OFFICE OF FAIR TRADING

Competition Act 1998

Decision of the Office of Fair Trading
No. CA98/2/2004

Notification by Arena Leisure plc/Attheraces Holdings Limited/ British Sky Broadcasting Group plc/ Channel Four Television Corporation/The Racecourse Association Limited

5 April 2004
(Case CP/1442-01)

The OFT finds that one aspect of the Attheraces notified arrangement infringes the Chapter I prohibition contained in the Competition Act 1998 and does not qualify for individual exemption. That aspect is the collective selling by the 49 participating racecourses of certain media rights necessary for the production of the Attheraces interactive digital TV channel, and of the Attheraces website. In particular, the provisions of the rights agreement providing for the collective grant of certain rights by the 49 racecourses and the payment for such grant infringe the Chapter I prohibition. However, no directions are appropriate as the OFT is satisfied that Attheraces has given effect to its notice terminating the rights agreement. However, since this development only took place very recently, that rights agreement is referred to in this decision in the present tense.

Note: Certain information has been redacted from this document to comply with the requirements of section 244(3) of the Enterprise Act 2002 regarding disclosure of information. Redactions are denoted by [...] or, where possible, by replacement of the information concerned with an approximate indication of the redacted figure, indicated in italics within square brackets.

CONTENTS

PART ONE PROCEDURE

1. A joint venture company trading as Attheraces Holdings Limited ('Attheraces'), owned ultimately by Arena Leisure plc ('Arena'), the Channel Four Broadcasting Corporation ('Channel 4') and British Sky Broadcasting Group plc, are parties together with the Racecourse Association Limited ('RCA') (these five undertakings together, the 'Applicants') to several inter-related agreements (the 'Notified Agreements'), which form a single arrangement by which Attheraces acquires the media rights to horseraces at 49 racecourses in Great Britain (the 'Notified Arrangement', described in more detail below).

2. On 15 November 2001, the Applicants applied to the Office of Fair Trading (the 'OFT') on Form N, (the 'Form N') under section 14 of the Competition Act 1998 (the 'Act'), for a decision as to whether the Notified Arrangement infringes the Chapter I prohibition set out in section 2 of the Act, and if so, for an individual exemption. The application related to:

   (i) the sale by 49 British racecourses (the 'Courses', listed in Annex 1) of certain of their media rights to Attheraces under a single agreement (the 'Rights Agreement', see paragraphs 22-31, where such rights are described and defined) negotiated on their behalf by the RCA;

   (ii) the formation of a joint venture company, Attheraces, by Arena, British Sky Broadcasting Group Ltd ('BSkyB') and Channel 4 to bid for and exploit certain media rights in relation to British horseracing, pursuant to the Shareholders' Agreement (see paragraphs 33-36); and

   (iii) certain ancillary arrangements entered into by Attheraces and its shareholders (see paragraphs 37-43); and other arrangements entered into by Attheraces (see paragraphs 44-50).

3. On 21 November 2001, the notification was placed on the OFT Public Register. From 11 March until 19 April 2002, the OFT undertook an informal consultation of third parties, by sending consultation letters to certain parties. This consultation was advertised on the OFT's website at approximately the same time.

4. On 8 April 2003, the OFT issued a notice (the 'Rule 14 Notice') in accordance with Rule 14 of the OFT's procedural rules (the 'OFT's rules'),[1] to the five Applicants and to the Courses, stating that the OFT proposed to issue a decision that one aspect of the Notified Arrangement infringed the Chapter I prohibition.

[1] The Competition Act 1998 (Office of Fair Trading's rules) Order 2000 (SI 2000/293). Available on the OFT website www.oft.gov.uk

5. On 25 June 2003, the RCA submitted written representations (the 'RCA Representations') on its behalf and on behalf of certain Courses.[2] This was followed on 4 July 2003 by an economics report prepared by RBB Economics (the 'RBB Report') in support of the RCA Representations.

6. The RCA indicated that it did not wish to make oral representations. No representations, whether written or oral, were received from the other Applicants at that stage.

7. On 12 August 2003, following commencement and settlement of judicial review proceedings, the British Horseracing Board Limited (the 'BHB') and the Jockey Club, the governing bodies of British horseracing, made a written submission to the OFT (the 'BHB Submission') and on 1 October 2003 made oral submissions at a meeting with the OFT's case team, recorded in a transcript of that meeting (the 'BHB Transcript').

8. The OFT issued a supplement to the Rule 14 Notice on 22 August 2003, to which the RCA responded on 19 September 2003, with supporting witness statements being provided on 7 and 9 October 2003. Further submissions were received from Arena (on 21 November 2003), the BHB (on 4 December 2003) and the RCA (on 21 November and 1 December 2003).

9. On 29 January 2004, Attheraces gave notice that it would terminate the Rights Agreement with effect on 29 March 2004.[3] The RCA has disputed the validity of this notice of termination.[4] In the interim, Attheraces began negotiating new media rights agreements with the Courses.[5] On 29 March 2004, pursuant to its termination notice, Attheraces ceased exploiting the Courses' Rights pursuant to the Rights Agreement. As a result, live British horseraces are no longer available via Attheraces' Channel and Website.[6] The OFT understands that there are a number of potential buyers of racecourses' rights and it is therefore possible that alternative arrangements will be put in place.

---

2 Racecourse Investments Limited ('RIL'), Ascot, Ayr, Bangor on Dee, Beverley, Cartmel, Catterick, Chester, Doncaster, Goodwood, Hamilton Park, Ludlow, Musselburgh, Newbury, Newton Abbot, Plumpton, Pontefract, Redcar, Ripon, Salisbury, Thirsk, Wetherby and York. This list does not include the racecourses controlled by Northern Racing Limited ('Northern') (including Chepstow, which is affiliated with Northern) and Arena.

3 Pursuant to Clause 24.3 of the Rights Agreement. This clause applies if the margin on certain bets available through Attheraces' services falls below a pre-set level.

4 Fax from Denton Wilde Sapte to the OFT dated 10 March 2004.

5 Attheraces press release dated 29 January 2004. This is attached to a fax from Attheraces to the OFT dated 29 January 2004.

6 However punters can continue to bet via the Website and the Channel is continuing to screen footage of US horseracing. The terms 'Channel' and 'Website' are defined in paragraph 12. See also paragraphs 60-62

10. The OFT is satisfied that Attheraces has given effect to its notice terminating the Rights Agreement. However, since this development only took place very recently, the Rights Agreement is referred to in this decision in the present tense.

PART TWO THE FACTS

I. THE APPLICANTS

1. Attheraces

11. Attheraces is a private limited company. It and its subsidiary companies were formed by Arena, BSkyB and Channel 4 (each described below) in connection with their joint bid for the rights offered by the 59 British racecourses, which the 49 Courses subsequently accepted by signing the Rights Agreement (described below).

12. The principal businesses of Attheraces are the exploitation of these rights, through broadcasting a basic pay TV channel primarily dedicated to British horse racing (the 'Channel'), running a website (the 'Website'), facilitating both the provision of fixed-odds betting services and the placing of pool bets through the Channel and the Website, sublicensing certain of the rights to third parties, and related activities.[7]

2. Arena

13. Arena is a public limited company listed on the London Stock Exchange. It owns six of the 59 racecourses in Great Britain (representing approximately 19% of annual British horseracing fixtures and accounting for approximately 16% of British off-course horseracing betting revenues). Arena owns three all-weather courses at Lingfield Park, Southwell and Wolverhampton and the turf courses at Folkestone and Royal Windsor, and has a 99 year lease to manage and operate Worcester Racecourse.

14. Arena has developed software to provide an interactive pool betting service based on horseracing, through its subsidiary Arena Online. Together with Scientific Games, Inc., Arena Online has developed a gaming system for British and international horseracing, called 'Trackplay'. Trackplay allows users of PCs, digital television, mobile telephones and personal digital assistants ('PDAs') to: (i) see live video pictures of horseracing; (ii) have access to racing information (e.g., form and other information on runners and riders); and (iii) place bets, including pool bets. Trackplay is used by Arena to provide and operate Attheraces' pool betting service.

---

[7] Subscription to a pay TV platform gives access to a package of channels. The cheaper packages contain what are known as 'basic channels' (in contrast, subscribers have to pay an additional fee if they wish to receive 'premium channels'). Fixed odds and pool bets are defined in paragraph 2 of Annex 3.

3. British Sky Broadcasting Group plc

15. British Sky Broadcasting Group plc is a public limited company listed on both the London and New York Stock markets. The majority of its activities and generation of turnover takes place in the UK. In the year ending 30 June 2002, it had turnover of £2,776 million.[8]

16. British Sky Broadcasting Group plc is a holding company for several subsidiaries with activities connected to television broadcasting in the UK and Ireland. The principal group operating companies are BSkyB, Sky Subscribers Services ('SSSL'), British Interactive Broadcasting ('BiB') and Sports Internet Group ('SIG'). Their activities comprise: (i) the creation of channels broadcast via digital satellite ('DSat') and offered for redistribution via cable and digital terrestrial television ('DTT'); (ii) the distribution via DSat of wholly owned, joint venture and third party channels and pay per view services; (iii) the provision of conditional access, access control and customer management services to broadcasters and interactive services providers on the DSat platform; (iv) the operation of a website and an internet service provider and the provision of website design and management services and media agency services; (v) the provision of fixed-odds betting services; and (vi) the provision of interactive services on the BSkyB DSat platform.

4. Channel 4

17. Channel 4 is a statutory corporation established by Act of Parliament, commercially funded, with a public service remit to foster creativity, diversity and innovation. Channel 4 broadcasts news, documentary, arts, sports and drama programmes in the UK via analogue and digital television, principally via its main television channel, Channel Four. Additionally, the Channel 4 group operates subscription television channels (FilmFour, FilmFour + 1 hour, FilmFour World and FilmFour Extreme) and a basic pay TV channel, E4. The Channel 4 group is also involved in film financing and distribution, international programme sales and co-financing, studio and post production facilities, and educational facilities.

18. Channel 4 also owns 50% of the share capital of the digital television multiplex operator, Digital 3 and 4 Ltd, which holds a licence granted by the Independent Television Commission to operate the Channel 3 and Channel 4 digital multiplex for the broadcast of services via DTT. ITV Network Ltd owns the other 50%.

---

[8] Figure taken from a BSkyB Press Release *British Sky Broadcasting Group PLC: Results for the year ending 30 June 2002* dated 31 July 2002. See http://media.corporate-ir.net/media_files/lse/bsy.uk/reports/q4_press.pdf.

5. The RCA

19. The RCA is a private company limited by guarantee, which represents and protects the interests of the 59 racecourses in Great Britain. Each of these 59 racecourses is a member of the RCA and holds one voting share. The RCA has been responsible for negotiating various agreements for the exploitation of certain media rights on behalf of RCA members (including those for broadcasts to off-course Licensed Betting Offices ('LBOs')). Further, it undertakes certain marketing, administrative and representational functions for the racecourses. Each member racecourse is, however, the legal owner of all media rights for events at its racecourse. 49 member racecourses have sold their rights to Attheraces (i.e., the Courses). The other 10 racecourses sold their media rights to GG Media Limited ('GG Media').

