

Conclusions

A. The anti-competitive practices

7.1. Under the terms of the reference and section 6(5) of the Competition Act 1980 we are required to report whether Sheffield Newspapers Limited (SNL) at any time in the 12 months ending on 21 December 1981 pursued the two courses of conduct specified in the reference, namely:

- (i) Whether SNL included in the conditions which it applied to the supply of certain of its newspapers to newsagents clause 5(d) of its Conditions of Supply—September 1980 and any amendment to that clause effected by its letter of 24 October 1980 to newsagents, or by its notice of 10 February 1981 to newsagents; and
- (ii) Whether SNL granted an annual discount to estate agents of 5 per cent on condition that the estate agents should advertise in the *Property Telegraph* for at least 48 weeks out of 52.

7.2. In this chapter we refer to these as the first and second courses of conduct respectively.

7.3. In the course of giving evidence to us, SNL confirmed that it pursued both courses of conduct during the relevant period, and indeed is still pursuing them. It added that clause 5(d) might have been modified by now but for this reference.

7.4. We are also required to report whether by pursuing the specified courses of conduct SNL was at any time during the relevant period engaging in anti-competitive practices, and if so whether those practices operated, or might be expected to operate against the public interest.

The interpretation of section 2(1) of the Competition Act 1980

7.5. Before we consider whether either course of conduct is anti-competitive, we deal with some arguments put to us on behalf of SNL about the interpretation of section 2(1) of the Competition Act, in relation to courses of conduct. In that section an anti-competitive practice is defined as follows:

... a person engages in an anti-competitive practice if, in the course of business, that person pursues a course of conduct which ... has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods in the United Kingdom or any part of it ...

7.6. It was submitted on behalf of SNL that this section should be interpreted as applying only to 'misconduct' which affects competition by

restricting, distorting or preventing it, not to any conduct which has that effect. It was argued that the words 'anti-competitive', 'restrict', 'distort' and 'prevent' were all words implying criticism or condemnation, and the use of such words was said to indicate that the section was aimed at 'misconduct'. To interpret it more widely (so the argument ran) would be to make many ordinary business practices anti-competitive, and might even result in what SNL called 'pro-competitive practices' becoming anti-competitive for the purposes of this Act, because successful competition may always lead to the disappearance of a competitor.

7.7. A similar argument urged upon us was that section 2(1) did not apply to a practice which was designed solely to protect SNL against unfair competition and to prevent infringement of its legal rights, and went no further than was reasonably necessary to secure these objectives. It was submitted that, if a term of a contract between SNL and a newsagent was as between them a reasonable provision for those purposes, that sufficed to exclude the operation of section 2(1) and make consideration of the public interest unnecessary. Only, it was argued, if such a contractual term was unreasonable as between the parties to the contract could section 2(1) come into play and consideration of the public interest become necessary.

7.8. We do not accept these arguments. One great difficulty which they present is that of giving any precise meaning to 'misconduct'. The operation of section 2(1) cannot be limited to illegal conduct, for clearly the Act is intended to make possible control of conduct which, unless prohibited by the exercise of powers under this Act, is perfectly legal. It is true that the section refers only to conduct restricting, distorting or preventing competition, but to interpret 'conduct' as meaning 'misconduct' in the sense of conduct producing that effect is to reduce the definition to a tautology. SNL's submission, while put forward with the object of restricting the operation of section 2(1), would in our judgement leave the definition of 'anti-competitive practice' with no clear or precise meaning at all. Since 'anti-competitive practice' is in fact defined in the sub-section, and defined purely in terms of effect on competition, the use of that description cannot support any inference that the section was meant to be confined to conduct which is irregular or unacceptable in some other way.

7.9. Our principal reason for rejecting the arguments, however, is that they appear to us to be incompatible with the language of the Act. Three features of the Act are particularly relevant to this conclusion. First is the generality of the language of section 2(1), which suggests that Parliament did not intend to exclude any course of conduct having the effect of restricting, distorting or preventing competition. Secondly, it is to be observed that section 2(3) gives the Secretary of State discretionary power to exclude a course of conduct for the purposes of the Act, so that an excluded course of conduct cannot constitute an anti-competitive practice. Such a power may be desirable if sub-section (1) applies (as in our judgement it does) to any course of conduct having the stated effect, but it is less easy to understand why the Secretary of State should be given a general power to protect types of 'misconduct'. Thirdly, section 8 expressly contemplates that an

anti-competitive practice may or may not operate against the public interest. The scheme of the Act is that if the Director General of Fair Trading decides that a course of conduct constitutes an anti-competitive practice, he may refer it to the Commission. If he does, the Commission in turn, have to decide, independently, whether the course of conduct is an anti-competitive practice. If they do, they then have to go on to decide whether the practice operates, or may be expected to operate, against the public interest. In deciding that question the Commission, by virtue of section 7(6), exercise the discretion conferred by section 84 of the Fair Trading Act. That discretion is amply wide enough to allow the Commission to consider questions—to the extent that it thinks them relevant in the particular circumstances—of the fairness or unfairness of the practice or any party's need to resort to it in order to defend his legal rights. In our judgement the intention is clear, that the Director General is to be concerned only with the question whether the course of conduct restricts, distorts or prevents competition, not with any other question of the character of the conduct. The further question whether the conduct operates, or may be expected to operate, against the public interest arises only at the subsequent stage of a reference to the Commission.

