were raised above competitive levels. Although there are many local papers in the surrounding area (in the Grampian region),<sup>26</sup> there has been little expansion into the Aberdeen area by publications serving neighbouring areas: first, the aggressive response by Aberdeen Journals to the *Independent* may have dissuaded other firms from entering the area (see analysis of barriers to entry in paragraphs 54-56 below). Second, the costs and time necessary to establish distribution, a customer base and readership indicate that newspapers circulating in neighbouring regions do not constrain the competitive conduct of papers within Aberdeen.
48. The Director therefore considers the geographic market to be Aberdeen or the circulation area of the *Herald & Post*, following the analysis set out above.
- 4. Acceptance of Aberdeen Journals' submissions on market definition would not affect the allegation of abuse of dominance.**
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 I*<sup>27</sup>). Even if the supply of

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<sup>26</sup> See Annex 3.

<sup>27</sup> Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECR II-755, paragraphs 112-122 of the judgment, confirmed on appeal, Case C-333/94 P, [1996] ECR I-5951, paragraphs 21-31 of the judgment.

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 preyed 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.

## 5. Aberdeen Journals' position in the relevant market

### 5.1 Market Share

53. The only local newspapers within Aberdeen are those titles owned by Aberdeen Journals and the Complainant. The free newspapers in Aberdeen are focussed on the urban area of Aberdeen. Aberdeen Journals states that 27% of the circulation of the *Evening Express* is outside this urban area.<sup>28</sup> However, the Director, in light of the ease with which both Aberdeen Journals and the Complainant vary the geographic distribution of their free titles, has included the entire circulation of the *Evening Express*, rather than apportioning the value or volume achieved by that paper according to the location of its circulation. Any such apportionment would, in any event, not substantially affect his analysis of Aberdeen Journals' market position.

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<sup>28</sup> Aberdeen Journals' Response to the Rule 14 Notice dated 2 February 2001, Appendix 1, Statement of Mr. Alan Scott, page 2.

MARKET SHARE OF ABERDEEN JOURNALS		
Period	By value	By volume
January to March 2000 quarter	[...] Over 70%	[...] Over 60%
April to June 2000 quarter	[...] Over 70%	[...] Over 60%
July 2000	[...] Over 70%	[...] Over 50%

The underlying data are provided in [Annex 4] [Redacted].

## 5.2 Barriers to entry

54. The Competition Commission has found that the initial cost of launching a free newspaper is relatively low, with desktop publishing technology becoming readily available, but has recognised that the cost of sustaining or expanding a presence can be higher (particularly where there are calls for an expansion of the editorial content).<sup>29</sup> In particular, a new entrant might expect to incur losses during its first years, the time taken to establish credibility and acceptability with advertisers (the only source of revenue for free titles). A free paper must establish credibility with readers to be able, in turn, to attract advertisers.<sup>30</sup> Further, establishing distribution networks can be difficult and time-consuming.<sup>31</sup>
55. The Competition Commission has also recognised that the behaviour and reputation of an incumbent influences ease of entry.<sup>32</sup> In particular, it notes that established newspaper publishers can respond to new entrants in several ways and that the expectation of the incumbent's response can deter

<sup>29</sup> Competition Commission – *Portsmouth & Sunderland Newspapers plc and Johnston Press PLC/Newsquest (Investments) Limited/ News Communications and Media plc* – a report on a proposed merger June 1999 paragraph 4.68.

<sup>30</sup> Aberdeen Journals' Response to the Rule 14 Notice dated 2 February 2001, Appendix 1, Statement of Mr. Alan Scott, page 1: size of readership and their time spent reading are key to advertisers.

<sup>31</sup> *Portsmouth & Sunderland Newspapers and Johnston Press /Newsquest (Investments) Limited/ News Communications and Media* paragraph 4.68.

<sup>32</sup> *Portsmouth & Sunderland Newspapers and Johnston Press /Newsquest (Investments) Limited/ News Communications and Media* paragraph 4.70.

potential entrants and, if entry does take place, could reduce the entrant's chances of success. This point was reiterated in a more recent report.<sup>33</sup>

56. A reputation for predatory response to new entry creates a barrier to entry.<sup>34</sup> This is particularly important where the incumbent operates in several product or geographic markets: Annex 1 shows that Northcliffe is active in many geographic markets. Accordingly, in this case, the predatory response of Aberdeen Journals to entry could create a reputation effect that acts as a significant barrier to entry and maintains its position in this and other markets.

## 6. Conclusion on dominance

57. Key to testing dominance is the ability of the relevant undertaking to behave to an appreciable extent independently of competitive pressures. The Director considers Aberdeen Journals dominant because:
- Under Community competition law, market shares significantly exceeding 70% found dominance, without the need for corroborating evidence.<sup>35</sup> Any share exceeding 50% raises a presumption of dominance.<sup>36</sup>

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<sup>33</sup> Competition Commission - *News Communications & Media plc and Newsquest (Investments) Limited/Johnston Press plc/Trinity Mirror plc – A report on the proposed merger* [April 2000] paragraph 4.57

<sup>34</sup> Office of Fair Trading Research Paper 5, *Predatory Behaviour in Competition Policy*, November 1994: '*An entry barrier that is of particular significance in predation cases is a reputation for aggressive responses to competition – this is an entry barrier that is created by the predatory action itself...Such a reputation is especially valuable if the incumbent operates in many markets, because predation in one market can spill over into a reputation for aggressive responses against entry in all its markets.*'

Office of Fair Trading Research Paper 2, *Barriers to entry and exit in UK competition policy*, pages 20 and 21: '*..the intuition that predatory pricing can be rational for reasons of reputation is shown to well-founded. Note that the purposes of predatory pricing of this kind is to deter future entry... Reputation and signalling motives for predatory behaviour may be particularly important when the incumbent firm operates in a number of (geographical and/or product) markets. The deterrent effect may operate in other markets as well as other times.*'

<sup>35</sup> Case 85/76 *Hoffman-La Roche v Commission* [1979] ECR 461, paragraph 41: '*although the importance of the market shares may vary from one market to another, the view may legitimately be taken that very large market shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position.*' Also Case T-30/89 *Hilti v. Commission* [1992] ECR II-1439, paragraphs 91, 2 and Case T-83/91 *Tetra Pak International v Commission* [1994] ECR II-755, paragraph 109.

<sup>36</sup> Case C62/86 *AKZO Chemie BV v. Commission* [1993] 5 CMLR 215, paragraph 60. See also paragraph 3.13 of OFT Guideline 402, 'The Chapter II prohibition.'