20. The RCA owns Racecourse Technical Services Limited ('RaceTech'), a company whose principal function is the provision of technical services at all race meetings. It provides starting stalls, computer photo-finish equipment and, among its television facilities, it ensures CCTV coverage and operates a television outside broadcast fleet. The RCA also holds a 10% stake in Satellite Information Services Limited ('SIS') as trustee for its racecourse members. SIS provides televised coverage of horseracing to LBOs (through the FACTS service).

II. THE NOTIFIED ARRANGEMENT

1. Sale of their rights by the Courses

21. In their Form N the Applicants highlighted the sale of the Courses' rights to Attheraces as an aspect of the Notified Arrangement that might interest the OFT.[9] Accordingly, the OFT has assessed the sale of the Courses' rights as part of its assessment of the Notified Arrangement.

2. The Rights Agreement

22. The Courses agreed to grant certain of their media rights (the 'Rights', comprising Access Rights, Media Rights and Other Rights, as defined in paragraphs 26-28 below) to Attheraces in the primary agreement giving effect to the Notified Arrangement (the 'Rights Agreement').

23. The Rights Agreement is structured as a single agreement executed by each of the courses who wished to participate. Courses are compensated by a payment by Attheraces to the RCA, which is divided between the Courses on the basis of a formula agreed between the Courses and the RCA.

---

[9] Form N, pages 40-41.

24. The Courses granted the Rights to Attheraces for a 10-year period (the 'Rights Period'). A 'break' clause that takes effect after 5 years has been inserted into the 10 year Rights Period, by dividing the Rights Period into an 'Initial Term' (the first five years from 1 July 2001) and Extension Period (the five years from 1 July 2006 to 30 June 2011). The RCA may terminate the Rights Agreement at the end of the Initial Term only if: (i) as at 31 December 2005, Attheraces' shareholders have already achieved the projected return on their investments in Attheraces of 15%, compounded annually, over the first four and a half years of the Rights Period; or (ii) Attheraces has not been exploiting the Rights effectively (measured against a pre-determined performance target (the 'Performance Target')).

25. Under Clause 3 of the Rights Agreement, each Course grants to Attheraces all of the Rights in races taking place on its premises, comprising Access, Media, and Other Rights, on a worldwide basis, subject to the Reserved Rights (each term as defined below).

2.1 Access Rights

26. The Access Rights comprise the rights required to enable Attheraces to attend the Races with outside broadcasting units (and the right to authorise the Attheraces sub-licensees to do the same) in order to produce audio-visual and audio coverage (i.e., to exercise the Media Rights) in connection with the Races (as detailed in Clause 4.1 of the Rights Agreement). 'Races' is defined in the Rights Agreement and includes any and all horseraces held at the Courses plus events relating to those races that occur on the same day.

2.2 Media Rights

27. The Media Rights comprise:

- the exclusive right for the holder to produce, either itself or by authorising third parties, films, live feeds and audio coverage of the Races and any other material comprising moving representations of any action of, or in relation to, the Races (where such material is derived from access to the Courses) (Rights Agreement, Clause 1.1(i));

- the exclusive right for the holder to distribute in any media now known or existing in the future worldwide, either itself, or by authorising third parties, all materials in relation to the Races filmed, recorded or produced by RaceTech, together with all soundtracks and on-course commentary (Rights Agreement, Clause 1.1 (ii)).

2.3 Other Rights

28. The following Other Rights are also granted or acknowledged by the Courses to be exercisable by Attheraces:

- the non-exclusive right to advertise, promote and publicise British horseracing and the exercise of the Rights by Attheraces;
- the non-exclusive right to use information and data relating to the Races for exploitation in connection with the Rights granted under the Rights Agreement;[10] and
- the right, in conjunction with the distribution of this coverage, to offer fixed-odds and/or pool betting services and interactive functionality including e-commerce services.[11]

2.4 Reserved Rights

29. The Reserved Rights are those rights reserved to the RCA and/or the Courses and not licensed to Attheraces. In all there are 20 categories of Reserved Rights, including:

- the rights granted under agreements with SIS and Intercontinental Racing Limited and all licence agreements entered into under such agreements, solely for the duration of such agreements. These rights enable the RCA to continue to supply pictures (together with commentaries) of the Races to LBOs in the UK, the Republic of Ireland and elsewhere throughout the world. These agreements have expired;[12]
- the right to produce, transmit and/or otherwise make available material for reception in LBOs in the United Kingdom and the Republic of Ireland; and
- the radio broadcasting rights granted to the BBC and Talksport Limited, dated respectively 29 May 1997 and 23 May 2000, solely for the duration of such agreements, which have also expired.[13]

2.5 Licence fees and other obligations

30. In return for the grant of the Rights, the Rights Agreement provided for Attheraces to pay the RCA, as representative of the Courses, a guaranteed minimum amount of over £306 million over the 10 year Rights Period (£[...] of

---

[10] As detailed in Clause 3.4.1 of the Rights Agreement.

[11] As detailed in Clause 3.3 of the Rights Agreement.

[12] They expired on 30 April 2002.

[13] These agreements expired on 31 March 2002 and 22 March 2002 respectively.

which is a fixed payment in respect of certain television broadcasting rights, which is to be covered by payments to Attheraces from the broadcasters to whom it sub-licenses these rights, and over £[...] of which is a minimum guaranteed share of betting and other revenues from exploitation by Attheraces of the Rights). Further, the Courses will be entitled to a share of any of Attheraces' betting and other revenues above the minimum guaranteed amount of over £[...]. The RCA will be responsible for distributing all payments to the Courses by Attheraces.

31. Attheraces also agreed to spend at least £[...] on marketing and promoting coverage of the Races, and British horseracing generally. Attheraces' total minimum financial commitment therefore exceeds £[...].

32. Separately, Attheraces entered into an agreement with the BHB, one of the governing bodies of racing. It does not form part of the Notified Arrangement. It concerns: (i) the grant of non-exclusive licences by the BHB to Attheraces to use the BHB's database of racing information for Attheraces' broadcasting, internet/new media and bookmaking activities; (ii) the establishment of a joint venture between Attheraces and the BHB for the exploitation of 'visual data' (i.e., graphic representations of the progress of a race) and for the broadcasting of a weekly race to be known as the 'Superbet' race, a new race upon which a separate high-margin pool betting service will be offered by the joint venture; and (iii) the appointment of a representative of the BHB as a non-executive director of Attheraces.

3. Agreements between Attheraces' shareholders

33. The Shareholders' Agreement gives effect to the formation of the joint venture company, Attheraces. The equity in Attheraces is held equally by Arena, BSkyB (through group company Sky Ventures Limited) and Channel 4 (through group company 4 Ventures Limited). The Shareholders' Agreement sets out the relationship between the shareholders and how Attheraces should carry on business. The initial funding required to develop, market and operate the Channel and Website, and to meet payments to the Courses, was provided by Attheraces' shareholders.

34. Under the Shareholders' Agreement, Attheraces sought offers from fixed-odds bookmakers and appointed three fixed-odds bookmakers on the Channel and the Website. The appointed bookmakers are Ladbrokes, Littlewoods betdirect and skybet.

35. Arena acquired the rights to provide and operate the pool betting service that Attheraces is to offer via the Website and the Channel.[14]

36. The Shareholders' Agreement (together with related agreements) provides for sub-licences of certain of the Rights granted to Attheraces under the Rights Agreement to be granted to Channel 4 and the BBC (and for Channel 4 and the BBC to surrender their existing rights to broadcast races at certain courses to Attheraces), enabling them to continue to broadcast terrestrial coverage of largely the same races as before. In addition, Channel 4 introduced a new daily lunchtime racing programme, although this was cancelled in March 2003. BSkyB was also granted a sub-licence, which enabled it to continue to show racing coverage as part of two of its programmes, 'Winning Post' and 'Racing News'.

4. Agreements between Attheraces and its shareholders

37. Various agreements have been entered into between Attheraces and its shareholders, under which the Rights acquired by Attheraces will be exploited by Attheraces and its shareholders. The principal agreements are summarised below.

4.1 Channel 4 Sub-Licence

38. Under the Channel 4 Sub-licence, dated 11 May 2001, Channel 4 terminated its existing television broadcast agreements with respect to such of the Rights in respect of which it currently has licences and instead sub-licenses such Rights from Attheraces to enable it to broadcast exclusively (save in respect of the Channel and the Website) coverage of certain races (as set out in the sub-licence) on its free-to-air television service.

4.2 Channel 4/Attheraces Licence

39. Under the Channel 4/Attheraces Licence, Channel 4 provides Attheraces a feed of the Races covered by it, which Attheraces is entitled to use on an exclusive basis to broadcast or transmit on a simultaneous or delayed basis on the Channel and the Website.

4.3 Channel 4 DTT/Production Agreement

40. Attheraces and Channel 4 entered into an agreement, whereby Channel 4 and Attheraces agreed that, subject to Channel 4 obtaining the consent of the

[14] This service is provided in conjunction with the Horserace Totalisator Board (the 'Tote'). The Tote is a statutory body that currently has an exclusive right to run pool betting on horseraces i.e., Attheraces cannot start its own pool. By agreement with the Tote, and for payment of a fee, Attheraces will be able to 'co-mingle' stakes taken by it with the Tote's pool.

Independent Television Commission and Attheraces agreeing appropriate arrangements with ITV Digital, Channel 4 will supply Attheraces with capacity on the DTT multiplex operated by Digital 3 and 4 Limited for transmission of the Channel by DTT for the duration of the Rights Period. In fact, the Channel is not broadcast on DTT.

4.4 Sky DTH Distribution Agreement

41. Attheraces and BSkyB have entered into an agreement, whereby BSkyB will be appointed the exclusive distributor of the Channel via DSat in the UK and Ireland, the Channel Islands and the Isle of Man. Attheraces includes interactive betting functionality and access relating to information on the Races as part of the Channel distributed via DSat. BSkyB agreed to distribute the Channel as a basic channel only, and to provide conditional access services, satellite transponder capacity and technical services to Attheraces.

4.5 Sky Programme Licence

42. Attheraces licenses to BSkyB the exclusive right (save of certain rights in respect of the Channel and the Website), as part of its Sky Sports channels, and for a period co-terminous with the Rights Agreement, to cover certain races in its 'Winning Post' and 'Racing News' programming.

4.6 Website and Pool Betting Services Agreement

43. Arena Online has entered into an agreement with an Attheraces subsidiary, ATR plc, to provide the technology for Attheraces' pool betting facilities for the Channel and the Website to be operated by Attheraces (and also for any other new interactive media platforms that Attheraces may in the future wish to use).

5. Other agreements entered into by Attheraces

44. Attheraces has entered into several agreements with third parties under which the Rights will be exploited by those third parties, including the agreements described below.

5.1 BBC Umbrella Agreement

45. The BBC Umbrella Agreement dated 20 June 2001 terminated an earlier agreement entered into between the Attheraces shareholders and the BBC, dated 10 November 2000. It provides for Channel 4 and the BBC to license the other archive footage of horseracing programmes and associated footage of races covered by them.

5.2 BBC Sub-Licence

46. Attheraces sub-licenses to the BBC the right to continue to broadcast those of the Races that the BBC was entitled to cover under its agreements with the Courses in effect during 2000, together with those from the Epsom Derby meeting, on an exclusive basis (save in respect of the Channel and the Website) solely by means of free-to-air television.