7.10. If the Director General's conclusion that a course of conduct amounts to an anti-competitive practice itself gave rise to the powers of the Secretary of State under section 10, some implied restriction of the comprehensive language of section 2(1) might be justifiable. In fact, the powers under section 10 are exercisable only if this Commission find that an anti-competitive practice operates, or may be expected to operate, against the public interest. We therefore see no reason to limit, in the way suggested to us, the courses of conduct liable to be found anti-competitive.

7.11. Our rejection of the argument that the use of a contractual term is not affected by section 2(1) if the term is reasonable as between the parties to the contract appears to us to be supported by an analogy drawn from the common law. At common law a covenant in restraint of trade is unenforceable unless it is shown, not only to be reasonable as between the contracting parties, but also not to be unreasonable in the public interest. We therefore see no reason to read section 2(1) subject to an implied limitation, the result of which would be that if a practice restricting, distorting or preventing competition were reasonable as between the immediate parties no consideration could be given to its effect upon the public interest.

7.12. It was put to us that section 2(1) was closely analogous to Articles 85 and 86 of the EEC Treaty, and that, as shown by decisions of the European Court, agreements and practices did not infringe those Articles where no misconduct was involved and the agreements and practices in question were designed solely to protect a party's rights under national law or safeguard him against unfair competition. There may well be substance in this argument as regards Article 86, which refers to the 'abuse' of a dominant position, but we see no affinity between that Article and section 2(1) of the Competition Act, the wording of which is entirely different. By contrast, the wording of the opening part of Article 85 does seem to us to reflect a concept

very similar to that embodied in section 2(1) of the Competition Act, and if SNL had been able to point to decisions of the European Court interpreting Article 85(1) in the restricted sense contended for, we might have had to consider to what extent the similarity of language should incline us towards a like interpretation. In fact, the decisions of the European Court to which we were referred do not seem to us in any way to justify the legal proposition for which they were cited. We are unaware of any ruling by the European Court that Article 85(1) is confined to cases of 'misconduct' and is inapplicable to agreements designed solely to protect a party's existing legal rights. On the contrary, the Court has held that the enforcement of industrial or commercial rights given by national law may contravene Article 85.

7.13. The true meaning of the definition of 'anti-competitive practice' in section 2(1) is, in our view, that it requires a distinction to be drawn between conduct which restricts, distorts or prevents competition and conduct which, while it may affect competition, does not affect it by way of restriction, distortion or prevention. It is not possible to specify in terms of general application characteristics which will place conduct in one class or the other, but it is possible to draw and apply the distinction in the particular circumstances of actual cases. The Commission are, indeed, accustomed to doing this when applying the very similar language of sections 6(2) and 7(2) of the Fair Trading Act. If this distinction is drawn, the possibility that what SNL called a 'pro-competitive practice' may for the purposes of the Act become an anti-competitive practice does not arise. It is a feature of competition that it may lead to the failure and disappearance of an unsuccessful competitor. Nevertheless, to fail in competition is not the same thing as to be excluded from competing because competition is restricted, distorted or prevented.

The first course of conduct— clause 5(d) and the additions to it

7.14. We first consider clause 5(d) and the additions to it in two ways:

- (a) What does each mean; how should each be interpreted legally?
- (b) What effect was each likely to produce on the people to whom it was addressed?

Clause 5(d)

7.15. Clause 5(d) of SNL's Conditions of Supply—September 1980, reads as follows:

Customers shall not provide, distribute or deliver, or cause or permit to be provided, distributed or delivered to any person who purchases or receives or regularly purchases or receives *Morning Telegraph* and/or any of the relevant publications, any printed material which is either unsolicited or for which no charge is made to such person being material which Sheffield Newspapers has previously notified the customer as being material reasonably considered by it to be detrimental to its interests or business.

(The Conditions apply to all newspapers supplied by SNL directly to newsagents but not to newspapers supplied, as the *Morning Telegraph* normally is, through wholesalers.)

7.16. The range of persons to whom, under this clause, newsagents may not deliver free or unsolicited material to which SNL objects is very wide. It consists of 'any person who purchases or receives', whether 'regularly' or not, any of SNL's publications. In view particularly of the circulation of *The Star* and the distribution of *The Star Weekly* to households which did not receive *The Star* regularly, this definition might have covered practically the whole population served by a newsagent in Sheffield. Clause 5(d) similarly prohibits newsagents from undertaking a very wide range of transactions. The words 'Customers shall not provide distribute or deliver, or cause or permit to be provided, distributed or delivered', cover not only home deliveries but also transactions in a newsagent's shop such as having a pile of free newspapers on display for anyone who wishes to take a copy. The definition of material to which SNL can object—'any printed material'—includes anything from free newspapers as generally understood to a leaflet or notice dealing with any item of goods or services or any event being advertised.

7.17. We conclude that clause 5(d) on its legal interpretation enabled SNL to prevent handling by newsagents of any free publications which SNL regarded as detrimental to its interests or business.