Calculating market share by value gives a better indication of Aberdeen Journals' position than a calculation based on volume, as this measure more accurately reflects economic significance within the relevant market. Aberdeen Journals' share by value exceeds 70%. The Director is therefore satisfied that Aberdeen Journals' share of the properly defined relevant market is sufficiently high for him to presume dominance (see paragraph 53 above).

- Existing competition from other local newspapers is weak with the only direct competitor, the *Independent*, subjected to an aggressive strategy of predation (see analysis below).
- Significant barriers to entry exist. Aberdeen Journals response to the *Independent*, taken with its previous conduct, has created a strong reputation for fighting entry. This is likely to deter potential entrants in the Aberdeen area from establishing competing titles and creates a significant barrier to entry.

58. In light of the very substantial shares persistently enjoyed by Aberdeen Journals on the relevant market, and the factors identified above, the Director considers that Aberdeen Journals is dominant in the supply of advertising space in both paid-for and free local newspapers in Aberdeen or the circulation area of the *Herald & Post*.

## B. ASSESSMENT OF ABUSE

### 1. Abuse of dominance - predation

59. Predation infringes the Chapter II prohibition. It comprises anticompetitive behaviour where a dominant undertaking deliberately incurs losses to expel rivals from the market,<sup>37</sup> or to deter entry by potential competitors on the same or associated markets.

60. In *AKZO*,<sup>38</sup> the European Court established criteria to assess predation. Pricing above average total cost could not be predatory. Pricing between average total cost and average variable cost would be predatory if part of a plan to eliminate a competitor.<sup>39</sup> Pricing below average variable cost should be presumed predatory. The European Court stated that:

'[p]rices below AVC... by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss.' (paragraph 71)

61. In *Tetra Pak II*,<sup>40</sup> the European Court stated that

'prices below average variable costs must always be considered abusive. In such a case, there is no conceivable economic purpose other than the elimination of a competitor, since each item produced and sold entails a loss for the undertaking.' (paragraph 41).

In that case the Court of First Instance had found that prices were considerably below average variable cost,<sup>41</sup> and therefore the European Court

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<sup>37</sup> Such expulsion may result either from the target ceasing business, or by acquisition by the predator. See OFT Research Paper 5 '*Predatory Behaviour in UK Competition Policy*' by Geoffrey Myers, November 1994.

<sup>38</sup> Case C-62/86 *AKZO Chemie v Commission* [1991] ECR I-3359.

<sup>39</sup> *AKZO*, paragraph 72.

<sup>40</sup> Case C-333/94P [1996] ECR I-5951.

<sup>41</sup> Case T-83/91 *Tetra Pak II* [1994] ECR II-755, paragraph 150 of the judgment.

found on appeal that: '*[p]roof of intention to eliminate competitors was therefore not necessary*' (*Tetra Pak II* paragraph 42).<sup>42</sup>

62. While not a requirement, evidence of intent constitutes additional evidence of predation when prices are below average variable cost, since it confirms the absence of objective justification for the pricing strategy.
63. Aberdeen Journals' conduct is assessed below within this legal and economic framework to determine if it has preyed in breach of the Chapter II prohibition.

## 2. Financial analysis

64. This section analyses the financial performance of Aberdeen Journals, to determine if losses have been incurred in publishing the *Herald & Post*, and their level, as a result of Aberdeen Journals' competitive strategy.

### 2.1 Background financial information

65. The *Independent* has been unprofitable since its launch and continued to make losses during the period under investigation. This is not relevant to the assessment of predation: the Director is not required to assess, and has not assessed, whether the *Independent* is efficient. The only relevance of this issue might be to Aberdeen Journals' argument that its conduct was 'meeting competition.' See paragraphs 93-96 below.
66. Aberdeen Journals as a whole (i.e., free and paid-for titles) continued to show profits.

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<sup>42</sup> OFT Guideline 414, 'Assessment of Individual Agreements and Conduct' (March 1999), paragraph 4.7 states the Director's view of predation:

'Generally, sustained selling at below average variable costs is unlikely to be rational. An undertaking failing to cover its variable costs ... is on average making losses on each unit of output it supplies. A rational undertaking could increase its profitability by, for instance, increasing its price or ceasing supply altogether. Therefore, prices below average variable costs may indicate that predation was occurring in the absence of convincing evidence that the undertaking's behaviour could be objectively justified.'

ABERDEEN JOURNALS' PROFITS		
Period	Profit/(Loss) before tax (£ thousands)	Profit/(Loss) after tax (£ thousands)
9 months ended 29 September 1996*	3,097	2,288
Year ended 28 September 1997*	6,298	4,131
Year ended 27 September 1998*	7,314	5,123
Year ended 3 October 1999*	4,084	2,809
10 months ended 30 July 2000#	[...]	Not known

\* Source: statutory accounts

# Source: management information provided by Aberdeen Journals

## 2.2 *Herald & Post income and cost categories*

67. The Director received monthly financial data for the *Herald & Post* from Aberdeen Journals covering the period from October 1995 to July 2000. Advertising revenue accounted for approximately 75% of *Herald & Post* revenue. The only other significant source of revenue was leaflet distribution. In the analysis that follows, leaflet distribution income is included in considering total income e.g., when calculating whether income exceeds average variable costs and calculating the losses for the periods. If this income were excluded, then the losses demonstrated would be larger. Advertising rates are calculated considering just advertising revenue.
68. The categories of cost are: (i) newsprint (i.e., the cost of the paper); (ii) editorial; (ii) advertising (assumed to be the cost of staff selling advertising space); and (iv) circulation (i.e., the cost of distribution).

69. The figures received on a monthly basis from October 1995 are for 'directly attributable costs' and 'directly attributable revenue,'<sup>43</sup> and the net balance of these figures provides the *Herald & Post's* contribution given in the management accounts for the *Herald & Post*. Certain costs, including printing and ink/plate costs which are incurred by Aberdeen Journals in producing the *Herald & Post* are not allocated to the *Herald & Post* and are not usually reported in the management accounts for the *Herald & Post*.
70. These costs should be included to understand all the costs incurred in producing the *Herald & Post*. Estimates of these costs (ink, plate and film charges) have been provided by Aberdeen Journals for the months since 1 March 2000. These costs amounted to: March £[...]; April £[...]; May £0 (Aberdeen Journals stated that there are no printing costs to allocate in May as the printing of the *Herald & Post* was undertaken by a third party in Leicester and the costs included in the management accounts of the *Herald & Post*); June £[...]; and July £[...]. These costs have been shown separately in the tables in paragraphs 81 and 86. The Director has not requested estimates of these costs for months before March 2000. If the Director had these figures, this would make the losses incurred in those periods above greater than the figures quoted below.