5.3 BBC/Attheraces Licence

47. The BBC agrees to produce coverage of the Races with a clean live feed, and will grant to Attheraces an exclusive licence for the Rights Period to exercise all rights in relation to the coverage, on condition that Attheraces shall only be entitled to exercise free-to-air television rights in the UK and the Republic of Ireland on television channels it owns or operates, and may not sublicense free-to-air television rights to other free-to-air television channels. The agreement also licenses to Attheraces the right to use archive footage of horseracing which the BBC owns, controls, or otherwise has the right to sublicense, on arm's length commercial terms to be agreed.

5.4 BiB Side Letter

48. Under the terms of a Sale and Purchase Agreement dated 14 July 2000 (the 'BiB SPA') between certain BSkyB group companies and each of the then shareholders in BiB, the parties agreed that the final payment in consideration of BSkyB group's acquisition of the other shareholders' interests would be subject to an 'earn-out'. Under the earn-out, the other shareholders would receive their final payment only if the valuation of BiB was greater than an agreed sum at certain times during 2003.

49. The BiB SPA contains provisions by which BSkyB agreed to accept certain restrictions on the way it would structure its business internally until the earn-out valuation process referred to above is completed. To ensure that the activities of Attheraces do not cause BSkyB to breach these provisions, Attheraces agreed that it will observe provisions equivalent to the non-compete provisions entered into by BSkyB as part of the original BiB joint venture agreement, and not become '*a person similar to BiB*'. By the same agreement, Arena and Channel 4 agreed that they will use their powers (and will procure that their affiliates use their powers) to ensure that Attheraces observed those provisions. The provision effectively prevented Attheraces from operating a platform for the provision of digital interactive television services.

5.5 Kirch Side Letter

50. In April 2000, the BSkyB group acquired an investment in a German pay television business, KirchPayTV. As part of this investment, BSkyB was restricted from participating in a business undertaking certain activities in Germany, Austria, Switzerland, Liechtenstein, Luxembourg and Alto Adige (the 'German Speaking Territories'). To ensure that the activities of Attheraces and its subsidiaries did not cause BSkyB to breach these restrictions, Attheraces agreed that it would not undertake certain activities in the German Speaking Territories. By the same agreement, Arena and Channel 4 agreed that they would use their powers (and procure that their subsidiaries use their powers) to ensure that Attheraces would not undertake those activities in the German Speaking Territories. The provision effectively prevented Attheraces from operating a pay TV business in the German Speaking Territories. Note that, in May 2002, KirchPayTV filed for insolvency and, following the opening of formal insolvency proceedings in August 2002, was dissolved as a partnership limited by shares.

PART THREE THE RELEVANT PRODUCTS AND MARKETS

I. INTRODUCTION

51. Under the Chapter I prohibition, the principal concern is whether any agreement or concerted practice has an appreciable adverse effect on competition.[15]

52. Such effect is principally assessed within the market relevant to the activities of the undertakings concerned. Market definition, both in terms of its product and geographic dimensions, is generally the first step in establishing the market power undertakings hold and the competitive constraints that they face when supplying their products or services.

II. THE RELEVANT PRODUCTS

53. The relevant product(s) an undertaking supplies must be determined to enable assessment of the constraints it faces in such supply. The relevant product will lie within the relevant market, but the relevant market may be wider.[16] While determining the relevant product is usually relatively straightforward in more traditional 'widget' industries, it may be difficult in more complex service industries.[17]

54. The OFT considers that there are five relevant products for the purpose of its analysis of the Notified Arrangement under the Chapter I prohibition: two 'upstream' sets of rights licensed by the Courses, which are necessary inputs for three 'downstream' products supplied by Attheraces. Annex 2 contains a diagram setting out the interrelationship between these products. Annex 3 contains more general details concerning betting services in the UK.

1. The Viewing Rights

55. These are the rights licensed by the Courses necessary to permit Attheraces to supply programming covering British horseraces to TV distributors for viewing.[18] The Viewing Rights largely correspond to the Media Rights, specified in Form N, pages 52-3 and listed above at paragraph 27.

---

15 *The Chapter I Prohibition*, OFT Guideline 401, March 1999, paragraphs 2.18 - 2.20.

16 See *Market Definition*, OFT Guideline 403, March 1999, paragraph 3.1.

17 For instance, see the OFT's *BSkyB* decision published 30 January 2003, paragraphs 64-87 which define the relevant products with regards to BSkyB's premium sports channels. Available on the OFT website at www.oft.gov.uk/NR/exeres/E5019794-B2A8-48EF-B420-F96F8A2BAD7F.htm

2. The Non-LBO Bookmaking Rights

56. These are the rights licensed by the Courses necessary to permit Attheraces to supply programming covering British horseraces to UK bookmakers other than LBOs ('UK non-LBO bookmakers'),[19] for distribution in combination with betting services. The Non-LBO Bookmaking Rights are part of the Other Rights, specified in Form N, page 53 (in particular the third bullet) and listed above at paragraph 28.

57. Since the Courses can license and price the Viewing Rights and the Non-LBO Bookmaking Rights independently, and the OFT considers them likely to have separate demand substitutes, it considers that they comprise separate relevant products (see paragraph 90).

3. British horseracing programming supplied to TV channel distributors for viewing

58. Using the Viewing Rights,[20] Attheraces has created the Channel, which is supplied to TV distributors. The Channel is distributed on the DSat platform and (subject to the conclusion of carriage agreements) via cable.[21]

59. Attheraces also supplies smaller pieces of footage to TV distributors, including both free-to-air broadcasters and pay TV operators. Attheraces allows a significant level of analogue terrestrial coverage of live racing, through the sub-licensing of television rights to certain races to the BBC and Channel 4.

4. Access to in-vision betting services via interactive digital TV ('iDTV')

60. Using the Non-LBO Bookmaking Rights, Attheraces supplies punters with access to in-vision fixed odds and pool betting (in conjunction with the Tote) on British horseraces via iDTV.[22] Punters watching the Channel can place in-vision bets on British horseracing. Pressing a button on the digital TV remote control while watching the Channel results in coverage (i.e., pictures) continuing to be shown in ¼ of the screen. Sound is uninterrupted. Text fills the remaining ¾ of the screen. Punters place bets by navigating through a series of text menus. The

---

18 The abbreviations 'Viewing Rights' and 'Non-LBO Bookmaking Rights' were not used in the Rule 14 Notice: these terms were set out in full. These abbreviations have been introduced for brevity and have not altered the substance or detail of the analysis.

19 Bookmakers in this context refers to both fixed-odds and pool betting suppliers. Non-LBO bookmakers who would demand programming are iDTV and internet bookmakers. On-course bookmakers (other than on-course LBOs) do not have the facilities to display live sound and pictures. The rights necessary to supply LBOs are part of the Reserved Rights (see paragraph 29).

20 The Channel also uses the Non-LBO Bookmaking Rights – see paragraphs 60-61.

21 Such an agreement has been concluded with NTL.

22 Fixed odds and pool bets are defined in paragraph 2 of Annex 3.

bets and odds available are displayed in the ¾ of the screen filled by text.[23] Bets can only be placed before the start of a race.

61. The Channel also features text services providing supplementary information, for example about race cards, odds, form and results.

5. Access to betting services in conjunction with live pictures of British horseracing via the Internet

62. Using the Non-LBO Bookmaking Rights, Attheraces has also created the Website which provides information relating to horseracing, as well as access to several fixed odds bookmakers' services and the new pool betting service to be offered by Attheraces. The Website incorporates live streamed video coverage of horseracing, allowing punters to watch races on which they have bet. When the race starts, a separate window opens on the PC screen, displaying sound and pictures of that race. Users can access the site via PCs, WAP mobile phones and PDA devices.

6. Alternative relevant product

6.1 The BHB submission

63. In its submission to the OFT, the BHB stated that the definitions of relevant products set out in paragraphs 55-62 above were overly narrow. Rather, the relevant product was the '*whole show*', that is 'British Racing' as a whole.[24] British Racing is horseracing run under the BHB and Jockey Club's Orders and Rules of Racing ('Orders and Rules').[25] The BHB's view of the characteristics of British Racing is perhaps best summarised as

> '... the whole interconnected web of all the things that go to make up British Racing. That is from the breeding, owning, training of thoroughbred racehorses, the race meeting itself and everything connected thereto including ... solidarity, integrity, meritocracy and competitive balance'.[26]

---

[23] This contrasts with non-in-vision betting via iDTV. As with in-vision bets, viewers press a button on their remote control and can access a series of text menus. However, sound and pictures of the TV program that the viewer was watching are unavailable whilst the viewer is using the text menus to place a bet.

[24] BHB Submission, Volume I, paragraph 143(2)). BHB Transcript, Mr Bethell and Mr Vaughan QC page 7, lines 1-3.

[25] BHB Submission, Volume I, paragraph 53. Note that almost all races in Britain for thoroughbred horses are run under the Orders and Rules.

[26] BHB Transcript, Mr Vaughan QC, page 6, lines 29-35.

64. The BHB stated that this product is consumed by (inter alia) punters, racegoers, racehorse owners, racehorse trainers, racehorse breeders and jockeys.[27] The BHB considers that all these consumers, including a licensee of the Viewing Rights and the Non-LBO Bookmaking Rights, are buying the same relevant product.[28]

6.2 The OFT's finding

65. The British racing industry's activities involve a variety of inputs and produce a variety of outputs, including spectator events, sponsorship opportunities, opportunities for racehorse owners to have their horses race, betting opportunities, picture rights and data rights. The OFT considers that these outputs should not be agglomerated into one for the purposes of market definition. Rather the normal competition law approach, with its focus on substitutability, should apply.

66. The OFT notes in its Guideline relating to market definition:

> 'The process starts by looking at a relatively narrow potential definition. This would normally be the products which two parties to an agreement both produce or the products which are the subject of a complaint. Common sense would normally indicate the narrowest potential market definition.'[29]

67. The relevant products proposed in the Rule 14 Notice and defined above were drawn from the definitions of the rights licensed by the Rights Agreement and the Form N,[30] and were not contested by the Applicants or any Course.[31]

68. A single event may generate several separate revenue streams. The production of a film may, for instance, generate revenues from theatre showings, video and DVD sale and hire, sales in separate TV windows, recorded music sales, computer game hire and sales, and from related merchandise such as children's toys. The OFT considers that products and services should not be conflated merely on the basis that they derive from a single event.

69. The OFT agrees that the amount and characteristics of the racing that the Viewing Rights and the Non-LBO Bookmaking Rights allow licensees to exploit

---

27 BHB Submission, Volume I, paragraph 29.

28 BHB Transcript, page 7, particularly lines 16-19.

29 *Market Definition*, OFT Guideline 403, March 1999, paragraph 3.1.

30 Contrary to the BHB's claims in BHB Transcript, pages 27-28, British Racing was not listed as the relevant product in Form N, page 69.