7.18. The effect which the clause was likely to produce on the newsagents to whom it was addressed was certainly no less than that. In view of the great importance of SNL's supplies of newspapers to most Sheffield newsagents they could only be expected to conclude that if they handled free publications at all they would endanger their supplies from SNL, and therefore they should avoid handling free publications altogether.

7.19. On both legal and practical considerations therefore we conclude that clause 5(d) was intended to prevent and was likely to prevent newsagents from handling free publications altogether.

The letter of 24 October 1980

7.20. The relevant part of this letter is the paragraph which reads:

It has already been agreed, between our solicitors and those acting for the Federation [the National Federation of Retail Newsagents (NFRN)], that without prejudice to the provisions of clause 5(d) newsagents can handle and distribute free newspapers and similar unsolicited material, generally, (ie any distribution cannot be limited to the regular recipients of *Morning Telegraph*, *The Star* or *The Star Weekly*) provided that the home delivery of such things is not made at the same time as the delivery of *Morning Telegraph*, *The Star* or *The Star Weekly*.

7.21. Apart from the uncertainty that arose soon afterwards when the NFRN told its members that it did not accept or agree with the restrictions

that SNL was imposing on them, this paragraph told newsagents that they could handle and distribute free publications generally, ie not limiting distribution to regular recipients of SNL's publications, without incurring the risk that SNL would withdraw supplies. To that extent its tone was less restrictive than clause 5(d). However, this was expressed to be 'without prejudice to clause 5(d)'. SNL told the OFT (paragraph 4.36 of the OFT report) that its solicitor took the view that 'without prejudice to clause 5(d)' meant 'without prejudice to the application of clause 5(d) in other circumstances'. In our view the true meaning was that clause 5(d) still remained unamended, and although newsagents could as a matter of indulgence do the things mentioned in the paragraph, SNL might at any time withdraw that indulgence and enforce the wider restrictions represented by clause 5(d) itself.

7.22. Even if the words 'Without prejudice to clause 5(d)' are ignored, and the letter considered to be an amendment to clause 5(d), by excluding home delivery of free publications at the same time as delivery of the *Morning Telegraph*, *The Star* or *The Star Weekly* (the latter itself an unsolicited free newspaper) SNL was covering virtually all households in Sheffield itself (though the coverage has now been reduced by SNL's decision not to publish *The Star Weekly* after the end of May 1982). It would be difficult for newsagents to devise alternative arrangements for distribution of free publications which would make efficient use of their resources. Whatever the strict legal interpretation of the letter, we think that in practice its effect upon newsagents must have been little different from that of clause 5(d) itself. This effect must have been reinforced by uncertainty whether, by reason of the inclusion of the proviso 'Without prejudice to the provisions of clause 5(d)' the paragraph effectively conferred any assured or unqualified freedom of action at all.

7.23. We conclude that SNL's letter quoted in paragraph 7.20 above did not modify the legal effects of clause 5(d) in spite of the indulgence introduced, nor did it remove the likelihood that newsagents would avoid handling free publications altogether.

The Important Notice of 10 February 1981

7.24. This notice reads as follows:

IMPORTANT NOTICE

CONDITIONS OF SUPPLY (1.9.80) CLAUSE 5(d)

Customers are advised that Sheffield Newspapers reserves the right not to supply their publications to customers who

- (a) distribute free publications at the same time as they distribute any of Sheffield Newspapers publications;
- (b) distribute free publications substantially only to regular recipients of Sheffield Newspapers publications.

For these purposes free publications are those which are unsolicited or not paid for by the reader and those which have a cover charge, the whole or a substantial part of which is retained by our customer.

.....

Should you have any queries regarding this matter, the Company would be pleased to provide clarification.

7.25. This notice clearly purported to extend the class of publications to which clause 5(d) applied. Clause 5(d) defined these publications as 'any printed material which is either unsolicited or for which no charge is made to [the recipient]'. The Important Notice adds to the class thus defined, publications 'which have a cover charge, the whole or a substantial part of which is retained by our customer'. As regards the class of transactions affected, however, the Important Notice does not purport to make any amendment of clause 5(d). Coming as it did immediately before the launch of *Homes* and at the end of a week of intensive activity by SNL to induce estate agents not to support *Homes*, the intention in this respect seems rather to have been to remind newsagents of the existence of clause 5(d) and to tell them of certain rights which SNL claimed under that clause.

7.26. The legal interpretation of clause 5(d) therefore remained unaffected, save for a possible increase of its severity by extension of the class of publications to which it applied. We may add that considerable difficulty might arise from the very ambiguous language in which the Important Notice is couched. It does not indicate whether practices (a) and (b) were intended to be separate or cumulative. In other words, did the threat to withhold supplies apply to anyone who adopted either practice, or only to those who adopted both? The description of practice (b) raises another ambiguity, for it is difficult to attach any precise meaning to the words, 'distribute free publications *substantially only* to regular recipients...'. Similar difficulty is caused by the new definition of 'free publications'. The reference to publications 'which have a cover charge, the whole or a substantial part of which is retained by our customer' might, according to the meaning placed upon 'a substantial part', cover many publications normally handled by newsagents.