### **2.3 Key parameters and changes in behaviour**

71. The key parameters that Aberdeen Journals could vary in producing the *Herald & Post* were: (i) advertising rate; (ii) pagination (i.e., number of pages in each edition); and (iii) distribution. The Director has received monthly data for the *Herald & Post* for these parameters.

#### **2.3.1 Advertising rate**

72. The average advertising rate was cut drastically shortly after the launch of the *Independent* from £[...] per sscm in April 1996 to £[...] in May 1996. The next significant cut was in October 1998 when the rate was cut below £[...] and it remained below that level until July 1999. In March 2000 the average rate was £[...] per sscm. This was then raised to £[...] per sscm in April 2000. The previous occasion it had exceeded £[...] was in December 1996. The average rates for May, June and July 2000 were £[...], £[...], and £[...] respectively.

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<sup>43</sup> Appendix 1 of letter from Aberdeen Journals to Mark Bethell of 10 February 2000.

73. *Herald & Post* advertising rate data is set out in Annex 2, Graph 1 [Redacted].

### 2.3.2 *Pagination*

74. The pagination of the *Herald & Post* increased significantly after the launch of the *Independent*, from under 100 pages per month in the period from October 1995 to April 1996 to 148 pages in May 1996. It then increased again: from March 1997 to August 1998 it was almost without exception in the range between 250 and 350 pages per month (weekly papers containing between 60 and 80 pages). Pagination peaked between September 1998 and October 1999 when it was largely in the 350 to 480 range (weekly papers of between 84 and 96 pages). It subsequently declined to between 300 and 380 pages per month between November 1999 and March 2000. Pagination in the month of March 2000 was 388. Pagination in April 2000 was cut back to 220, a lower level than at any point in the preceding two years. Pagination has been maintained at about this level (May 2004, June 256 (a 5-week month) and July 2004).

75. *Herald & Post* monthly pagination data is shown in Appendix 2 Graph 2. There are 'spikes' in months when five newspapers were published, but trends are clear.<sup>44</sup>

### 2.3.3 *Distribution*

76. The distribution of the *Herald & Post* was between 80,000 and 100,000 from October 1995 to April 1998. It then rose to between 100,000 and 115,000. In November 1998 it was increased to above 120,000 and was maintained at between 120,000 and 126,000 for almost a year until September 1999. Distribution declined to between 100,000 and 108,000 from October 1999 to March 2000. In March 2000 distribution was 102,600 but was then cut to 83,974 in April 2000 and remained at this level in May, June and July 2000.

77. *Herald & Post* monthly distribution data is set out in Annex 2 Graph 3.

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<sup>44</sup> The Office has weekly circulation data from June 1997 until July 2000.

## 2.4 *Herald & Post* – financial results

78. The contribution to Aberdeen Journals' financial results from the *Herald & Post* may be analysed in five phases. These phases accord with the changes in behaviour outlined above:

ABERDEEN JOURNALS' COMPETITIVE STRATEGY		
Period	Strategy	Contribution to Aberdeen Journals/loss of <i>Herald &amp; Post</i> , per the management accounts
(i) Before launch of the <i>Independent</i> (October 1995 to March 1996)		Positive contribution of between £[...] and £[...] per month
(ii) After entry by <i>Independent</i> in March 1996 (June 1996 to September 1998) <sup>45</sup>	Advertising price cut by Aberdeen Journals, increase in pagination and circulation.	Losses between £[...] and £[...] per month
(iii) October 1998 to September 1999	Circulation increased, pagination increased and advertising rates cut	Losses between £[...] and £[...] per month
(iv) October 1999 to 29 March 2000	Strategy changed: distribution and pagination reduced	Losses reduced to between £[...] and £[...] per month  The loss in the month of March was £[...].
(v) From April 2000	Distribution and pagination reduced. Advertising rates increased.	Losses further reduced to between £[...] and £[...] (April £[...]; May £[...]; June £[...]; July £[...])*

\*Note: The figures given for the losses for March, April, May, June and July 2000 are those given in the management accounts of the *Herald & Post* and are on a consistent basis with the rest of the figures given in this table. If the common costs incurred by Aberdeen

<sup>45</sup> April and May 1996 were a period of flux for the *Herald & Post*. It made a positive contribution of £[...] in April and a loss of £[...] in May.

Journals but not allocated to the *Herald & Post* by Aberdeen Journals are included, these losses become significantly greater: March £[...], April £[...], May unchanged at £[...], June £[...], and July £[...]. (see paragraph 70).

79. The *Herald & Post* has been unprofitable since May 1996, and was clearly selling at below the average total cost at least until July 2000. (According to the information provided in response to the Rule 14 notice, it returned to profit in early 2001 with February 2001 the first profitable month.) Annex 2 [Graph 4] [Redacted] shows the losses being incurred by the *Herald & Post*.<sup>46</sup> These losses are very significant in the context of the revenue being earned. Annex 2 [Graph 5] [Redacted] shows *Herald & Post* revenue and costs with the 'gap' showing the losses.
80. During the period from November 1998 to September 1999 losses were over 75% of revenue and in March 2000 they represented 42% of revenue. These were not losses incurred as a result of a miscalculation: they were too large and durable for this to be the case. The losses since April 2000 are less significant and the July losses represented 12% of revenue.
81. The losses incurred on the production of the *Herald & Post* in the months since February 2000 (i.e., when the Act entered into force and the period relevant to this decision) are as follows:

<b>HERALD &amp; POST LOSSES SINCE FEBRUARY 2000</b>					
<i>Herald &amp; Post</i>	March 2000 £	April 2000 £	May 2000 £	June 2000 £	July 2000 £
Income	[...]	[...]	[...]	[...]	[...]
Costs in management accounts	[...]	[...]	[...]	[...]	[...]
Contribution shown by management accounts	([...])	([...])	([...])	([...])	([...])

<sup>46</sup> This graph shows the losses given in the management accounts for the *Herald & Post*. Costs which are incurred on behalf of the *Herald & Post* but not included in their management accounts are excluded as the Office only has these figures for the months since March 2000. Such costs increase the losses above those shown in the graph.

Additional costs incurred in producing the <i>Herald &amp; Post</i> (see paragraph 70)	[...]	[...]	0	[...]	[...]
True loss on <i>Herald &amp; Post</i>	([...])	([...])	([...])	([...])	([...])

Note: These figures were provided to the Director on 1 and 23 August 2000. The only significant difference between these figures and those provided in Section 4 of the Response to the Rule 14 notice is that these figures include the Leicester printing costs which Aberdeen Journals had removed (see paragraph 70).