31 Indeed the RCA appears to have decided not to include this BHB point in its representations, despite the BHB suggesting it. BHB Submission, paragraphs 70-71.

influences the attractiveness of those rights. It has taken this into account in its analysis and findings. However, it does not mean that 'British Racing' is the relevant product. The OFT considers that this approach is wrong in principle and unsupported by precedent.[32]

70. The OFT is therefore satisfied that the five relevant products listed in paragraphs 55-62 should form the starting-point for market definition in this case.[33]

71. Linked with its definition of the relevant product, the BHB made arguments about the complementarity of the Courses' Rights, the redistribution of funding through the racing industry, the existence of feedback effects between various customers and claimed that collective selling of the Courses' Rights creates a new, more desirable product. The OFT has considered these arguments in paragraphs 159-161, 256-258, 263-266, 283-289, 380-381 and 383-393.

7. Conclusion

72. The OFT finds that the relevant products affected by the Notified Arrangement are:

(i) the Viewing Rights;

(ii) the Non-LBO Bookmaking Rights;

(iii) British horseracing programming supplied to TV channel distributors for viewing;

(iv) access to in-vision betting services via iDTV; and

(v) access to betting services in conjunction with live pictures of British horseracing via the Internet.

73. The OFT now proceeds to define the relevant markets within which these relevant products lie. In defining the markets relevant to these products, the OFT has applied the approach of the so-called hypothetical monopolist test. This test asks whether a hypothetical monopolist of a certain set of products could

---

[32] For example, in *Joint selling of the commercial rights of the UEFA Champions League*, OJ 2003 L291/25 ('*UEFA Champions League*'), the European Commission considered (separately) the product markets for various televised football rights, various new media rights and other rights (sponsorship, product licensing etc) (see paragraph 56). It did not conflate these (along with match attendees, the supply of professional football players etc.) into the single product of, say, 'Champions League football'. See also the discussion of *PMI-DSV* and *Tiercé Ladbroke v Commission* in paragraphs 81-82.

[33] The fact that the OFT has analysed the Viewing Rights and the Non-LBO Bookmaking Rights for the purposes of defining the relevant markets in this case does not imply that these are the only products associated with horseracing (e.g., training services, riding services, racegoing).

maximise its profits by consistently charging higher prices than it would if it faced competition. If the hypothetical monopolist would be prevented from profitably setting prices above the competitive level by customers switching to alternative products then such substitutes should be included in the relevant market.[34]

74. The OFT has assessed the markets and competitive constraints on the supply of the five relevant products in turn.

III. MARKET RELEVANT TO THE SUPPLY OF THE VIEWING RIGHTS

1. The Applicants' view

75. The Applicants stated that '*the relevant product market ... may be viewed as the market for the supply of rights to video programming*.' The Applicants considered that horseracing is highly substitutable with other sports from the perspective of both viewers and punters.[35]

2. The OFT's view

76. This market was not considered in the Rule 14 Notice,[36] as the OFT did not propose to make an adverse decision in relation to the collective sale relating to these rights. As the market for the supply of the programming to TV channel distributors is wide (see paragraphs 165-166), the market for the supply of the Viewing Rights may also be wide.

77. The OFT is satisfied that the market relevant to the provision of the Viewing Rights is sufficiently broad for the Notified Arrangement not to have an appreciable effect on competition within the meaning of the Chapter I prohibition.

IV. PRODUCT MARKET RELEVANT TO THE SUPPLY OF THE NON-LBO BOOKMAKING RIGHTS

78. Internet and in-vision iDTV bookmaking services are provided to punters by non-LBO bookmakers. Further, the suppliers of these services are the two categories of non-LBO bookmaker who might choose to purchase sound and pictures of British horseraces.

---

34 *Market Definition*, OFT Guideline 403, March 1999, paragraphs 2.8-2.9.

35 Including other equestrian sports, greyhound racing, touring cars, motor cycling, other forms of motor sport, ice hockey, basket ball, cricket, rugby union, rugby league, football, snooker, tennis, cycling, athletics, skiing and golf. Form N, page 70.

36 A point noted by the RCA: The RBB Report, page 5.

79. To define the market relevant to the supply of the Non-LBO Bookmaking Rights, the OFT sets out:

(i) relevant EC and UK precedent;

(ii) its evidence and analysis;

(iii) its assessment of the Applicants' views, the RCA Representations, and the BHB Submission; and

(iv) its conclusion on the relevant market, namely that the supply of the Non-LBO Bookmaking Rights is a relevant product market.

1. EC and UK precedent

1.1 EC precedent

80. Under section 60 of the Act, the OFT must have regard to European Commission decisions, and must, so far as is possible (having regard to any relevant differences between the EC and UK provisions) ensure consistency with European Court decisions, to the extent that these determine corresponding questions of competition law.

1.1.1 OFT's analysis from the Rule 14 Notice

81. The European Commission's Decision on *PMI-DSV* concerned the supply of sound and pictures to German bookmakers.[37] The Commission held that the relevant market was '*the relaying of televised pictures and news of horse racing for the customers of betting shops*,' a market ancillary to the betting market. Supplying betting shop customers with televised pictures and news induces them to bet more. The relaying of '*greyhound races or other sports events'* was considered to be a separate market.[38]

82. In *Tiercé Ladbroke v Commission,*[39] the Court of First Instance upheld a European Commission decision[40] in which the Commission found that the supply of horseracing sound and pictures in Germany was a relevant market. This was on the basis that, in Germany, 40% of horseracing bets were placed on German races, 40% were on French races and 20% were on British races.[41] Likewise, in

---

37 *PMI-DSV*, OJ 1995 L221/34, see paragraph (3)(d).

38 *ibid.*, paragraph (3)(c).

39 Case T-504/93, *Tiercé Ladbroke v Commission,* [1997] ECR II-923, [1997] 5 CMLR 309.

40 Decision of the European Commission contained in a letter dated 24 June 1993.

41 *Tiercé Ladbroke v Commission*, footnote 38 above, paragraph 84.

Belgium, 31.5% of bets on horseraces were on Belgian races, 63% were on French races and 5% were on British Races.

1.1.2 The BHB's view

83. The BHB considered that *PMI-DSV* and *Tiercé Ladbroke v Commission* are not relevant to the analysis of the Notified Arrangement. The BHB considered that foreign horseracing's (low) share of UK betting turnover is not evidence that sound and pictures of foreign horseraces are not substitutes for those of British races.[42]

1.1.3 The OFT's finding

84. The OFT has considered these cases and the BHB's view carefully. Its analysis of the position within the UK indicates that the market is limited to the supply of live sound and pictures of British horseraces (see paragraphs 85-164 below).

85. The number of bets placed on foreign racing is considerably lower in the UK than in either Belgium or Germany: foreign horseracing accounts for less than 5% of off-course betting turnover on all horseraces.[43] There is thus a major factual difference between the situation considered by the Commission in the above cases and the situation in this case.

86. The OFT has considered *The impact of changing the quality and quantity of horse racing on off-course betting turnover*, an econometric report for Ladbrokes (the 'NERA Report').[44] This suggests that, if a race were held in Ireland rather than Britain, LBO betting turnover on that race would be £493,000 lower.[45] This is 73% of the turnover of an average race (£680,000).[46] The NERA Report also suggests that, if a race were held in a foreign country other than Ireland then UK LBO betting turnover would be £703,000 lower on that race.[47]

---

42 BHB Submission, Volume I, paragraph 143(4).

43 See paragraph 7 of Annex 3.

44 *The impact of changing the quality and quantity of horse racing on off-course betting turnover*, a report for Ladbrokes, prepared by NERA, February 1999. This report is attached to an e-mail from Ladbrokes to the OFT dated 10 January 2002.

45 The BHB has criticised this report (see paragraph 155). As explained in footnote 164, there are reasons to be wary of this model's precise estimate for how much less is bet on a foreign horserace than on an otherwise identical race held in Britain. However, this does not alter its broad conclusion that a foreign horserace is much less attractive that an otherwise identical race held in Britain. The NERA Report, page 19.

46 *ibid.*, page 11. This figure is the turnover on an average race aggregated across all LBOs.

47 *ibid.*, page 19. See the comment in footnote 45. There are two reasons why the reduction in turnover for a foreign horserace (£703,000) is greater than the betting turnover on an average British horserace (£680,000). First, the specification of the econometric model underlying the NERA Report. Second, other than the fact that they are held overseas, the

87. Foreign horseracing is generally used in UK LBOs to fill gaps between UK horseraces, rather than as a stand-alone product.[48] No UK LBOs subscribe exclusively to foreign racing.[49] Further, the OFT notes that the Courses' market share, measured by betting turnover, would not be materially affected by the inclusion of foreign horseracing in the relevant market.[50]

1.2 UK precedent

88. In a 1998 report on a bookmaking merger, the Monopolies and Mergers Commission ('MMC') concluded that

> '... betting is best seen as a separate activity and as a separate market, that is the terms on which betting is undertaken are not closely constrained by other forms of gambling or other leisure activities. We received no evidence in support of a contrary view.'[51]

Respondents in that case included the RCA, which is not reported as arguing that gaming is a substitute for betting.

89. The OFT's further analysis of the relevant market, having regard to more recent evidence relating to the UK, is set out below.

2. The OFT's evidence and analysis from the Rule 14 Notice

90. In licensing their rights, racecourses supply inputs that are used to produce and broadcast live sound and pictures of British horseracing. A racecourse can set licensing terms that determine how that programming can be used. It can thus charge different prices for the supply of rights for programming for subsequent supply to TV distributors (i.e., the Viewing Rights) and for programming that is to be combined with bookmaking services. Further, a racecourse can charge different prices to different bookmaking outlets (i.e., LBOs and non-LBOs)[52] and

---

foreign races on which British LBO punters bet tend to have relatively attractive characteristics i.e., an otherwise identical race held in Britain would generate above average betting turnover.

48 Fax from SIS to the OFT dated 22 April 2002, response to question 3.3.

49 E-mail from Warwick Bartlett, BBOA, dated 16 May 2002.

50 The Courses account for approximately 90% of betting turnover on British horseraces (see paragraph 182). As foreign horseracing accounts for less than 5% of betting turnover on all horseraces (see paragraph 7 of Annex 3), the Courses' market share will be approximately 85% if foreign horseracing is included in the relevant market.

51 Ladbroke Group Plc and the Coral betting business: a report on the merger situation, Cm 4030 (September 1998) (the 'Ladbroke/Coral MMC report'), paragraph 2.63.

52 For example the rights granted to Attheraces exclude the right to supply programming to LBOs.

bookmakers in different countries.[53] Accordingly, switching behaviour by TV distributors, foreign bookmakers or LBOs will not constrain the price of rights to non-LBO bookmakers.

91. The demand for the Non-LBO Bookmaking Rights is a derived demand. Accordingly, the OFT has analysed the impact of an increase in the price of live sound and pictures of British horseracing to UK non-LBO bookmakers.[54] Internet and in-vision iDTV bookmakers are UK non-LBO bookmakers who might choose to purchase sound and pictures of British horseraces. Attheraces is a UK non-LBO bookmaker and also supplies access to other non-LBO bookmakers' services.

2.1 The application of the hypothetical monopolist test

92. The OFT considers that an increase in the price of pictures should not increase the unit price of bets. Rather, a non-LBO bookmaker covers the cost of pictures from the profits generated from the additional demand those pictures stimulate. Accordingly, it is not strictly necessary to analyse how punters would respond to an increase in the price of bets on British horseracing when defining the market for the supply of programming to non-LBO bookmakers. The OFT's reasoning is as follows.