7.27. Even if the intention of SNL was to amend clause 5(d) by the Important Notice, we do not consider that newsagents would have viewed it in that way, having regard to these ambiguities and the overall context in which the Notice was sent out, coupled with the specific reference to clause 5(d). They would have found it very difficult to work out their position under this notice in relation to the other two documents already discussed, and would have been likely to conclude that SNL still did not want them to handle free publications, so that their best course would be to have nothing to do with such publications.

7.28. We therefore conclude that the Important Notice (paragraph 7.24 above) did not effectively reduce the restrictions on newsagents contained in clause 5(d) and in SNL's letter of 24 October 1980.

Anti-competitive aspects of clause 5(d) and additions

7.29. We turn now to the question whether, by pursuing the first course of conduct, SNL was engaging in an anti-competitive practice.

7.30. In doing so we have borne in mind the importance of SNL's publications in the market for newspapers in Sheffield and the surrounding area, and the importance of the supply of its newspapers to newsagents. In the newspaper market the *Morning Telegraph* (with a circulation of over 30,000 on Monday-Friday and nearly 60,000 on Saturday) is the only local morning newspaper in Sheffield, though it faces some competition from national dailies (with a combined circulation of over 200,000 in the circulation area of SNL's newspapers). Its property supplement, the *Property Telegraph*, is the dominant property newspaper in Sheffield. *The Star* is the only evening newspaper in Sheffield, in which over 120,000 of its total of 140,000 copies are distributed. It faces virtually no competition in Sheffield as an evening newspaper. Thus SNL is the dominant supplier of local and property advertising newspapers in Sheffield.

7.31. Nearly 350 newsagents in Sheffield (excluding SNL's own Star News Shops) handle SNL's publications. In considering the possible effects on newsagents of SNL's dominance as a supplier of local newspapers, and of the conditions on which it might supply those newspapers, we have noted that it is the small, single outlet newsagents who handle most of the circulation of the late afternoon and evening sales of newspapers. *The Star* is particularly important to them, while the *Morning Telegraph* is also important. The direct importance of SNL's publications to a newsagent is increased by other considerations. Many people prefer to order all their newspapers, especially for home delivery, together from the same newsagent, so that any newsagent who could not supply the *Morning Telegraph* or *The Star* would be likely to lose all orders from such customers. This is a particularly important consideration in relation to *The Star*, 76 per cent of the circulation of which in Sheffield is home-delivered. Loss of sales of SNL's and other publications, in that way, would be likely also to reduce the newsagent's sales of tobacco, sweets and other goods.

7.32. We have already said that we interpret the Conditions of Supply, imposed by SNL, as enabling it to prevent newsagents in Sheffield from handling free publications. Newsagents in other parts of the United Kingdom are already involved in such activity. With the continuing growth in the publication of free newspapers and other free material, it is likely that newsagents will become more interested in obtaining such business. Indeed they, with advice from the NFRN, are beginning to make new arrangements to achieve that objective (see paragraph 5.33). The dominance of SNL as a supplier of local newspapers, and the importance of its supplies of such newspapers to newsagents in Sheffield (as described in paragraphs 7.30 and 7.31) mean that SNL is in a position to implement its conditions of supply, and effectively to prevent newsagents in Sheffield from taking part in these developments.

7.33. We now consider several arguments put forward by SNL to show that these Conditions of Supply do not and did not have anti-competitive

effects. The first of those arguments was that the conditions do not prevent free publications from being delivered or distributed in other ways, such as by the mass delivery to all households in selected areas which up to now has been the normal way of distributing free newspapers in the United Kingdom. The fact that clause 5(d) does not affect the distribution of free publications other than through newsagents does not in our judgement mean that it is not anti-competitive. The publishers of free publications may wish, as the publishers of *Homes* wished, to use other means of distribution and also the services of newsagents. If they are denied the services of newsagents the means of distribution available to them are limited, and it follows that their opportunity to compete with other newspapers is also restricted. Furthermore, competition between newsagents and others to distribute free publications is restricted.

7.34. SNL went on to argue that the conditions did not actually prevent other methods of distribution being used by *Homes*, or the entry of *Homes* into the market. The conditions, however, contributed to the facts, that *Homes* did not use newsagents as part of its methods of distribution, and in consequence that its opportunity to compete with the *Property Telegraph* was restricted; and that newsagents did not have an opportunity to compete with other means of distribution available to *Homes*. Sheffield Chronicle Ltd (SCL) originally intended that its property guide would be distributed free by its own employees in Sheffield and, as a paid-for publication, by newsagents in outlying areas of Sheffield, the newsagents retaining the whole of the payment. As a result of the views of the estate agents SCL agreed in August 1980 to consider distributing by the methods preferred by the estate agents, which were mainly through newsagents as a paid-for publication, with free distribution only in areas where newsagents would not handle the guide. Following the appearance of clause 5(d) SCL was concerned that, although it thought the clause did not appear to apply to the property guide, SNL might take further steps to prevent any copies of it being distributed if the distribution system was wholly dependent on newsagents (paragraph 6.19 of the OFT report). SCL subsequently established that over 450 newsagents in Sheffield and the surrounding areas were interested in distributing the guide. However, because of SCL's concern about what SNL might be able to do, after further discussion with the estate agents a decision was taken in January 1982 that the guide should be distributed free in Sheffield and that newsagents would only be used in peripheral areas. Even that limited possibility for newsagents was later removed, because as SCL explained to the OFT, it did not wish to use newsagents in that way while the NFRN remained in dispute with SNL over its Conditions of Supply. SCL also took the view that the Important Notice would have prevented it from using newsagents to distribute *Homes* (paragraph 6.20 of the OFT report). The Important Notice, among other things, included in the definition of free publications those which had a cover charge, the whole or a substantial part of which might be retained by the newsagent, because SNL believed that *Homes* might be published in that way. SNL was aware of the efforts being made by SCL to involve newsagents in the distribution of the new property guide and clearly intended to prevent newsagents taking part in that distribution on a basis which the estate agents considered important