### 3. Analysis of financial data

82. The Director requested analysis of the costs of the *Herald & Post* after 1 March 2000 using the definitions of ‘fixed’ and ‘variable’ contained in OFT Guideline 414.<sup>47</sup> This sets out that the relevant timescale for analysing costs in assessing predation is the time period over which the alleged predatory pricing prevailed or could reasonably be expected to prevail. Predation prevailed since 1996. However, variable costs have been assessed on the basis of periods limited to a single month, as Aberdeen Journals produces management accounts monthly and it was a period over which short term planning for the *Herald & Post* might be determined. Over one month, fewer costs are variable than would be the case if a period of several months was used. Accordingly, such a short reference period errs against a finding of predation.

#### 3.1 *Newsprint and circulation costs as proxy for variable costs*

83. Over one month, there is a fixed element to the costs of the editorial staff and the advertising team for the *Herald & Post*, but the costs of newsprint and circulation are variable. Assessing the period from October 1995, the Director has used only newsprint plus circulation costs as a proxy for variable costs. Annex 2, [Graph 6] [*Redacted*] contains a graph comparing revenue with this proxy for average variable cost. In the 45 months between July 1996 and March 2000, revenue income exceeded the costs of

<sup>47</sup> Glossary of terms, page 27: fixed costs are costs which do not vary with an undertaking’s output; variable costs are costs which do vary with an undertaking’s output.

newsprint and circulation on only five occasions, most recently in April 1998.

84. In March 2000, income was £[...], which did not cover the newsprint and circulation costs of £[...]. In April, May, June and July 2000 the costs of newsprint and circulation have been covered by revenue income.

**3.2 *Variable costs including allocation of common costs to determine variable costs since February 2000***

85. Aberdeen Journals provided information on the costs, fixed and variable, it considers could be avoided within a period of a month for the months of March to July 2000 (the duration of this investigation). An analysis setting this out was provided on 1 August 2000 and updated to July 2000 on 23 August 2000, which allocated each of Editorial, Advertising, Circulation and Newsprint to fixed or variable costs. Aberdeen Journals also provided information on printing costs related to the *Herald & Post* that were not in the *Herald & Post* management accounts but were incurred by Aberdeen Journals in printing the *Herald & Post* for these months.
86. For May and part of June 2000, the *Herald & Post* was printed in Leicester as a result of local production problems, namely the threat of industrial action in Aberdeen. Aberdeen Journals contended that these extra newsprint costs should be subtracted from the variable costs before comparing variable costs with revenue. The Director disagrees, as these extra costs are clearly variable costs that would not have been incurred if the paper had not been produced during this period.<sup>48</sup> On this basis, variable costs exceeded income for the *Herald & Post* by £[...] in May and £[...] in June. Aberdeen Journals, having adjusted for the Leicester costs, argued that revenue exceeded variable costs by £[...] in May and £[...] in June.

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<sup>48</sup> These costs can be seen as a proxy for the variable costs that Aberdeen Journals would otherwise have incurred. Furthermore, these costs are avoidable since they would not have been incurred if the paper had not been produced for that month.

<b>HERALD &amp; POST'S VARIABLE COSTS VERSUS INCOME 2000</b>					
	March £	April £	May £	June £	July £
Income	[...]	[...]	[...]	[...]	[...]
Variable costs in <i>Herald &amp; Post</i> accounts	[...]	[...]	[...]	[...]	[...]
Variable costs to be allocated (see paragraph 70)	[...]	[...]	0	[...]	[...]
<b>Surplus/(deficit)</b>	<b>([...])</b>	<b>[...]</b>	<b>([...])</b>	<b>([...])</b>	<b>[...]</b>
Aberdeen Journals' proposed adjustment re Leicester <sup>49</sup>			[...]	[...]	
Aberdeen Journals' suggested Surplus/(deficit)	<b>([...])</b>	<b>[...]</b>	<b>[...]</b>	<b>[...]</b>	<b>[...]</b>

87. The results above show that Aberdeen Journals failed to price above average variable costs regarding the *Herald & Post* in March, May and June of 2000.

#### 4. Evidence of intent

88. Aberdeen Journals provided the Director with internal memoranda between staff of Aberdeen Journals and Northcliffe, as well as additional documents in response to a notice by the Director under section 26 of the Act. These documents demonstrate that Aberdeen Journals intended to expel the *Independent* from the market, by means of incurring substantial losses on the *Herald & Post*.

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<sup>49</sup> Proposed in Appendix 5 of letter dated 1 August 2000 from Aberdeen Journals to Mark Bethell of OFT.

**DOCUMENTS DEMONSTRATING  
ABERDEEN JOURNALS' EXCLUSIONARY INTENT**

Item	Indication of intent
<p>Memo dated 12 July 1996, Mr Alec Davidson (Managing Director of Northcliffe) to Mr Alan Scott (Managing Director of Aberdeen Journals).</p>	<p>Under the heading '<i>Herald &amp; Post</i>': 'You view the <i>Herald &amp; Post</i> as a tactical tool in the company's armoury. Barwell's [Keith Barwell owns the <i>Independent</i>] 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.'</p> <p>'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.'</p>
<p>Memo dated 1 April 1997, Mr Davidson to Mr Ian Lovett (Commercial Systems Manager at Aberdeen Journals)</p>	<p>After references to whether the <i>Independent</i> is making a profit, or loss, 'Finally, please keep your foot on their neck!'</p>

<p>Memo dated 12 May 1998, Mr Davidson to Mr Scott</p>	<p>'You perceive the <i>Independent</i> to be less of a threat to you and therefore propose to fight it with the <i>Herald &amp; Post</i>, 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 <i>Independent</i> may cease publishing by the end of this financial year but here goes anyway!'</p> <p>'You also proposed to place greater separate focus on the <i>Herald &amp; Post</i> so that it is our only title pitched against the <i>Independent</i>. 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.'</p>
<p>Memo dated 29 July 1998, Mr. Michael Pelosi (Deputy Managing Director at Northcliffe) to Mr Scott</p>	<p>'the closure of the <i>Aberdeen Independent</i> would allow you to reduce gradually investment in the <i>Herald &amp; Post</i>, resulting in additional profits of between £0.5m and £1m.'</p>
<p>Memo dated 6 December 1999 from Mr. Davidson to Mr. Scott</p>	<p>'You agree to produce 2 scenarios as far as the <i>Independent</i> is concerned. The first assumes that we acquire them. The second assumes that you are given a sum of money to neutralise them.'</p>