93. The OFT notes that if a monopolist licenses rights to a distributor for a fixed fee (i.e., a fee independent of turnover),[55] then an increase in this fee does not increase the distributor's marginal cost of production.[56] If the distributor's marginal costs do not change then there are unlikely to be economic reasons for the distributor to change the price it charges. Thus an increase in the monopolist's (fixed) licence fee may not affect the final price at which the product is offered to consumers.[57] Accordingly, ultimate consumers' price

---

53 As argued by the Applicants: 'Programming rights are, in general, defined on a territory by territory basis by rights owners ...' Form N, page 76

54 The price of those pictures paid by a non-LBO bookmaker includes not only the price of the Non-LBO Bookmaking Rights but also other costs (such as filming, distribution) and normal profits. Therefore a certain per cent increase in the price of the Non-LBO Bookmaking Rights is likely to give rise to a lesser percentage increase in the price of live pictures. As a result there is correspondingly less switching than if the downstream price of live pictures had itself risen by that per cent.

55 This is largely analogous to the fee structure that Attheraces is paying.

56 In other words, the incremental cost to the distributor of selling an extra unit of output (e.g. accepting one more bet) is unchanged.

57 If the higher fee results in some distributors exiting the market, because their fixed costs are higher, then such exit may lead to an increase in the price paid by final consumers (punters). However, the OFT notes that, in any market, non-marginal distributors may make supra-normal profits (although if entry barriers are low then entrants will not be able to make supra-normal profits). An increase in the licence fee that only affects these non-marginal distributors merely captures some of those profits and transfers them upstream.

sensitivity (i.e., their switching conduct in response to a price rise) may not constrain the monopolist's pricing.[58] Rather, it is the licensees' ability to recover the licence fee that constrains the monopolist's prices. A bookmaker covers the cost of the licence fee it pays for pictures from the profits generated from the additional demand those pictures stimulate.

94. Following a small, significant, persistent increase in the price of pictures of British horseracing, a non-LBO bookmaker will cease to purchase those pictures if it is no longer profitable to do so. When defining the relevant market for pictures of British horseracing, it is important to focus on the punters for whom pictures of British horseracing are especially important, and who will not be attracted by pictures of greyhound racing, numbers games, etc. These punters would be lost by the non-LBO bookmaker if it ceased to purchase pictures of British horseracing. The larger the value of the extra demand for bets attracted only by pictures of British horseracing, the more likely a non-LBO bookmaker is to continue to purchase those pictures following a small, significant price increase.

95. The following paragraphs together demonstrate the value of the extra demand for bets only generated by pictures of British horseracing.

    (i) paragraphs 96-114 consider the extent to which demand for bets is boosted by screening pictures; then

    (ii) paragraphs 115-126 consider the extent to which other betting opportunities are good substitutes for betting on British horseracing.

    Together this analysis demonstrates that a non-LBO bookmaker will continue to purchase pictures of British horseracing following a small, significant price increase in their price.

2.2 The impact of pictures on betting turnover

2.2.1 Comparison of websites with and without live pictures

96. Websites attract substantial extra custom by providing live pictures, which would be lost if the website ceased taking live pictures in response to a picture monopolist's price increase.

Accordingly, such a non-marginal distributor's behaviour will be unaltered (assuming it continues to purchase the licence).

[58] To contrast, if a manufacturer of car parts increased the per unit price of those parts to car manufacturers, this will increase car manufacturers' marginal costs and thus lead to an increase in the price of cars. Dependent on final consumers' response to this rise in car prices, demand for cars (and thus for car parts) may fall sufficiently for the original price rise

97. The Applicants estimated that [*over £3 billion*] of pool bets will be staked via Attheraces' internet sites over 10 years.[59] Totalbet, originally a joint venture between the Tote and PA Sporting Life Ltd, also takes pool bets on British horseraces via the internet but does not feature live pictures of racing.[60] In the year to 31 March 2002, [*less than £4m*] of pool bets were staked via the internet with Totalbet.[61] Comparing these figures suggests that the Applicants believe that live pictures of racing will attract significant additional demand.

98. Given the novelty of providing live horseracing coverage over the internet, greyhound racing (another sport for which betting is very important) can inform the OFT's analysis. Gambling website Eurobet's turnover on a greyhound race that is webcast increases by an average of 300% relative to a race without pictures.[62] This is consistent with analysis by ABN AMRO, which argued that a website's content (including pictures) is essential to maximising market penetration and encouraging users to place bets.[63]

2.2.2 Betting and viewing enhance each other

99. Combining live pictures and betting enhances both the gambling experience and the viewing experience:

> '[i]t is natural that a punter placing a bet on a horse would wish to see how his chosen horse performs during the race, rather than simply knowing the result. This is because part of the excitement of placing a bet on a sporting event is being able to watch how the event bet upon unfolds.'[64]

It therefore appears that punters are more attracted to bookmakers with pictures than those without pictures.

---

not to be profitable for the car part manufacturer. Thus final consumers' price sensitivity potentially constrains the price of car parts.

59 [...] from pool bets at the Attheraces '.co.uk' site and [...] at the '.com' site. *Attheraces Holdings consolidated business plan 2001 to 2011*, 2 May 2001, page 4. This plan is at Schedule 11 of the Shareholders' Agreement.

60 Available at www.totalbet.com. Note that since May 2002 this website has been operated solely by Sporting Life.

61 E-mail from Tote to the OFT dated 26 March 2003.

62 Section 26 Notice response by Coral Eurobet dated 27 November 2001, question 36.

63 *E-betting*, Leisure, entertainment and hotels sector research, ABN AMRO, 4 May 2000, page 22.

64 Letter from Blue Square to the OFT dated 19 April 2002, response on market definition, paragraph 10.2. Similarly, the BHB stated that punters' '*enjoyment is enhanced by watching or listening to the race unfold, during which they can support "their" horse*.' Expert report of Professor B Lyons, dated 4 September 2003, paragraph 26.

100. Similarly, watching a horserace is likely to be more enjoyable if a bet rides on the outcome. This effect may be particularly relevant for horseracing, where for many viewers much of the pleasure derives from gambling, compared to other sports such as football. Punters tend not be loyal to a particular horse, whereas many football viewers will be loyal to a particular team.[65]

2.2.3 The importance of pictures to in-vision iDTV bookmakers

101. The advantages that in-vision bookmakers located on a channel devoted to British horseracing, such as the Channel, have over non-LBO bookmakers unable to simultaneously offer pictures of British horseracing indicate the importance of such pictures and the absence of close demand substitutes for pictures of British horseracing.

102. The Channel is likely to attract viewers interested in betting on British horseraces and may also prompt viewers to place impulse bets.[66] Those watching the Channel would have to change channel to bet with another iDTV bookmaker. One of the attractions of iDTV betting is '*the convenience of* ... [placing] *bets on an event merely by changing to a different iDTV screen ...*'[67]

103. A key advantage of in-vision iDTV betting over non-in-vision iDTV betting is that punters can continue watching the event on which they are betting. William Hill stated to the OFT that '*there will no doubt be punters who regard the ability to place bets interactively whilst watching live sound and pictures as a superior product offering ...*'[68]

104. Blue Square considered that:

> 'being able to view a TV picture whilst placing a bet will be particularly important as far as betting on horseracing is concerned ... because factors such as how a horse looks and behaves prior to a race affect how the punter will bet.'[69]

---

65 For example, only 18% of LBO punters who bet regularly on horseracing state that their betting selection is influenced by '*follow*[ing] *certain horses*.' Section 26 Notice response by Ladbrokes dated 29 November 2001, question 10.

66 Coral considers that 'iDTV betting is likely to attract a new breed of betting customer, who will become aware of betting opportunities through viewing a particular sports event.' Information request regarding the Attheraces Notification, responses of Coral Eurobet Plc, fax dated 24 April 2002, response to question 3.5.

67 *ibid.*, response to question 3.4(ii).

68 Letter from William Hill dated 17 April 2002, paragraph 2.10(c). Similar views were expressed in *Information request regarding the Attheraces Notification, responses of Coral Eurobet Plc*, fax dated 24 April 2002. In particular, response to questions 2(ii) and 3.4(ii).

69 Letter from Blue Square to the OFT dated 19 April 2002, response on market definition, paragraph 11.2.

105. Research by Deutsche Bank estimated that Attheraces would account for 23% of off-course betting on British horseracing by 2010. '*The key point* [in justifying the large market share Attheraces will capture] *is that this is the first time that pictures will be married with the ability to place a bet "instantly"*.'[70]

106. Similarly, an ABN AMRO report stated that iDTV betting could account for 10 - 15% of UK off-course betting by 2004:

> '[t]he proposition of coupling quality live pictures, easy access to fixed odds information and direct linkage to the bookmaker, without having to leave your armchair, has great potential ... In our view, live sports content will drive additional betting revenue.'[71]

Thus third party research indicates that pictures are likely to increase iDTV betting revenue substantially.

107. Attheraces estimated that [*over £2 billion*] of pool bets will be staked with it via iDTV over 10 years.[72] In 2000, £183m of pool bets (in total) were staked on British horseraces.[73] Comparing these two figures suggests that the Applicants believe that iDTV betting, in conjunction with live pictures of horseraces, will be very attractive to punters.

108. The OFT considers that iDTV bookmakers will attract substantial extra custom by providing services via channels primarily dedicated to British horseracing, given the complementarity of betting and viewing, discussed in paragraphs 99-100. This would be lost if the iDTV bookmaker ceased taking live pictures in response to a picture monopolist's price increase.

2.2.4 Payments by fixed odds bookmakers

109. Attheraces provides punters with access to fixed odds bookmakers in conjunction with live pictures of races. The price fixed-odds bookmakers are willing to pay for such access indicates their assessment of the additional business they will attract from the simultaneous provision of live pictures. Attheraces estimated that it will receive an income of [...] over 10 years from

---

70 *Arena Leisure*, Deutsche Bank equity research, 29 August 2001, page 16.

71 *E-betting*, Leisure, entertainment and hotels sector research, ABN AMRO, 4 May 2000, page 26.

72 *Attheraces Holdings consolidated business plan 2001 to 2011*, 2 May 2001, page 4. This plan is schedule 11 of the Shareholders' Agreement.

73 Section 26 Notice response from the Tote dated 28 November 2001. Attachments, page headed '*Year 2000*'. The exact figure is £183,317,075.

providing such access.[74] This suggests that Attheraces believes bookmakers will attract substantial extra custom from the provision of live pictures.

2.2.5 Importance of pictures in LBOs

110. As the combination of live pictures of British horseracing with iDTV and internet bookmaking is a relatively new service, the OFT considers that it may reasonably make inferences from comparable behaviour when LBO punters are offered the opportunity to bet with and without sound and pictures.

111. The NERA Report suggests that LBO betting turnover on a horserace is £114,000 lower if there is only audio coverage of that race in LBOs, compared to sound and pictures.[75] This is 17% of the turnover of an average race (£680,000).[76] If there is no coverage in LBOs, then LBO turnover is £309,000 lower (45% of an average race's turnover), compared to when sound and pictures are offered.[77] Further, LBO turnover on a horserace is £590,000 higher (87% of an average race's turnover) if that race is televised on terrestrial TV, compared to just being televised in LBOs.[78] This suggests that some punters bet on races in LBOs and then watch those races at home. First, this supports the conclusion that the supply of pictures increases demand for betting services. Second, Attheraces' iDTV bookmaking service appears well placed to capture the business of these punters.