for its prospects of success. That was also in our judgement the effect which clause 5(d) and the additions to it achieved.

7.35. In concluding as we have done in the preceding paragraph that SNL clearly intended to limit the methods of distribution available to *Homes* we have borne in mind that no other newspaper, as SNL itself has acknowledged, has taken similar steps to restrict the way in which newsagents may handle free publications. Publishers of some provincial daily newspapers told us that they would strive to meet competition from free publications in other ways.

7.36. SNL also argued that *Homes* had proved not to be an effective competitor. The reaction of the market had, SNL suggested, demonstrated the truth of its claim that it was unnecessary to have another advertising medium in addition to the *Property Telegraph*, which fully met the needs of the market. SNL argued that steps taken as a reaction to something which was not and was unlikely to become effectively competitive could not themselves be regarded as having an anti-competitive effect.

7.37. Our comments on that argument are first, that SNL's Conditions of Supply had the effect of limiting the methods of distribution available to *Homes*, and may themselves thus have contributed to the limited effect of *Homes'* competition. Secondly, the things which SNL did to counter the entry of *Homes* (as described in the OFT report) hardly suggest that SNL itself regarded *Homes* as an ineffective competitor at the time. Thirdly, even if SNL's argument has some validity in the particular case of *Homes*, clause 5(d) and its amendments deal with a much wider range of free publications. Section 2(1) of the Competition Act is concerned with potential competitors in general, and not only with actual competitors. It covers conduct which is intended or is likely to affect competition, and not only with the actual effects that may have been produced on competition. We therefore need to take into account what the effect of clause 5(d) and its amendments might be if other free publications entered into competition with SNL's publications. We consider that those Conditions of Supply may be expected to prevent newsagents from participating in the distribution of any free publications, and for that reason would have the anti-competitive effects described in paragraph 7.33.

7.38. We therefore conclude that, whether considered by itself or together with the letter of 24 October 1980 and the Important Notice, clause 5(d) of the conditions of supply which SNL imposed on newsagents restricted competition and might be expected to restrict competition as follows:

- (a) between paid-for and free publications as a means of advertising;
- (b) between newsagents and others as a means of distribution of publications; and
- (c) between newsagents one with another, by removing the possibility that they might compete in undertaking new and potentially profitable business.

For these reasons the first course of conduct as specified in the reference constitutes in our judgement an anti-competitive practice.

Effects on the public interest

7.39. Having concluded that the first course of conduct is an anti-competitive practice, we are required to state our conclusions on whether the practice operates or might be expected to operate against the public interest and if so what are or are likely to be the effects adverse to the public interest.

7.40. We consider first some arguments put forward by SNL with regard to the public interest. SNL submitted that clause 5(a) should not be regarded as operating against the public interest, because it did no more than protect SNL's legal rights. It submitted that a newsagent's customers for SNL's publications were obtained predominantly by the efforts of SNL; the newsagent might have some part in obtaining the customers, but a very much smaller part than SNL. SNL's most important direct method of obtaining customers was canvassing, which it carried out regularly. Names of new customers were obtained by canvassers and given to newsagents nearby. SNL contributed to the obtaining of customers by a number of means, which it listed as follows:

1. Production of a paper which will so appeal to the public as to attract home delivery.
2. Promotional and publicity expenditure over £250,000 pa to promote *The Star* and *Morning Telegraph* and especially home delivery.'
3. [A wide variety of promotional activities].
4. Permanent staff and teams of canvassers (for 10 months pa)
—£100,000 (1981)
—£69,000 (1982 budget).
5. Direct incentives to newsagents (eg prize draws) and newsboys (eg rewards for new customers).
6. Safety aids for newsboys supplied by SNL at cost.
7. Better terms (28·125 per cent) for delivery of *The Star* and acceptance of canvassed orders.
8. Display signs etc at newsagents' shops—over £10,000 in 1981.
9. Regular research into readers' habits, preferences etc
—£28,825 (1981)
—£39,750 (1982 budget).
10. Payment for delivery service through the rate offered to newsagents.'

(See paragraph 4.29 and Appendix 6).