<p>Memo dated 5 January 2000 from Mr Davidson to Mr. Taymour Ezzat (then Northcliffe's London Financial Controller)</p>	<p>'The purpose of your visit is to help Aberdeen construct three operational and financial scenarios relating to the <i>Aberdeen Independent</i>. These can be summarised as: 2.1 To continue with the existing policy 2.2 To purchase the <i>Aberdeen Independent</i>; and 2.3 To considerably enhance our existing activity with a view to denying the <i>Independent</i> all commercial oxygen'.</p>
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<p>Review of Aberdeen Independent by Mr. Ezzat (undated, but responsive to Memo dated 5 January 2000 from Mr. Davidson to Mr. Ezzat)</p>	<p>After reviewing competition between Aberdeen Journals and <i>Independent</i>: 'The current position is one of stalemate' (page 2). Recommendation (page 5): 'to purchase the <i>Independent</i> 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 &amp; 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.</p> <p>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 &amp; Post at the same time.</p> <p>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 <i>Independent</i> to break even.</p> <p>I believe that maintaining the pressure on Barwell by attacking the <i>Independent</i> more aggressively and satisfactorily resolving the OFT queries will eventually ensure he will accept our offer.'</p>
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89. On 10 January 2000, the Director sent his first letter to Aberdeen Journals actively investigating the Complaint. It is not surprising that no further non-privileged documents demonstrating exclusionary intent were created

following receipt of that letter, and no conclusion may be drawn from their absence that Aberdeen Journals had ceased predating at that point.

90. The memoranda and documents cited, addressed to, and authored by, senior management within Aberdeen Journals and its parent, Northcliffe, demonstrate that Aberdeen Journals' express intention was to use the *Herald & Post* strategically to expel the *Independent* from the market, as late as mid-January 2000.

## 5. Assessment of predation

### 5.1 *Presumption of predation for prices below average variable cost*

91. In March, May and June 2000, the Director presumes predation, in the absence of an objective justification, since the *Herald & Post's* prices were below average variable cost (even when such costs are defined on a reference period as short as one month).
92. Aberdeen Journals argued that prices below average variable cost only raises a presumption but not proof of predation,<sup>50</sup> which it sought to rebut for the period after 1 March 2000, claiming that: (i) it was meeting competition, as dominant undertakings may under the Act; (ii) by 1 March 2000, it had changed strategy and so lacked the intent necessary for predation; and (iii) in May and June the threat of industrial action compelled it to print the *Herald & Post* in Leicester, and that this forced increase in costs should not found predation.

### 5.2 *Aberdeen Journals' claim that it was 'meeting competition'*

93. Aberdeen Journals argued that it responded competitively to a new entrant, and that this, rather than any exclusionary strategy, was its sole intent.<sup>51</sup> It referred to *Compagnie Maritime Belge*,<sup>52</sup> where the Court of First Instance held that:

'Whilst the fact that a dominant undertaking is in a dominant position cannot deprive it of entitlement to protect its own commercial interests if they are attacked; and whilst such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect

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<sup>50</sup> Submission made by Herbert Smith dated 31 August 2000.

<sup>51</sup> Letter dated 4 April 2000 from Herbert Smith to Mark Bethell, paragraphs 3.5 - 3.7.

<sup>52</sup> Case T-24/93 *Compagnie Maritime Belge Transports v Commission*, [1997] ECR II-1019.

those interests, such behaviour cannot be allowed if its real purpose is to strengthen this dominant position and therefore abuse it.'  
(Paragraph 146 of the judgment)

94. Aberdeen Journals cited survey evidence dating from January 2000 to demonstrate that pricing levels are broadly equivalent between the *Herald & Post* and the *Independent*. This did not, however, show that Aberdeen Journals merely defended its commercial interests that were attacked (per *Compagnie Maritime Belge*, above). It only suggested that pricing levels were roughly equivalent at the time of survey.
95. A comparison of the prices achieved by the *Herald & Post* and the *Independent*, since the latter's launch in April 1996 (set out in Annex 2, [Graph 7] [Redacted]), demonstrates that the *Herald & Post* was the first to cut its rates and did not raise these significantly during the period to July 2000. Aberdeen Journals initiated and sustained price cuts, and increased pagination and circulation, rather than simply responded to competition.
96. This conclusion is supported by documents cited above (paragraph 88) that demonstrate that Aberdeen Journals did not react proportionately to a new entrant, aiming to meet competition, but rather initiated and maintained a strategy designed to expel that entrant from the relevant market, using the *Herald & Post* as a 'fighting title.' Accordingly, Aberdeen Journals is responsible for its losses (and the low advertising rates prevailing in the relevant market), and cannot claim the *Independent's* ability to match its predatory prices and to sustain losses as a defence to the allegation of predation. Predation infringes the Chapter II prohibition even if it fails to expel its target from the market.<sup>53</sup>

### **5.3 *Aberdeen Journals' claim that its strategy did not persist after February 2000***

97. In relation to its conduct after February 2000, Aberdeen Journals contended that: (i) such conduct should be considered in isolation from conduct before the Act came into force; (ii) Aberdeen Journals competed fairly since February 2000 and had taken steps to ensure this; (iii) Aberdeen Journals'

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<sup>53</sup> *Compagnie Maritime Belge Transports* paragraph 149. Also Case T-228/97, *Irish Sugar v Commission* [1999] ECR II-2975, paragraph 191: 'where an undertaking in a dominant position actually implements a practice aimed at ousting a competitor, the fact that the result hoped for is not achieved is not sufficient to prevent that being an abuse of a dominant position within the meaning of Article 86.'

failure to cover its average variable costs in March 2000 was a result of its management's inability to predict accurately the outcome of the steps it had taken; and (iv) the very short time over which Aberdeen Journals had priced below average variable cost since the entry into force of the Act was insufficient to establish predation. These claims are assessed below.

### *5.3.1 Relevance of pre-Act conduct*

98. The Director is satisfied that Aberdeen Journals instigated and persisted in a predatory campaign against the *Independent*. It deliberately incurred very significant losses over a prolonged period, and failed to cover its average variable costs (other than for four months) from July 1996 until and including March 2000. There is clear evidence that these losses were intended either to expel the *Independent* from the market, or to allow Aberdeen Journals (or Northcliffe) to purchase it at a depressed price.
99. Aberdeen Journals did not dispute this conduct, but correctly argued that it was lawful (absent regulatory intervention) before 1 March 2000. In its oral submissions, Aberdeen Journals argued that any conduct dating from before 1 March 2000 was irrelevant, unless there was a clear, unbroken chain of conduct that continued after that date.
100. Aspects of Aberdeen Journals' conduct before 1 March 2000 are relevant to assessment of its pricing conduct after that date. The duration, continuity, scale, and express aim of the losses it incurred before 1 March 2000 indicate its likely intent immediately thereafter, supporting the presumption of predation arising from its pricing below average variable cost that displaces the requirement for evidence of intent. Further, its pre-March conduct explains the level of the *Herald & Post's* prices on and following 1 March 2000: Aberdeen Journals' clear predatory intent depressed the *Herald & Post's* prices to the levels prevailing in March 2000.
101. Accordingly, only convincing evidence of an objective justification for Aberdeen Journals' pricing below average variable cost could rebut the presumption of predation arising from such pricing in March 2000.

