

UNDERTAKINGS OF THE NATIONAL HOUSE-BUILDING COUNCIL TO
THE SECRETARY OF STATE

The National House-Building Council hereby gives the following undertakings to the Secretary of State under section 88 of the Fair Trading Act 1973:

Changes to the NHBC's Rules of Membership

1. (1) The NHBC shall not make any amendment or addition to the Rules of Membership to which this paragraph applies unless the Director General of Fair Trading has previously given his consent thereto in writing.
- (2) This paragraph applies to any amendment or addition to the Rules of Membership that has or may have the result that the NHBC ceases to comply with, or complies to a lesser extent with, the MMC recommendations.

Interpretation

2. In these undertakings:

"the MMC recommendations" means the recommendations set out in paragraphs 8.90 to 8.102 of a report by the Monopolies and Mergers Commission entitled "A report on the existence or possible existence of a monopoly situation in relation to the supply within the United Kingdom of structural warranty services in relation to new homes" (Cm 1439);

"the NHBC" means the National House-Building Council; and

"the Rules of Membership" means the rules as laid down from time to time by the NHBC for builders and developers of new homes registered with the NHBC.

ANTHONY JOHN ALLEN, DIRECTOR & CHIEF EXECUTIVE

For and on behalf of NHBC

7/12/95 (date)

- (f) The content and implementation of Rule 38 represents an action, on the part of NHBC, which is attributable to the existence of the monopoly situation and omissions on its part described in paragraphs 8.80 to 8.82 are also so attributable. For the reasons given in paragraphs 8.81 and 8.82, these omissions represent facts which operate and may be expected to operate against the public interest (paragraph 8.85).
- (g) In its content and implementation Rule 41 constitutes an action, on NHBC's part, which is attributable to the existence of the monopoly situation, and the rule represents a fact which operates and may be expected to operate against the public interest (paragraph 8.86).
- (h) The facts set out in (f) and (g) have the particular effect adverse to the public interest that they restrict competition in the supply of reference services by discouraging builders from voluntarily seeking cancellation of their membership of NHBC in order to transfer to another scheme (paragraph 8.87).
- (i) None of the matters set out in (f) and (g) represent steps being taken by NHBC for the purpose of exploiting or maintaining the monopoly situation (paragraph 8.88).

Recommendations

8.90. Having identified (paragraphs 8.77 and 8.87) particular effects adverse to the public interest, we have to consider what action (if any) should be taken for the purpose of remedying or preventing these. We may, if we think fit, include in this report recommendations as to such action.

Rule 12

8.91. NHBC has told us that it understands, but does not share, our concern that Rule 12 operates as a barrier to entry to the market. It vigorously denies this both at the level of principle and by reference to experience. It doubts whether any claim could be made that Rule 12 has operated in practice as a barrier to entry, if only because of the short period of relevant experience since Foundation 15 entered the market, and the extraordinarily poor commercial environment for the construction industry since then. Under these circumstances, whatever might be the theoretical consequences of Rule 12, its practical effect must necessarily be speculative, and it would be undesirable to make irrevocable and profound changes on the basis of a paucity of information. Accordingly, NHBC would be willing to assent to a period of scrutiny by the Director General of Fair Trading and if, after a reasonable and representative period, he came to the view that Rule 12 did in practice constitute a barrier to entry, NHBC had little doubt that it could accede to any reasonable request to amend the rule after consultation with the Director General.

8.92. On the other hand, MMI has told us that in the absence of a significant change to NHBC's rules it is doubtful whether it can obtain a viable market share, and it would therefore have to give serious consideration to withdrawing from the reference services market. If it withdraws, in its view, there must be some doubt whether other companies would seek to enter the market in the foreseeable future.

8.93. We believe that the existence of Rule 12 has in the past helped to raise building standards. However, in the new and changing situation of emerging competition its rigidity is anti-competitive. We believe it would be inappropriate at this stage to recommend the total abolition of Rule 12 but some significant amendment is clearly required.

8.94. In our view, Rule 12 should be amended so as to allow a builder to source from other bodies providing the reference services but only where the standards of those bodies are broadly comparable to those of NHBC's Buildmark scheme. The standards of Foundation 15 are broadly comparable to those of Buildmark and, indeed, the Foundation 15 scheme is closely modelled on Buildmark. We recommend therefore that Rule 12 should additionally permit two forms of exception which would apply only to those new homes which:

- (a) have been accepted for cover by Foundation 15 or any other scheme of broadly comparable standard to NHBC's scheme; and
- (b) comprise an entirely separate housing unit, for example a block of flats, a sheltered home development covered by a single management agreement or an individual home not sharing common parts with any other home. (This would prevent, for example, the placing of one flat in a block with one scheme and the rest with another.)

Under the terms of the amended Rule 12 members of NHBC would no longer be in breach of NHBC's rules if part of their output of new homes had not been notified to NHBC but placed with another scheme as defined at (a) above. This, of course, implies that they would inform NHBC of new homes covered by such other schemes.