7.41. It was submitted that the result of all this was to produce a relationship of confidence between SNL and the newsagent, and it would be a breach of that confidence for the newsagent to reveal to a competitor of SNL the names of his customers who regularly bought SNL's publications. In particular, it was submitted, it would be a breach of confidence for the newsagent to agree to deliver a competing free newspaper to those of his customers who bought SNL's publications, and to those customers only, because this would be equivalent to revealing to the publisher of the free newspaper those customers' names. On the same grounds it was submitted that SNL and a newsagent had joint proprietary rights in the list of the newsagent's customers subscribing to SNL's publications, or alternatively that the readerships of SNL's publications constituted an element of goodwill in which SNL, as well as the newsagent, had an interest, so that SNL would be entitled to control the use made of the lists by the newsagent.

7.42. We are not persuaded that this relationship of confidence or these joint rights or interests exist, certainly not in a form as wide as that suggested by SNL. In the first place, it seems to us doubtful whether some of the means employed by SNL to attract readers, as set out in their list, give rise to a relation of confidence at all or to any such rights or interests. Secondly, we do not know how effective canvassing is. The NFRN told us their opinion was that very few new customers for a newspaper obtained by canvassing continued to buy that newspaper for more than a short time. SNL itself acknowledged that it did not know what proportion of canvassed readers remained as customers after periods longer than two months. Thirdly, we believe that of a newsagent's customers for SNL's publications there is a larger proportion than SNL was prepared to admit for whom no activity of SNL capable of giving rise to a relationship of confidence, or to any joint rights or interests, is responsible. On the material before us, we do not consider that information is actually imparted in confidence by SNL to newsagents to an extent which would justify the rights claimed by SNL.

7.43. However this may be, there is no doubt that these rights can exist only between SNL and a particular newsagent, and must depend upon the particular course of dealing between SNL and that newsagent. The relevant considerations may thus vary between one newsagent and another. For example, the terms on which SNL supplies its newspapers to newsagents vary according to whether the newsagent provides a delivery service for *The Star*, takes part in SNL's promotions, and so on (see paragraphs 2.32-2.35). Even if a relationship of confidence, or joint rights or interests, exist between SNL and one newsagent, they will not necessarily be repeated between SNL and another; nor, if they exist at all, will they necessarily apply to the same proportion of customers in the case of one newsagent as in the case of another.

7.44. For these reasons it is very unlikely that a condition applied, as clause 5(d) is, indiscriminately to all newsagents dealing with SNL can avoid going beyond what is necessary to protect SNL's legal rights in this respect. In the particular case before us clause 5(d) clearly does go beyond this. The operation which in our judgment, clause 5(d) has, (see paragraphs 7.17-7.19)

goes far beyond any customers who, even on SNL's argument, could be affected by any right of confidence. SNL admitted to us that in its original form clause 5(d) had a wider operation than was necessary for its protection, and we consider the same to be true of the clause after the issue of the subsequent letter and Important Notice (see paragraphs 7.23 and 7.28).

7.45. We do not express any final view of the correctness of SNL's argument about the existence of a relationship of confidence or joint rights or interests. Even if that argument is to be accepted wholly, clause 5(d) in our judgement cannot be regarded as doing no more than give protection to SNL's legal rights, so that the company's argument cannot in its own terms apply. If clause 5(d) could be regarded as simply protecting SNL's legal rights, that would be one factor, but only one factor, relevant to the question of the effect of clause 5(d) on the public interest.

7.46. It was also contended on behalf of SNL that, even if it did not have the legal rights or interests referred to above, it was entitled to protect itself against unfair competition, and it was in the public interest to discourage unfair competition and so to uphold practices designed to prevent it and limited to what was reasonable for that purpose. We accept that there is a public interest in the maintenance of ethical standards of business behaviour and the upholding of practices designed to eliminate unfair trading. In our judgement, however, clause 5(d) goes beyond anything reasonably necessary for that purpose. If an anti-competitive practice could be regarded as reasonably necessary for protection against unfair competition, that again would be but one of the public interest factors to be considered and could not of itself be conclusive of the question whether the practice was or was not against the public interest. We give some indication in paragraphs 7.53-7.55 below of what we should consider reasonable and permissible in the case of SNL.

7.47. SNL also put to us another argument affecting the consideration of the public interest. This was that, even if clause 5(d) and its additions went too far, or were regarded by the Commission as anti-competitive, the importance of preserving a long-established local newspaper, the *Morning Telegraph*, was sufficiently in the public interest to outweigh any adverse effects that the Commission might find in the reference practice. We recognise the value to the public in Sheffield of a long-established local newspaper, but we do not accept that it would be in the public interest that the *Morning Telegraph* should be preserved for its services to one group, its readers, if that were at the expense of other groups such as buyers and sellers of property in Sheffield, and those who receive or might receive free newspapers.

7.48. The restrictions of competition which we have found, as set out in paragraph 7.38, may be expected to have the following effects adverse to the public interest:

- (a) We believe that advertising charges are likely to be higher than they would be in the absence of such restrictions. *Homes* itself offered and continues to offer cheaper advertising rates than SNL for some

properties; SNL argued that such lower rates were unlikely to be maintained, but the public would certainly be deprived of those rates if *Homes* were not available. SNL's own rates are lower for some properties than they were before the entry of *Homes* into the market (see Table 2.3). It would be more difficult for other free publications to enter the market or to compete with SNL, which would find it easier to maintain or increase its advertising rates for other articles as well as for houses.