### *5.3.2 Aberdeen Journals competed fairly since February 2000 and had taken steps to ensure this*

102. An unsubstantiated claim by Aberdeen Journals that it was competing fairly by 1 March 2000 is not sufficient to rebut the presumption of predation raised by its pricing levels or to break the link with its conduct before that

date. Aberdeen Journals' counsel detailed steps it took to cease predating, in a letter dated 4 April 2000, comprising:

- (i) October 1999, a cut in distribution levels by 17,000 copies;
- (ii) a reduction in the proportion of non-revenue producing pagination, from an average of 40% in the three months preceding March 2000 to below 20% by the end of March 2000;
- (iii) January 2000, attempted renegotiation of advertising contracts to increase prices charged and/or reduce the size of the advert purchased;
- (iv) February 2000, introduction of a rate card to improve pricing transparency; and
- (v) February 2000, moving the *Herald & Post* to Aberdeen Journals' head office.

Aberdeen Journals cited this letter in its oral submissions as evidence that it lacked predatory intent from 1 March 2000.

103. The Director has assessed these five steps. It must have become apparent well before 1 March 2000 that step (i) had not raised the *Herald & Post's* prices above its variable costs. Aberdeen Journals admits that the reaction of advertisers to step (iii) was 'mixed'.<sup>54</sup> Further, documentary evidence demonstrates Aberdeen Journals' continued predatory intent which post-dates step (i) and is contemporaneous with step (iii).<sup>55</sup>
104. Derogations to the ratecard referred to in step (iv) were potentially so wide that its effect on Aberdeen Journals' pricing policy would inevitably be limited.<sup>56</sup> In any event, it was introduced so late that it was unlikely to produce significant effects by the entry into force of the Act.
105. While the cost savings from step (v) were estimated at £[...], Aberdeen Journals knew that these would be realised progressively and therefore could

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<sup>54</sup> Letter dated 4 April 2000 from Herbert Smith to Mark Bethell, page 3, paragraph 3.2.

<sup>55</sup> Memorandum dated 5 January 2000 from Mr. Davidson and responding review by Mr Ezzat, provided by Aberdeen Journals in submission dated 10 February 2000.

<sup>56</sup> They included 'specific circumstances authorised by management' such as 'situations where it seems clear that the *Herald & Post* is being undercut on pricing': letter dated 4 April 2000 from Herbert Smith to Mark Bethell.

not have significant effects in March 2000.<sup>57</sup> Similarly, step (ii) was only implemented by the end of March 2000 and so could not have had any significant impact on Aberdeen Journals' costs in that month.

106. Other than step (i) (which can be discounted for the reasons given), Aberdeen Journals took no decisive action to reduce its variable costs until the end of March 2000.<sup>58</sup> As noted in paragraph 80 above, its losses in March 2000 still represented 42% of its revenues, a very substantial proportion.
107. These steps therefore do not provide convincing evidence that Aberdeen Journals had ceased predating once the Act came into force: they failed, predictably, to allow the *Herald & Post* to recover its average variable costs.

*5.3.3 Aberdeen Journals' failure to cover its average variable costs in March 2000 was a result of its management's inability to predict accurately the outcome of the steps it had taken*

108. While it might have been '*impossible to predict the precise impact*' of such steps on Aberdeen Journals' financial results,<sup>59</sup> for the reasons set out above, Aberdeen Journals' management could have predicted their broad impact, and must have known that it was at serious risk of continuing to price the advertising space of the *Herald & Post* below its average variable costs in March 2000. The steps had either already shown themselves to be ineffectual, or were introduced so late that they could not affect Aberdeen Journals' financial position before the Act came into force. Accordingly, in the circumstances of this case, the stated inability of Aberdeen Journals' management to predict accurately the outcome of the steps it had taken does not rebut the presumption of predation arising from the *Herald & Post's* low prices in March 2000 (particularly where those prices were caused by a campaign of predation pursued by that same management.)

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<sup>57</sup> Letter dated 4 April 2000 from Herbert Smith to Mark Bethell, page 3, paragraph 2.5.

<sup>58</sup> As noted at paragraph 74 above, the total pagination of the *Herald & Post* remained at 388 pages in March 2000, with the significant cut to 220 pages taking place in April.

<sup>59</sup> Aberdeen Journals' Response to the Rule 14 Notice dated 2 February 2001, page 36, paragraph 3.60.

5.3.4 *The period over which Aberdeen Journals had priced below average variable cost since the entry into force of the Act was insufficient to establish predation*

109. There may be circumstances where a dominant undertaking might inadvertently price below average variable cost for a short period. They are not present in this case. The lengthy transition period provided by the Act, enacted in November 1998, was designed to allow all undertakings time to adapt and prepare for the entry into force of the Act. Aberdeen Journals was aware that the Act was due to come into force on 1 March 2000, and states it carefully considered its provisions, together with the Director's Guidelines, in detail with external counsel before that date.<sup>60</sup> In addition, Aberdeen Journals was put on notice by the Office that it was alleged to have preyed on 27 July 1999, a notice followed by an active investigation starting on 10 January 2000.
110. Aberdeen Journals therefore had sufficient opportunity to moderate its exclusionary policy in time to avoid infringing the Chapter II prohibition, but failed to do so. On 29 March 2000, Aberdeen Journals demonstrated that it also had the ability to act decisively to stem its losses, when it cut the circulation of the *Herald & Post* to approximately 85,000 and significantly reduced its variable costs. However, this change does not prevent Aberdeen Journals' prior strategy, maintained without objective justification after February 2000 (if only for a brief period), from being predatory and infringing the Chapter II prohibition.
111. In mid-January 2000, according to the Review of Aberdeen Independent by Mr. Ezzat (Northcliffe's London Financial Controller), Aberdeen Journals still assumed that '*the OFT risk is minimal*', and was aiming to continue preying against the *Independent* to allow Aberdeen Journals or Northcliffe to purchase the *Independent* at a low price. This intention, as much as any managerial inability, caused the *Herald & Post* to price below average variable cost in March 2000. Aberdeen Journals appears to accept that its abrupt change of strategy implemented on 29 March 2000 was caused by the Director's investigation.<sup>61</sup>

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<sup>60</sup> Aberdeen Journals' Response to the Rule 14 Notice dated 2 February 2001, paragraph 3.3.