112. The OFT has further evidence demonstrating the importance of pictures in LBOs. Several bookmakers have estimated the impact of only taking pictures from the 10 courses that sold their rights to GG Media, rather than from all 59 British racecourses, plus any races screened on free-to-air television. The British Betting Office Association ('BBOA') estimated that this would reduce an LBO's total betting turnover by 15%.[79] The Levy Board, based on discussions with LBOs, estimated that betting turnover on horseracing would fall by approximately 30%.[80] Ladbrokes estimated that horserace betting turnover would fall by 40%, although it gave two conflicting estimates of the impact on

---

74 Figure for 'Fixed Odds Income (Net of all direct costs ...)'. *Attheraces Holdings consolidated business plan 2001 to 2011*, 2 May 2001, page 5. This plan is at Schedule 11 of the Shareholders' Agreement.

75 The NERA Report, page 20.

76 *ibid.*, page 11.

77 *ibid.*, page 20.

78 *ibid.*, page 20.

79 *BHB data, video and audio proposals: sensitivity analysis*, BBOA, 5 March 2002, comparing scenario (c) with scenario (d).

80 E-mail from Levy Board to the OFT dated 4 April 2002.

other bets.[81] This is confirmed by survey evidence. Good TV coverage was given an importance of 83 (out of 100) by regular LBO punters.[82]

113. In summary, evidence from LBOs shows that supplying live pictures in conjunction with betting opportunities encourages punters to bet substantially more. This is consistent with the analysis that pictures are likely to be very important to other off-course UK bookmakers.

2.2.6 Conclusion on the impact of pictures on betting turnover

114. The evidence set out in paragraphs 96-113 above shows that by providing live British horseracing coverage a non-LBO bookmaker will significantly increase demand for British horseracing bets.[83]

2.3 Possible substitutes for betting on British horseracing

115. As explained in paragraph 94, it is important to focus on the punters who will principally be attracted to place bets on British horseracing by pictures of British horseracing and who will be less attracted by pictures of greyhound racing, football, numbers games, etc. These are the punters who will be lost if a bookmaker replaced pictures of British horseracing with pictures of greyhound racing etc.

116. Some of the evidence in this section is based on the behaviour of LBO punters. However, the OFT expects that punters betting via iDTV and the internet will behave in a similar manner.

2.3.1 Impact of foot and mouth disease

117. In 2001, British racing was suspended for one week in response to the nationwide outbreak of foot and mouth disease, and the number of races was significantly reduced for a longer period.[84] In response, the amount of overseas

---

[81] Section 26 Notice response by Ladbrokes dated 29 November 2001, paragraph 33.1. Letter from Ladbrokes to the OFT dated 14 February 2002, Annex 1, scenarios 2 and 3.

[82] The average rating was 70. The *Ladbroke/Coral MMC report*, Appendix 4.3, Table 11, page 181.

[83] The OFT recognises that, subsequent to the sale of rights being agreed, those rights may be less (or more) attractive than originally anticipated. However, what determines whether a hypothetical racecourse monopolist could increase the price of rights are potential customers' views at the time the deal is struck, rather than their subsequent views.

[84] British horseracing was suspended between 27 February and 6 March 2001. During this week 29 fixtures were lost. In total there were 70 foot and mouth related abandonments between 30 May 2000 and 28 April 2001.

horseracing (particularly from France, Italy and South Africa) broadcast in UK LBOs was increased.[85]

118. During the week when British horseracing was suspended, Ladbrokes' total betting turnover on horseracing fell to around 20% of its normal level.[86] This suggests that punters accounting for only 18% of Ladbrokes' betting turnover on British horseracing would switch to foreign horseracing, even if British racing was unavailable anywhere.[87] Telephone and internet punters were particularly unlikely to switch.[88] When British horseracing was suspended, over half of William Hill's betting turnover on British horseraces was lost[89] i.e., less than half of William Hill's betting turnover switched to any other category of bet. Turnover in LBOs operated by the Tote was approximately 65% of normal levels during periods when there was little or no British horseracing.[90] This is equivalent to the loss of 47% of British horserace betting turnover.[91]

119. The (limited) substitution to foreign racing during that period was not sustained: as British racing returned to normal, betting turnover on foreign horseracing fell back to its usual (low) level.[92] Any British horseraces generally attracted the majority of bets, despite the higher than usual coverage of foreign horseracing.[93] Bookmakers have argued that, while some punters were willing to switch temporarily during foot and mouth disease, '*the business experienced during foot and mouth would not be sustained long term*.'[94]

---

85 Letter from the Tote to the OFT dated 8 April 2002, page 2.

86 Section 26 Notice response by Ladbrokes dated 29 November 2001, paragraph 17.3.

87 British horseracing accounted for 98% of Ladbrokes total horseracing turnover in 2000 (Source: *ibid.*, question 2). As 80% of total horseracing turnover was lost, this equates to a loss of 80/98 = 82% of British horseracing turnover. Thus punters accounting for 100 – 82 = 18% of British horseracing turnover switched.

88 BHB inquiry: Market definition information request, responses of Coral Eurobet Plc, 11 April 2002, page 4.

89 Second submission to the Office of Fair Trading concerning the infringement of Chapters I and II of the Competition Act 1998, William Hill Ltd, dated 10 September 2001, paragraph 3.1.3 and footnote 42.

90 Letter from the Tote to the OFT dated 8 April 2002, page 2.

91 OFT calculations. 74% of bets placed at Tote owned LBOs are wagered on British horseracing (source: Section 26 Notice response by the Tote dated 28 November 2001. Attachments, page headed '*Total British Horse Racing Turnover*'). Turnover fell by 100 - 65 = 35% which equates to a loss of 35/74 = 47% of British horseracing turnover.

92 Section 26 Notice response by Ladbrokes dated 29 November 2001, paragraph 17.4.

93 Letter from the Tote to the OFT dated 8 April 2002, page 2.

94 *A response to the questions posed by the Office of Fair Trading regarding market definition*, BBOA, 9 April 2002, page 3. Also letter from the Tote to the OFT dated 8 April 2002, page 2.

120. Estimates from the foot and mouth period suggest that punters accounting for between 47% and 82% of betting turnover on British horseraces will not substitute to other bets (e.g. foreign horseracing, greyhound racing etc), even if bets on British horseracing are unavailable anywhere. These punters are only interested in British horseracing. This implies that the bulk of the punters attracted to bet by pictures of British horseracing will not be attracted to bet by pictures of foreign horseracing, greyhound races, football, numbers games, etc. This, in turn, implies that pictures of these other sports and events are not close substitutes for pictures of British horseraces.

2.3.2 Punters' switching costs

121. Regular punters form the core of a bookmaker's business.[95] Punters who regularly bet on British horseracing tend to follow racing and have built up expertise of particular jockeys, tracks, trainers and horses. This knowledge is important to punters when deciding which bets to place: '*serious fans study form in the same way as investors scrutinise a company's prospects before buying its shares*.'[96] '*Punters regard betting as a game of skill in which they pit their wits against the bookmaker*.'[97] This is shown, first, by survey evidence that suggests that the participation of familiar horses and horses with established form were the two most important factors which encourage betting on a horserace.[98] Second, punters use a wide variety of information sources when selecting their bets (e.g., newspapers, television, radio, tipsters).[99] Third, only 5.6% of punters claim '*always*' to back a horse purely because it is the favourite.[100]

122. Punters who bet on British horseracing thus have an existing body of knowledge on British horses, tracks, trainers and jockeys. They are unlikely to have the same knowledge about other sports, including foreign horseracing.[101] Of those

---

95 The MMC found that regular (at least once a month) LBO users account for some 97.5% of LBO turnover (paragraph 2.36). In addition, a small proportion of punters account for a large number of bets: the highest spending 14% of LBO customers account for approximately 40-55% of LBO turnover (paragraph 4.60). Source: The *Ladbroke/Coral MMC report*.

96 *Online betting*, Mintel Leisure Intelligence, May 2001, page 13.

97 Section 26 Notice response by William Hill dated 26 October 2001, paragraph 17.1.

98 ibid.

99 Section 26 Notice response by Stanley Leisure dated 7 December 2001, question 10.

100 ibid.

101 Fewer than 1% of the runners in British horseraces come from overseas. This contributes to UK punters' unfamiliarity with foreign horses. Figures for foreign runners for 1998 – 2001 taken from Section 26 Notice response by Weatherbys dated 10 June 2002. Total runners in British horseraces calculated from grand total of jump runners plus grand total of flat runners. *The racing industry statistical bureau statistics*, Tables D9 and D10, years 1998 - 2001.

regular LBO punters who bet on horseraces, 68% do not bet on greyhound races, 70% do not bet on football and 89% do not bet on other sports.[102] For these punters, there are likely to be switching costs as they need to acquire knowledge of other sports in order to '*feel that they are exercising real skill in selecting their bets*.'[103]

123. Switching costs for the bulk of British horseracing punters mean that these punters are unlikely to bet on other sports and events. This again implies that the bulk of the punters attracted by pictures of British horseracing will not be attracted by pictures of greyhound races, football, numbers games, etc.

2.3.3 Gaming

124. A 2000 survey found that, of those who had bet on a horserace in the preceding 12 months, 87% had also gambled on the National Lottery and 41% on scratchcards. Participation in other forms of gaming was much lower. Only 13% had gambled on bingo and 11% had visited a casino.[104] Survey evidence suggests that only 20% of regular LBO punters who bet on horseracing also bet on numbers games. Only 10% of regular LBO punters who bet on horseracing also gamble on slot machines.[105]

125. Accordingly, punters who bet on horseracing are, in general, not interested in gaming. This implies that the bulk of the punters attracted by pictures of British horseracing will not be attracted to bet by pictures of numbers games or of other forms of gaming.[106] The exception is the National Lottery, which many horseracing punters also play. However, see paragraphs 129-133 for discussion of the National Lottery.

2.3.4 Gaming and the role of judgment

126. As noted in paragraphs 121-123, it is important to punters to feel that they are exercising judgment when placing bets. Betting allows the opportunity to weigh

---

[102] Calculated from the *Ladbroke/Coral MMC report*, Appendix 4.3, Table 3, page 175.

[103] Section 26 Notice response by William Hill dated 26 October 2001, paragraph 17.1. Similar points were also made in *Information request regarding the Attheraces Notification, responses of Coral Eurobet Plc*, fax dated 24 April 2002, response to question 3.3 and a fax from SIS to the OFT dated 22 April 2002, response to question 3.3. Further, the BBOA estimates that bookmakers' margins would increase by 3.5%, from 14.2% to 14.7%, if punters were unable to bet on British horseracing. This presumably also reflects punters' unfamiliarity with foreign horseracing and the role of judgment in betting. *BHB data, video and audio proposals: sensitivity analysis*, BBOA, 5 March 2002, scenario (e).

[104] BHB additional material on market definition, BHB, 18 April 2002, Table 3.

[105] The *Ladbroke/Coral MMC report*, Appendix 4.3, Table 3, page 175.