- (b) There will be less pressure on or incentive to SNL to maintain or improve the standards and variety of service it offers to advertisers and to the public. SNL's reactions to the entry of *Homes* illustrate the force of this point (see paragraph 2.21), which may be expected to apply to any other area of advertising, if SNL chooses to enforce the condition.
- (c) The choice of advertising media available to advertisers and the public will be restricted because the number and circulations of competing free publications are likely to be reduced because of the limitations on their methods of distribution.

7.49. We also concluded in paragraph 7.38 that clause 5(d) and additions to it had and are likely to have the effect of restricting competition between newsagents one with another by removing the possibility that they might compete in undertaking new and potentially profitable business. The efficiency and profitability of many newsagents' businesses depend on their willingness and ability to arrange the distribution or delivery together of a large number of publications. Clause 5(d) and its amendments, by restricting their freedom to take on new business, may be expected to affect adversely the service they can offer to publishers and to the public, and therefore to be against the public interest.

7.50. For the purpose of remedying the adverse effects of this anti-competitive practice, we recommend that SNL be required to remove clause 5(d) from its Conditions of Supply and to withdraw the letter of 24 October 1980 and the Important Notice.

7.51. As we have said in paragraph 7.44, SNL told us in the course of our inquiry that clause 5(d) went further than it had intended or now regarded as necessary for protecting its legal and commercial interests, though it still considered that the clause was not anti-competitive. Partly as a reaction to some of the questions we put to it, SNL gave us two redrafts of clause 5(d) (see Appendices 7 and 8), in which it sought to express the more limited objective it told us it now wants to achieve. That objective we understand to be confined to preventing newsagents from distributing or delivering a free publication of any kind only (or 'substantially only') to people who are selected on the basis that they regularly order either for home delivery or for collection at the newsagent's shop any edition of *The Star* and/or the *Morning Telegraph*.

7.52. As we told the company during the inquiry, it is not the Commission's task to comment on possible alternative practices, but only to deal

with matters referred to us. If new conditions are to be introduced, that is a matter for the Director General of Fair Trading to consider. However, there are a few observations which we hope can usefully be made on some of the issues raised by the reference, and we do so in the following paragraphs.

7.53. We should not consider it unreasonable for SNL to include in its contract with newsagents who purchase and distribute its newspapers a condition that it reserves the right to cancel or suspend future supplies to a newsagent who facilitates competition of a potentially damaging nature by selective distribution of a competing free (ie unsolicited) newspaper or other free publication competing for advertising revenue with paid-for newspapers, such distribution being to that newsagent's readers of SNL's own publications and to nobody else. In such circumstances the publishers of free newspapers or other publications would be obtaining a competitive benefit by taking advantage of a known and established readership with particular interests without having to undertake the expense and effort of promoting and developing its own readership. SNL ought to be able to take reasonable steps to protect itself in such circumstances by withholding supplies.

7.54. Care would have to be taken to ensure that SNL did not introduce conditions of supply which went beyond the bounds of what is reasonably needed for its protection. This is a particularly important consideration because SNL has a very strong position in the market for newspapers in Sheffield, and in that situation its conditions of supply are likely to have an effect going beyond their strictly legal interpretation. It would also be important for the conditions of supply to include clear statements of their underlying intention and of the extent to which newsagents could distribute free newspapers without attracting any sanction.

7.55. As described in paragraph 4.41, SNL told us of its concern to prevent any loss of reputation which might occur if it was unable to examine advertising material distributed simultaneously with or inserted in its publications, and to prevent the dissemination of obscene or offensive material in similar ways. It was also concerned to prevent any delay in the distribution of its newspapers which might be caused by the simultaneous distribution of free publications. In our view these are quite different problems which SNL should deal with separately *vis-à-vis* newsagents, and not as part of a condition purporting to deal with the problems described in paragraph 7.53.

Summary: the first course of conduct

7.56. To summarise our views on the first course of conduct referred to us:

- (i) We conclude that it operates, and may be expected to operate, against the public interest.
- (ii) We recommend that SNL should be required to remove clause 5(d) from its Conditions of Supply and to withdraw the letter of 24 October 1980 and the Important Notice.

- (iii) It is for the Director General of Fair Trading, not for this Commission, to deal with any new conditions of supply which SNL may wish to put forward to replace its present conditions.
- (iv) We have made certain observations which may be useful, as regards the general issue raised by the reference course of conduct (in paragraphs 7.53-7.55).

The second course of conduct

7.57. This course of conduct consists of the granting by SNL of an annual discount of 5 per cent to estate agents on condition that they should advertise in the *Property Telegraph* for at least 48 weeks out of 52. The circumstances in which this discount was introduced, the other conditions which apply to it, and the extent to which it has been offered to estate agents are described in paragraphs 4.17 to 4.20.

7.58. We first consider whether the discount is an anti-competitive practice.

7.59. SNL argued that discounts aimed at attracting a certain frequency of advertising, over a particular period of time, are widespread and that for the Commission to find against this particular discount would be to condemn the discounts many other people employ. SNL gave us some 70 examples which it claimed supported its argument.