<sup>61</sup> Response to the Rule 14 Notice dated 2 February 2001, paragraph 3.55: '*If the Office had raised its concerns earlier..., it is entirely possible that Aberdeen Journals would have covered its average variable costs at all times post 1 March 2000...*' Aberdeen

**5.4 *Aberdeen Journals was compelled to print in Leicester in May and June by the threat of industrial action***

112. In its written and oral submissions responding to the Rule 14 Notice, Aberdeen Journals provided further information and evidence relating to the printing of the *Herald & Post* in Leicester in May and June. This was undertaken due to the high likelihood of industrial action at the paper's usual production facilities. The Director considers that these costs were variable, but accepts the explanation given for Aberdeen Journals' failure to cover its average variable costs in those two months as an objective justification displacing the presumption of predation that arises.

**6. *Aberdeen Journals' submissions***

113. The Director need not address in this Decision every point set out by Aberdeen Journals in its written and oral submissions responsive to the Rule 14 Notice, but notes first, that Aberdeen Journals consistently and erroneously alleged that the standard of proof on the Director is one of 'beyond reasonable doubt.' The Director is not alleging, in substance, that Aberdeen Journals has committed a criminal offence in breaching the Chapter II prohibition, and so this is not the appropriate standard of proof. He is satisfied that he has adduced sufficient evidence to establish that Aberdeen Journals has infringed the Chapter II prohibition. Second, under applicable UK competition law, including section 60 of the Act, the Director need not consider issues concerning the efficiency of the *Independent*. The efficiency of the target of predation forms no part of the test laid down by the European Court in *AKZO*, or following cases. However, the economic rationale underlying the use of average variable costs as a test for predation itself recognises that an incumbent would not need to price below average variable costs in order to compete with a less efficient new entrant. Third, the Director need not assess whether Aberdeen Journals could recoup losses incurred as a result of predation, since this is not part of the applicable test under EC or UK competition law.<sup>62</sup>

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Journals, like all undertakings active in the UK, is responsible for ensuring it obeys the Act. It cannot shift this responsibility by claiming that the Office should have commenced investigating earlier.

<sup>62</sup> See also Case C-333/94P *Tetra Pak International SA v Commission* [1997] ECR I-5952, paragraph 44 of the judgement.

## 7. Conclusion on predation

114. After considering the evidence and Aberdeen Journals' submissions objectively, the Director is satisfied that there is a clear, unbroken chain of conduct linking Aberdeen Journals' pre-1 March 2000 predatory conduct with its conduct once the Chapter II prohibition entered into force. There is no objective justification for that conduct. In particular, there is insufficient evidence to rebut the presumption that Aberdeen Journals had predated raised by its failure to cover its average variable costs from 1 March to 29 March 2000.
115. Even if there were convincing evidence that Aberdeen Journals no longer intended to predate in March 2000 (which the Director is satisfied there is not), Aberdeen Journals' conduct from 1 March to 29 March 2000 would be predatory. These pricing levels were not inadvertent or caused by any external factor. They resulted directly from the sustained predatory campaign pursued by Aberdeen Journals against the *Independent* over the preceding four years, before the Act came into force. Aberdeen Journals' failure to take effective action to cease predating (even though it was subject to investigation by the Office) by reducing its costs or increasing its revenues was, at best, negligent, and continued to have the anticompetitive effect of potentially expelling its only rival from the relevant market. Consequently Aberdeen Journals' failure to cover its average variable costs until 29 March 2000 was not legitimate competitive conduct.
116. 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 predated for the period from 1 March until 29 March 2000.

## 8. Effect on trade within the UK

117. Aberdeen Journals' conduct had the object and effect of preventing effective competition within the UK. It was intended to eliminate Aberdeen Journals' only competitor and had a direct effect on the business interests of the *Independent*. This conduct also damaged the legitimate interests of any other undertaking that may seek to compete with Aberdeen Journals in the

markets concerned, and raised barriers to entry in the relevant market. It therefore had an effect on trade within the Aberdeen area.

118. Further, a reputation acquired by Aberdeen Journals for predatory behaviour would not be limited to the Aberdeen area, so its conduct could potentially affect trade across a broader territory within the UK. That the parent companies had been prepared for Aberdeen Journals to incur the costs of its predatory activities, would suggest to potential new entrants that the parent companies might be prepared to do the same in other areas. Annex 1 sets out the other titles that Northcliffe publishes.
119. The Director therefore considers that trade within the UK was likely to be appreciably affected by Aberdeen Journals' abusive conduct and it therefore infringes the Chapter II prohibition.

#### **IV. THE DIRECTOR'S PROPOSED ACTION**

120. This section sets out the action which the Director proposes to take and his reasons for it.

##### **1. Directions**

121. Section 33(1) of the Act provides that if the Director has made a decision that conduct infringes the Chapter II prohibition, he may give to such person or persons as he considers appropriate such directions as he considers appropriate to bring the infringement to an end. Since Aberdeen Journals has provided evidence to the Director that it has ceased predating, no directions are necessary in this case.

##### **2. Penalties**

###### ***2.1 Power to impose penalty***

122. 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.
123. Aberdeen Journals does not benefit from the limited immunity from penalties for conduct for 'conduct of minor significance,' since the applicable turnover

of the undertaking of which it comprises a part exceeded £50 million in the year ended 3 October 1999.<sup>63</sup>

## **2.2 *Aberdeen Journals intended to predate or was negligent in predating***

124. The Director may impose a penalty on an undertaking which has infringed the Chapter II prohibition only if he is satisfied that the infringement has been committed intentionally or negligently.<sup>64</sup>
125. The Director is satisfied that Aberdeen Journals has intentionally or negligently infringed the Chapter II prohibition. It cannot rely on the newness of the regime to avoid a finding of intention or negligence. Aberdeen Journals was aware of the strong position it held in the supply of newspaper advertising space in Aberdeen, in particular due to its high market share. The predatory conduct was engaged in deliberately by Aberdeen Journals and was designed to expel the *Independent* from the relevant market. Aberdeen Journals was well aware that its conduct was at risk of infringing the Chapter II prohibition, given that the Director notified Aberdeen Journals of the allegation that it was predating on 27 July 1999 and sought detailed information regarding predation with a letter dated 10 January 2000.

## **2.2 *Calculation of penalty***

126. The Director proposes to impose a penalty on Aberdeen Journals. In accordance with section 38(8) of the Act, the Director has followed the guidance on penalties issued under section 38(1) of the Act when setting the amount of the penalty.<sup>65</sup>

### *Step 1: Starting point*

127. The starting point for determining the level of penalty is calculated by applying a percentage rate to the 'relevant turnover' of the undertaking, up to a maximum of 10%. The 'relevant turnover' is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the last financial year. Aberdeen Journals'

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<sup>63</sup> Section 40(1) of the Act and Section 4 of the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262).