[106] This implies that replacing pictures of British horseracing with pictures of gaming would result in the loss of almost all of the demand that these pictures generate.

up the available evidence and, on the basis of the punter's assessment of that information, to decide which outcome to back. In contrast, in gaming the probabilities of the various outcomes are immutable. In particular, numbers games do not allow punters to exercise skill and judgment, in the same way that betting does. These forms of gambling thus lack the characteristics important to punters when they bet. Other forms of gaming may entail skill and weighing up of probabilities. Nonetheless the type of skills (e.g., bluffing in poker) and the nature of the judgment exercised differ from the judgment used in betting on horses. This implies that the bulk of the punters attracted to bet by pictures of British horseracing will not be attracted by pictures of numbers games or other forms of gaming.

3. Analysis of the Applicants', the RCA's and the BHB's views

127. The OFT notes that the RCA has not suggested an alternative market definition in its representations, or explicitly stated that the OFT's conclusions on market definition are incorrect.[107] The RCA has also stated that '*any live British horserace is likely to be significantly more attractive to ATR* [Attheraces] *than any alternative programming*.'[108] Further, the RCA argued in its representations that it would be '*largely impractical*' for Attheraces to use foreign horseracing rights instead of British horseracing rights '*because* [of] *time differences between the UK and the major horseracing countries, most of which are outside the EU* ...'[109] It has also stated that it is '*mis-conceived*' to suggest that Attheraces could take bets on races for which it does not have the picture rights '*since the principal attraction of betting on the ATR* [Attheraces] *platform derives from being able to watch the race at the same time*.'[110] These RCA statements imply there are no close substitutes for the Non-LBO Bookmaking Rights.

128. Further, the Applicants argued that collective selling by the Courses was necessary to '[realise] *the full value of their rights*.'[111] Contrary to the Applicants' contention that the relevant market is wide, this directly implies that the relevant market is sufficiently narrow for collective selling to have an appreciable adverse effect on competition (and, indeed, that there is such an effect caused by the collective selling).

---

[107] RCA Representations, paragraph 2.5.

[108] The RBB Report, page 2, second paragraph.

[109] Witness statement of S Atkin, dated 3 October 2003, paragraph 5.7.

[110] Witness statement of S Atkin, dated 3 October 2003, paragraph 5.7.

[111] Form N, page 105, second paragraph. See also the evidence in paragraphs 298-301 that the parties considered that collective action could increase prices.

3.1 Econometric studies

3.1.1 The Applicants' view

129. Two statistical papers were annexed to the Form N. First, the Applicants cited a Home Office paper that estimated that every £1 staked on the National Lottery has diverted approximately 25 pence away from off-course betting on horseracing.[112] Second, the Applicants cited econometric analysis according to which there is price substitution between National Lottery games and betting as a whole.[113] The Applicants therefore considered that (at least) fixed odds betting and the National Lottery are in the same relevant product market. However, the Applicants considered that it is likely that similar substitutability would be observed between the National Lottery and other types of betting and gaming. The Applicants thus considered that '*all types of betting and gaming should be regarded as being within the same product market*.'[114]

3.1.2 The OFT's finding

130. The Applicants considered there to be substitution between fixed odds betting and the National Lottery. However, bookmakers are prohibited from taking bets on the UK National Lottery.[115] Thus, even if punters place additional wagers on the National Lottery when supplied with pictures of the National Lottery, bookmakers cannot boost their income by screening those pictures. As a result, the OFT considers that UK Non-LBO bookmakers will not regard sound and pictures of the National Lottery as a substitute for sound and pictures of British horseracing.

131. The second paper supplied by the Applicants uses econometrics to analyse price substitution between betting as a whole and the National Lottery.[116] However, the OFT considers that a non-LBO bookmaker covers the cost of pictures from the profits generated from the additional demand those pictures stimulate. An increase in the price of pictures should not increase the unit price of bets.[117]

---

[112] *The Impact of the National Lottery on the Horserace Betting Levy, Fifth Report*, S. Brand, M. Weiner and J. Powell (2000), Home Office. This paper is Annex 19 to Form N and cited at Form N, page 74.

[113] *A Time Series Analysis of the Demand for Gambling in the United Kingdom*, Dr. D. Paton, Professor M. Seigel and Dr. L. Vaughan Williams, March 2001. This paper is Annex 20 to Form N and cited at Form N, page 74.

[114] Form N, page 74.

[115] See section 18 of the National Lottery Act 1993 which amended the Betting, Gaming and Lotteries Act 1963.

[116] *A Time Series Analysis of the Demand for Gambling in the United Kingdom*, Dr. D. Paton, Professor M. Seigel and Dr. L. Vaughan Williams, March 2001.

[117] The bulk of the payments for the Courses' Rights by Attheraces are in the form of a lump sum. If the price of pictures is a lump sum then an increase in that price will not affect a

Accordingly, the OFT considers that it is not strictly necessary to analyse how punters would respond to an increase in the price of bets on British horseracing when defining the market for the supply of programming to non-LBO bookmakers.

132. Further, the authors used three statistical techniques to estimate the effect of changes in the price of betting on monthly Lottery sales. The authors of the Applicants' paper note that two of these statistical techniques find that Lottery sales rise in response to an increase in the price of betting.[118] The Applicants quote this finding.[119] However, the third statistical technique finds that Lottery sales instead fall in response to an increase in the price of betting.[120] Whether substitution is observed accordingly depends on the statistical technique used.

133. The authors attempt to estimate the price elasticity of demand for bets. A key variable in this analysis is the price of betting. The authors do not use bookmakers' margins as a measure of the price of betting. Instead they use other variables as proxies for the price of betting.[121] If these proxies are poor (as the authors themselves suggest) then the accuracy of the resulting estimates is compromised. Indeed the final series of estimations do not include an explicit price variable, because of concerns that it was mis-specified.[122]

3.2 Application of the hypothetical monopolist test

3.2.1 The RCA's view

134. The RCA stated that the OFT did not define, even in theory, what the competitive price for the Non-LBO Bookmaking Rights would be. It set out fifteen different possibilities, each giving a different 'competitive' price. The RCA stated that, without a theoretical benchmark for the competitive price, it is

---

bookmaker's marginal costs. See paragraph 93. The RCA appeared to accept this – see footnote 150.

[118] See the coefficient on the variable $PRICE^{B}_{t}$ in columns (1) and (2) of Table 3. *A Time Series Analysis of the Demand for Gambling in the United Kingdom*, Dr. D. Paton, Professor M. Seigel and Dr. L. Vaughan Williams, March 2001.

[119] Form N, page 74.

[120] See the coefficient on the variable $PRICE^{B}_{t}$ in column (3) of Table 3. *A Time Series Analysis of the Demand for Gambling in the United Kingdom*, Dr. D. Paton, Professor M. Seigel and Dr. L. Vaughan Williams, March 2001.

[121] The proxies used are (i) the percentage rate of General Betting Duty; and (ii) the proportion of betting turnover accounted for by telephone and internet bets. *ibid.*, page 6.

[122] *ibid.*, pages 14-15.

difficult to justify a claim that a hypothetical monopolist could raise prices above that level.[123]

3.2.2 The BHB's view

135. Like the RCA, the BHB has argued that it is important to identify the competitive price, as this forms the counterfactual on which the hypothetical monopolist test is based.[124] Further, the BHB stated that in any event it is inappropriate to apply the hypothetical monopolist test for two reasons.[125]

136. First, collective selling might be the only way of selling the Non-LBO Bookmaking Rights. This implies that the price under individual selling (which the BHB considered to be the competitive price) does not exist.[126]

137. Second, the value to a buyer of the Non-LBO Bookmaking Rights to an individual race depends on what other rights have already been purchased by that buyer (e.g. because Attheraces requires a portfolio of rights, the BHB stated that the value of the rights to a single race is almost zero whereas the value of the rights to a large number of races is large). The BHB considers that this means there is no unique value for these rights, and thus no unique competitive price.[127]

3.2.3 The OFT's finding

138. The RCA suggested multiple different theoretical ways of specifying the competitive price. The OFT considers that at least some of these are incorrect.[128] Some of the methods suggested by the RCA imply a competitive price close to zero,[129] which would imply that the relevant market is narrow.[130]

---

123 The RBB Report, page 7. Five different ways of defining the competitive price are set out in bullet points, multiplied by three different ways of specifying the demand side (single buyer, all possible current buyers, an infinite number of buyers). This gives fifteen different possibilities.

124 BHB Submission, Volume I, paragraph 143(7)(b)(ii).

125 BHB Submission, Volume I, paragraph 143(7)(a).

126 BHB Submission, Volume I, paragraph 143(7)(a)(i).

127 BHB Submission, Volume I, paragraph 143(7)(a)(ii).

128 In particular, the RCA have suggested that the competitive price could be the price that would emerge if all existing groups of courses were to negotiate individually (RBB Report, page 7, fourth bullet). The BHB also considered this to be the competitive price (see paragraph 136). However, this effectively says that (where suppliers act independently) the current price is the competitive price. To illustrate why this is incorrect, consider the following example (the same problem arises, albeit to a lesser degree, in examples where the market is less concentrated): if there were actually only a single owner of all racecourses, then that monopolist's price is defined to be the competitive price.

129 The RCA have suggested that the competitive price could be the marginal cost of making the Non-LBO Bookmaking Rights available. An infinite number of suppliers (courses) might also yield a price close to marginal cost. (RBB Report, page 7, first and second bullets).

Of the other methods for defining the competitive price suggested by the RCA,[131] the OFT is satisfied that a small, significant rise from those prices would be profitable for a hypothetical monopolist i.e., that the OFT's market definition is correct on those methods. This is for the reasons in paragraphs 85-128 above.

139. The OFT does not accept the BHB's claim that it is inappropriate to apply the hypothetical monopolist test in this case. In paragraphs 403-404 the OFT finds that collective selling is not indispensable to ensuring that the Non-LBO Bookmaking Rights are sold, contrary to the BHB's claim. Further, the BHB is incorrect to conclude that the absence of a unique value to the consumer for these rights implies that there is no unique competitive price. The value (or 'utility') to the buyer is not the same as the competitive price. Indeed, almost every product or service does not have a unique value,[132] so that the implication of the BHB's claim is that the hypothetical monopolist test can almost never be used. The OFT does not accept this. Nor does it accord with accepted practice in the EU and US.

3.3 The market facing a vertically integrated supplier

3.3.1 The BHB's view

140. The BHB considered that, by analysing whether a hypothetical monopolist of the Non-LBO Bookmaking Rights could increase the price of those rights to non-LBO bookmakers, the OFT risks mistaking *'... relative bargaining power for market definition*.'[133] The BHB defined market power as the ability to influence price or the quantity supplied to final consumers, whereas bargaining power is the ability to earn economic rents.[134]

The RCA stated that this cost is '*approximately zero*' (RBB Report, page 7, first line; see also RCA Representations, paragraph 3.6.6).

[130] The reasoning is as follows. The actual price paid by Attheraces for the Non-LBO Bookmaking Right is much greater than zero. Because consumers (i.e., Attheraces) are willing to pay much more that the competitive price suggested by the RCA (namely, almost zero) this shows that a 5-10% price increase would be profitable for a hypothetical monopolist and thus that the market is narrow.