8.95. These exceptions to enable dual sourcing would be simply a limited amendment to Rule 12 to assist in remedying the adverse effects which we have identified, and would provide sufficient flexibility to enable a member of NHBC to use an alternative scheme while remaining a member of NHBC. We also recommend, however, that NHBC should adopt a rule equivalent to that possessed by Foundation 15 (Rule 20a) requiring members adopting this option to notify purchasers or potential purchasers that while the builder remains an NHBC builder the individual property is not covered by the Buildmark scheme.

8.96. We do not believe that such limited exceptions from Rule 12 would either prevent NHBC retaining sufficient control over the output and performance of its members to make a builder's registration meaningless nor impose any unnecessarily heavy burden of documentation or administration either on the builder himself or upon the providers of the alternative scheme. These providers would of course have a considerable incentive to facilitate the operation of the arrangements by providing swiftly to the builder concerned the documentary evidence required to be produced to NHBC in respect of individual units. Whilst this would give NHBC precise information about the activities of MMI or any other competitor, and this is MMI's view, we believe that NHBC's comprehensive network of inspectors would in due course acquire this knowledge anyway. Moreover, as the properties concerned would already, at the time of the notification, have been accepted for warranty by the competing scheme, it is hard to see how such notifications would give NHBC a competitive advantage. In our view it is important that in the interests of consumer protection all homes which an NHBC member places outside the NHBC scheme should indeed be covered by another scheme broadly comparable to Buildmark.

8.97. In making our recommendation at paragraph 8.94(a), we have not lost sight of the fact that in our review with NHBC of hypothetical remedies, it clearly indicated that such a procedure was in its view unsuitable (see Appendix 8.1). Nevertheless it remains our view that the procedure we have recommended is both desirable and practicable. We note that we received support from MMI as to its practicability.

8.98. We appreciate that NHBC may wish for reassurance that other warranty schemes are of broadly comparable standard to its own, given the inevitable differences of detail between schemes. We have sought information from the British Standards Institution (BSI) about the relevance of company and sectoral quality assurance schemes operating under BS 5750 to this sector. One possibility is that NHBC might accept certification of a competing scheme under BS 5750, by one of the bodies accredited by the National Accreditation Council for Certification Bodies, as evidence that it both is and remains of adequate standard to safeguard the interests of home buyers. Alternatively NHBC, MMI, and any other competitor which may enter the market, could together draw up a sectoral scheme, with agreed criteria against which their performance would be monitored on a continuing basis by one of those certification bodies. Clearly there would need to be detailed discussion between all interested parties on the best way of utilising this approach for determining the broad comparability of structural warranty schemes.

8.99. The question of the use, without breach of NHBC's rules, of subsidiary or associated companies not registered with NHBC to build or develop new homes outside the Buildmark scheme should also be considered. The present practice of NHBC in not prohibiting (but not expressly permitting) such practices leaves its builder members in a rather ambiguous position. In our view if the above exceptions to Rule 12

were permitted the need for such arrangements becomes less necessary. If on the other hand the exceptions to Rule 12 were not as fully permitted as we have suggested, then we recommend that the present ability for NHBC's members to take individual properties outside the Buildmark scheme in this way should be expressly recognised by the rules in order to go some way towards alleviating the adverse effects we have identified as resulting from the present terms of Rule 12.

Rules 38 and 41

8.100. We recommend that the adverse effect which we have identified in paragraph 8.87 should be remedied in the following manner:

- (a) NHBC should introduce a new rule confirming the right of a builder to cancel his registration with effect for all homes not yet notified to it. Any homes already notified to NHBC under the rules prior to notice of cancellation of a builder's registration being received by NHBC would remain covered by Buildmark, so that normal documentation would continue to be issued for them to their purchasers, and in respect of which the builder would retain all his liabilities under the scheme.

This change would be particularly helpful to medium- or large-size builders with a large number of homes in the course of construction at any one time. NHBC has told us that such a change would be acceptable and in any event it would propose to amend its rules in this way.

- (b) An additional new rule should be introduced under which a member cancelling registration with NHBC would be allowed to rejoin it at a later date without prejudice to his previous length of membership with NHBC.

Quite independently, NHBC would be free to take account of the member's claims record during his period of absence.

- (c) Rule 41 should be clarified to make clear that it is for the builder withdrawing from membership to decide whether to exercise his option to pay the lump sum to NHBC (as notified to him by NHBC) to cover his existing liabilities or to choose to retain his liabilities for the remainder of the initial two-year period for each new home.

8.101. If these changes were introduced to NHBC's rules we believe the adverse effects which we have identified would be sufficiently remedied. We do not believe that these changes would cause any detriment to the purchaser of new homes. We have noted (see paragraph 8.31) that NHBC itself has recognised that certain of its rules require some clarification.

Consequential changes to NHBC's rules

8.102. A number of consequential changes to NHBC's rules would be necessary as a result of the implementation of our recommendations.

Overview

8.103. Our report has been critical of certain of NHBC's rules and of some omissions from them. They are long-standing and require clarification and amendment, especially in the relatively new situation where direct competition is being provided by MMI, and to ensure that they do not deter further entry to the reference services market. We also received some complaints from purchasers of new homes about the operation of NHBC's scheme. It seems to us to be inevitable that a nation-wide scheme of this kind will not always work perfectly at the local level. Overall, however, we have been impressed by NHBC's achievements, which have been actively encouraged by the Government over the years, in improving