<sup>64</sup> Section 36(3) of the Act.

<sup>65</sup> OFT423 'The Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty', March 2000.

turnover in the supply of advertising space in both paid-for and free local newspapers within Aberdeen or the circulation area of the *Herald & Post* for the financial year ended 3 October 1999 was £4.743 million (comprising the advertising revenue of *The Evening Express* of £[...]m and the advertising revenue of the *Herald & Post*, £[...]m).

128. The Director considers predation to be a very serious infringement of the Act, due to the significant harm it may inflict on the competitive process.<sup>66</sup> Since Aberdeen Journals preyed against its only direct competitor in the relevant product and geographic market, if successful, it would have obtained a monopoly position. Accordingly, a starting point of 10 per cent of this turnover, i.e., £474,300 is appropriate to reflect the gravity of the infringement.

*Step 2: Adjustment for duration*

129. The Director has not increased the penalty for duration since the abuse lasted less than one year following entry into force of the Act.

*Step 3: Adjustment for other factors*

130. Aberdeen Journals, which had a turnover of £33.9 million is owned by Northcliffe, which publishes over 50 separate regional titles and achieved turnover of £59.3m (not including the turnovers of the subsidiaries it controls, including Aberdeen Journals), and is in turn owned by Daily Mail & General Trust plc, with a turnover of £1,620 million for the year ended 3 October 1999. The management of Northcliffe was intimately involved in Aberdeen Journals' conduct with regard to the *Herald & Post*, authorising, directing, and financing the losses the predatory conduct incurred. Further, the acquisition of a reputation for predation by Northcliffe could have far-reaching adverse effects on competition in several markets served by the newspaper publishing industry across the UK.<sup>67</sup>

131. To ensure that the penalty acts as an adequate deterrent to predation to this undertaking, to the broader newspaper publishing industry, and more generally, the Director has increased the proposed penalty by a factor of four, i.e., to £1,897,200. While this increase is significant, the Director

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<sup>66</sup> Paragraph 2.4 of OFT423 singles out predation as one of the most serious infringements of the Act.

<sup>67</sup> See paragraph 2.4, footnote 9 of OFT423.

considers that any lesser increase would fail to act as a fully effective deterrent to predation.

*Step 4: Adjustment for mitigating factors*

132. The Director accepts first that Aberdeen Journals has cooperated fully throughout the investigation, and second, that it took rapid steps to cease its infringement (albeit in the face of an active investigation, and an explicit warning that it was at risk of infringing the Chapter II prohibition.) He therefore has reduced the amount of the penalty by 10% and 20% respectively for each of these mitigating factors, and therefore imposes a penalty of £1,328,040.

*Step 5: Prevention of maximum penalty being exceeded, and avoiding double jeopardy.*

133. No penalty which has been fixed by the Director may exceed 10% of the turnover of the undertaking calculated in accordance with the provisions of the Competition Act 1998 (Determination of Turnover for Penalties Order) 2000.<sup>68</sup> The penalty of £1,328,040 does not exceed 10% of the turnover of Aberdeen Journals (let alone Northcliffe, Daily Mail & General Trust plc, or Rothermere Continuation Ltd, which is the relevant undertaking).

**2.3 Payment of penalty**

134. The Director requires Aberdeen Journals to pay him a penalty of £1,328,040 in respect of the infringement set out in paragraph 116. The penalty must be paid by 17 October 2001.

135. If Aberdeen Journals fails to pay the penalty within the deadline specified above, and has not brought an appeal against the imposition or amount of the penalty within the time allowed or such an appeal has been made and determined, the Director can commence proceedings to recover the required amount as the civil debt.

**John Vickers**  
**Director General of Fair Trading**

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<sup>68</sup> Section 36(8) of the Act and SI 2000/309.

## ANNEXE 1

### Regional newspapers published by Northcliffe Newspapers Group Ltd

City/town/region	Name of newspapers
Aberdeen	<i>Evening Express, Herald &amp; Post and Press &amp; Journal</i>
Cornwall	<i>Cornish Guardian, The Cornishman, The West Briton</i>
Derbyshire	<i>Derby Express, Derby Telegraph</i>
Devon	<i>Exeter Express &amp; Echo, Exeter Leader, Mid Devon Gazette, North Devon Journal, Plymouth Evening Herald, Plymouth Extra, Torbay Weekender, Torquay Herald Express, Wellington Weekly News, Western Morning News</i>
Essex	<i>Brentwood Gazette, Essex Chronicle</i>
Gloucestershire	<i>Cheltenham News, Gloucester Citizen, Gloucester News and Gloucestershire Echo</i>
Humberside	<i>Grimsby Evening Telegraph, Grimsby Target, Hull Advertiser and Hull Daily Mail</i>
Kent	<i>Kent &amp; Sussex Courier, Sevenoaks Chronicle, Sevenoaks News in Focus, Tunbridge Wells News in Focus</i>
Leicestershire	<i>Ashby &amp; Coalville Mail, Leicester Mail Series, Leicester Mercury, Loughborough Mail</i>
Lincolnshire	<i>Lincoln Target, Lincolnshire Echo, Scunthorpe Evening Telegraph, Scunthorpe Target, Gainsborough Target, South Lincs Target</i>
Nottinghamshire	<i>Mansfield &amp; Ashfield Recorder, Nottingham Evening Post, Nottingham Recorder, Retford, Gainsborough &amp; Worksop Times</i>
Staffordshire	<i>The Sentinel (Stoke), North Staffs Advertiser</i>
Sussex	<i>East Grinstead Courier</i>
Wales	<i>Carmarthen Herald, Carmarthen Journal, Llanelli Star, South Wales Evening Post, Swansea Herald</i>

Source: BRAD July 2000

See separate graphs for annexe 2

## **ANNEXE 3**

### **Regional newspapers distributed in the Grampian region**

Banffshire Advertiser  
Banffshire Herald  
Banffshire Journal  
Buchan Observer  
The Deeside Piper  
Donside Piper & Herald  
Elgin Plus  
Ellon Advertiser  
The Ellon Times & East Gordon Advertiser  
Forres Gazette  
Fraserburgh Herald  
Huntly Express  
Inverurie Advertiser  
Inverurie Herald  
Kincardineshire Observer  
The Mearns Leader  
Montrose Review Series  
Northern Scot  
Northern Scot Midweek Extra  
Turriff Advertiser

Source: BRAD August 2000