7.60. Our researches, mainly into the examples suggested by SNL, showed that discounts aimed at encouraging particular frequencies of advertising (often associated with volume targets, as is also the case with SNL's discount) are indeed widespread. There are, however, very few of those we have examined which, if they offer a top rate of discount for a year or more, do not also offer lower rates for shorter periods such as a half-year, a quarter or a month. The shorter periods and smaller commitments could be more attractive to advertisers with smaller amounts of business. As SNL itself acknowledged, the inclusion of the 48 week condition in the relevant discount meant that it could not sensibly be offered to estate agents who advertised infrequently or at irregular intervals. The discount was offered only to those estate agents who had entered into advertising contracts (see paragraphs 4.19 and 4.20).

7.61. SNL also argued that, although another condition of obtaining the 5 per cent discount was the achievement of a volume target fixed for each individual estate agent, the 48/52 frequency discount itself included no requirement as to volume in any particular week. The only requirement affecting the volume of a week's advertising was the minimum weekly cost which applied to all advertisements in the *Property Telegraph*. This minimum was so low that, SNL argued, the 48/52 weeks condition could not have the effect of binding estate agents to advertise only in the *Property Telegraph*, and could not therefore be a 'loyalty' discount and in consequence anti-competitive as argued in paragraph 8.39 of the OFT report.

The truth of this was demonstrated, in SNL's view, by the fact that some 20 estate agents including many who qualify for this discount supported the relaunched *Homes*.

7.62. Whether the reference practice is anti-competitive depends primarily on whether it might have the effect of discouraging estate agents from advertising in any other medium or proposed medium in the property market, thus restricting competition between advertising media. When the discount was introduced, it was one of a number of practices which, in our judgement, was intended to have such an effect. SNL at that time was refusing altogether to accept advertisements for property appearing in *Homes*, and making some advertising rates conditional on a substantial proportion of an estate agent's advertising being placed exclusively in the *Property Telegraph*. SNL has since given undertakings to the Director General of Fair Trading to abandon those practices.

7.63. We have already noted that the existence of the discount did not stop numerous agents who qualify for it from supporting the relaunched *Homes*. Indeed SCL has publicly acknowledged that it does not regard the discount as likely to affect the competitive position of *Homes* (see paragraph 5.16).

7.64. It also appears to us unlikely that the prospect of a discount at the end of the year of no more than 5 per cent will have any appreciable effect in persuading an estate agent to place all his advertising in any one week in the *Property Telegraph* if there are good reasons for him to place some of it with another publication. SNL told us that no estate agent failed to obtain the discount in 1981 solely because of not advertising for as many as 48 weeks (see paragraph 4.43).

7.65. We therefore conclude that, whatever effect the reference practice may have had in discouraging estate agents from placing advertisements with other media than the *Property Telegraph* when SNL was pursuing the other practices mentioned in paragraph 7.63, at its present level of 5 per cent, and in present circumstances, it cannot be seen to have any such effect.

7.66. We have also considered whether some estate agents, perhaps those with comparatively small amounts of advertising to place, might in order to obtain the discount place advertisements more often than they would otherwise do, or at different times, since it is the vendor who pays separately for the advertising but the estate agent who obtains the discount. We have concluded that any effect of this kind which the discount may have had has not been and is unlikely to be significant, because the estate agent's primary interest is to sell property, and to do that he needs to place his advertisements in ways and at times likely to lead to sales rather than for any other reason.

7.67. For the above reasons we conclude that the second course of conduct as referred to us is not an anti-competitive practice. Therefore the question whether it operates or may be expected to operate against the public interest does not arise.

Summary

7.68. We are required to report whether Sheffield Newspapers Limited (SNL) at any time in the 12 months ending on 21 December 1981 pursued the two courses of conduct specified in the reference, namely:

- (i) Whether SNL included in the conditions which it applied to the supply of certain of its newspapers to newsagents clause 5(d) of its Conditions of Supply—September 1980 and any amendment to that clause effected by its letter of 24 October 1980 to newsagents, or by its notice of 10 February 1981 to newsagents (the Important Notice); and
- (ii) Whether SNL granted an annual discount to estate agents of five per cent on condition that the estate agents should advertise in the *Property Telegraph* for at least 48 weeks out of 52.

SNL confirmed that it pursued both courses of conduct throughout that period.

7.69. We are also required to report whether by pursuing those courses of conduct SNL was engaging in anti-competitive practices, and if so whether those practices operated, or might be expected to operate against the public interest.

7.70. We conclude that the first course of conduct—(i) in paragraph 7.68—is anti-competitive and operates and may be expected to operate against the public interest. We recommend that SNL should be required to remove clause 5(d) from its Conditions of Supply and to withdraw the letter of 24 October 1980 and the Important Notice.

7.71. We conclude that the second course of conduct—(ii) in paragraph 7.68—is not anti-competitive.

J G LE QUESNE (*Chairman*)

P J CUSTIS

R M GOODE

M S LIPWORTH

R L MARSHALL

N E D BURTON (*Secretary*)

11 August 1982