[131] Namely the price if all 59 racecourses negotiated alone (i.e., as 59 competing undertakings) or the price that gives a seller a normal return on its investment.

[132] For example, the value (or utility) to a consumer of a beverage depends on how many other beverages the consumer has drunk that day, as well as factors such as the weather, the consumer's current mood, etc. Thus the value to the consumer of that beverage is not unique.

[133] BHB Transcript, Mr Elliott, page 72, lines 12-13.

[134] BHB submission dated 5 September 2003, Part XIII, paragraph 2412.

141. The BHB considered that the correct approach to market definition in this case is to consider a (vertically integrated) hypothetical monopoly supplier of Non-LBO Bookmaking Rights and of in-vision iDTV betting services and internet betting services in conjunction with live pictures of British horseracing[135] and ask whether that vertically integrated monopolist could increase prices to final consumers by 5-10%.[136] To support this argument, the BHB cited a paper in the European Competition Law Review (the 'ECLR Paper').[137]

3.3.2 The OFT's finding

142. The OFT does not accept the BHB's distinction between bargaining power and market power.[138] The BHB has advanced no precedent to support this distinction. In any event, the OFT does not accept that the BHB's approach is the correct way to define the relevant market. This approach is inconsistent with the OFT's guidelines.[139] Further, the BHB's approach is flawed – it only provides information on the market power of Attheraces and says nothing about the market power of the racecourses.[140] As a result, it can lead to errors.[141]

---

135 BHB Submission, Volume I, paragraph 143(7)(b)(iv).

136 BHB Transcript, Mr Elliott, page 72, line 17.

137 *Market definition in oligopolistic and vertically-related markets: some anomalies*, Harbord D and von Graeventiz G, ECLR, Vol 21, Issue 3, March 2000, pages 151-158. Referred to in BHB Transcript, Mr Elliott, page 72, lines 22-23.

138 The BHB would categorise the division of profit between the buyers (non-LBO bookmakers) and sellers (racecourses) as a matter of relative bargaining power (rather than market power). Paragraphs 302-303 consider whether this division is a competitively-neutral transfer.

139 *Market Definition*, OFT Guideline 403, March 1999, section 3 (particularly paragraph 3.1). Further, the alternative test proposed in the ECLR Paper is not clearly specified. It is unclear how far up the vertical chain of input suppliers one should go when determining what constitutes the hypothetical vertically integrated monopolist.

140 Neither the BHB nor the authors of the ECLR Paper explain how to interpret the outcome of their alternative market definition test (e.g., if the vertically integrated firm could profitably increase prices above the competitive level what does this imply about the market power of the various elements in that vertical chain?)

141 Two examples. First, if (hypothetically) Attheraces could increase the price of horseracing bets to punters but, in fact, providing pictures had almost no effect on betting turnover (this example is illustrative – the OFT does not find this to be the case), the BHB test would conclude that the vertically integrated firms had market power (and thus, presumably, that the Courses had market power). However, because pictures have a negligible effect on betting turnover in this example, the Courses could not increase the price of their rights (because, if they did, buyers would simply choose not to have pictures at all). The BHB's test thus leads to the wrong conclusion. Second, continuing the car parts example from footnote 58, a 5-10% rise in the price of car parts might only lead to a 1-2% rise in the price of cars. If it was the case that a 5-10% rise in the price of cars was unprofitable, but a 1-2% rise was, then the traditional SSNIP test would conclude that the market for cars was wide but the market for car parts was narrow. However, the BHB's test (by focusing on a 5-10% increase in the price of the final good) would incorrectly conclude that car parts manufacturers were in a wide market.

Contrary to the BHB's claims,[142] the ECLR Paper does not appear to support the use of this alternative approach to market definition in this case.[143] In any event, the authors of the ECLR Paper appear to have justified their approach based upon a misconception of how to define a market in practice.[144]

3.4 Valuable rights

3.4.1 The RCA's view

143. The RCA noted that the OFT's approach to market definition (as set out in paragraphs 90-95) implies that any uniquely valuable rights with a low marginal cost of provision would be considered to constitute a relevant market.[145] However, the RCA also stated that '*it may be argued that* ... [the OFT's] *approach is a legitimate interpretation of the standard market definition test*.'[146]

3.4.2 The OFT's finding

144. The OFT has no view as to whether every '*uniquely valuable right*' comprises a separate market, and is only considering the rights relevant to this case. It considers that the hypothetical monopolist test had been correctly applied when defining the market for the Non-LBO Bookmaking Rights. The RCA provided no evidence to show that the OFT's approach leads to an erroneous conclusion.

3.5 Price discrimination

3.5.1 *The RCA's view*

145. The RCA considered that the OFT had concluded that the possibility of rights holders price discriminating between outlets (specifically, LBOs and non-LBOs)

---

142 BHB Transcript, Mr Elliott, page 72, lines 22-23.

143 The authors of the ECLR Paper considered that market power at multiple levels of the supply chain (e.g. where an upstream monopolist supplies an input to a downstream monopolist that, in turn, supplies final consumers) causes problems for market definition (see ECLR Paper, pages 154-155). This is not the situation in this case, as Attheraces (the downstream firm) is in a weak position relative to final consumers (see paragraphs 184-186), as acknowledged by the BHB in BHB Submission, Volume I, paragraph 143(7)(b)(iv).

144 The '*anomalies*' identified in vertically related markets in the ECLR Paper appear to arise because the authors use a firm's current margin/profitability to assess whether it has market power (see page 155, particularly second column, paragraphs 2-3). Clearly, however, in markets which are highly uncompetitive, such measures are unreliable. Further, the authors, in their stylisation of antitrust authorities' approach (page 153), omit the consideration of buyer power (something the OFT takes into account). The OFT considers that the ECLR Paper '*anomalies*' in vertically related markets do not arise if the traditional SSNIP test is correctly performed.

145 The RBB Report, pages 1 and 8.

146 The RBB Report, page 8.

effectively results in these rights being separate markets.[147] The RCA considered that the OFT has failed to consider adequately the consequences of the wide downstream market definitions.[148]

3.5.2 The OFT's finding

146. The fact that the Courses can (and do) price discriminate between different users of their rights determines the relevant product, i.e., the starting point for market definition. This does not, however, imply that this product is necessarily a relevant market. Paragraphs 302-303 address the RCA's arguments regarding the consequences of a wide downstream market definition.

3.6 General and marginal customers

3.6.1 The RCA's and the BHB's view

147. The RCA and the BHB considered that the OFT's analysis failed to distinguish between general punters and marginal punters (i.e., those most likely to switch).[149]

3.6.2 The OFT's finding

148. The OFT finds that the RCA is incorrect to focus on marginal punters when defining the relevant market for the Non-LBO Bookmaking Rights. The OFT's analysis has examined whether non-LBO bookmakers are likely to switch (i.e., the OFT has focused on marginal non-LBO bookmakers). Non-LBO bookmakers' preferences are influenced by punter behaviour but, for the reasons set out in paragraphs 92-94, the key punters are those for whom pictures of British horseracing are especially important.[150]

---

147 RCA Representations, paragraph 2.3.2 (a).

148 RCA Representations, paragraph 2.3.2 (a).

149 RCA Representations, paragraph 2.3.2(d). BHB Submission, Volume I, paragraph 143(7)(b)(i), third bullet.

150 The OFT considers that the RCA's claims about marginal punters are inconsistent with other statements made by the RCA. The RCA appeared to agree with the OFT's reasoning, as set out in paragraphs 92-94, and stated that '*the payment made by ATR* [Attheraces] *to the racecourses neither influences, nor is constrained by, the price that is charged to customers* [i.e., punters].' The RBB Report, page 11.

3.7 Racing's declining betting share indicates competitive constraints

3.7.1 The RCA's view

149. The RCA considered that British horseracing's declining share of total betting turnover (from 73% to 69% over the last five years) is due to competition from other sports and from gaming terminals introduced into LBOs.[151]

3.7.2 The OFT's finding

150. In principle, horseracing's share of total betting turnover could decline even if there is no substitutability between it and other betting products. Where overall demand for certain betting products increases (without any change in demand for bets on horseracing) overall betting turnover will increase and, as a consequence, the proportion of that larger turnover accounted for by betting on horseracing will fall. Accordingly, the statistic given is not inconsistent with a narrow market definition.

151. Further, for pictures of other sports to be a close substitute for pictures of British horseraces from the perspective of a non-LBO bookmaker, the bulk of horseracing punters would need to be willing to switch to betting on those sports (or, equivalently, there would need to be few punters who can only be attracted to place bets by pictures of British horseracing).[152] The size of the decline in horseracing's proportion of betting turnover, as highlighted by the RCA, does not imply that this is the case.[153]

3.8 Implications of foot and mouth disease

3.8.1 The BHB's view

152. The BHB stated that the conclusions drawn by the OFT from the impact of foot and mouth disease on betting (see paragraphs 117-120) wrongly focus on punter behaviour in the very short term.[154]

---

[151] RCA Representations, paragraph 2.3.2(b). The RCA also cited a 2001 estimate that earnings from bets on horseracing may fall to 60% of major bookmakers' turnover by 2004. Source: *Betting Shops*, Mintel report, July 2001, page 19.

[152] For example, if only 20% of punters would switch then the non-LBO bookmaker would lose 80% of the extra custom generated by screening pictures of British horseraces if it switched to pictures of another sport. The non-LBO bookmaker is thus unlikely to want to cease purchasing pictures of British horseracing.

[153] Similarly the evidence in paragraphs 85-128 does not suggest that this is the case.

[154] BHB Submission, Volume I, paragraph 143(7)(b)(i), final bullet.

3.8.2 The OFT's finding

153. The OFT is satisfied that the impact on betting patterns of racing's suspension due to foot and mouth disease, in combination with the other evidence presented above, supports its conclusions on market definition. Indeed, as stated in paragraph 119, bookmakers have argued that punter switching behaviour was overstated during the outbreak of foot and mouth disease.

3.9 Significance of pictures

3.9.1 The RCA's view

154. The RCA considered that the rapid growth in turnover on betting exchanges,[155] which do not feature live pictures, demonstrates that pictures are not highly attractive.[156] The RCA considered that the comparison between the Website and Totalbet (see paragraph 97) is misleading, as the turnover figures for the Website cover a period when interactive revenues are expected to grow rapidly, whilst the Totalbet figures precede this expansion.[157]

155. The BHB considered that there are weaknesses[158] with the NERA Report (see paragraphs 86 and 111), that this modelling cannot be used to determine substitutability (in the '*conventional*' sense) and that Ladbrokes (who commissioned the report) is not a disinterested party.[159]

3.9.2 The OFT's finding

156. The OFT does not accept that the success of betting exchanges undermines its conclusion that adding live horseracing coverage will significantly increase demand for bets from a website.[160] The success of betting exchanges is likely

---

155 Betting exchanges are internet sites. They effectively facilitate individuals placing bets between themselves. For example, some individuals using an exchange offer to 'lay' a horse running in a particular race (i.e. accept bets) and then other users 'back' that horse (i.e. place bets with the 'layers'). If the horse in question wins, then the layer must pay the backer (and vice-versa). In return, the exchange receives a commission.

156 RCA Representations, paragraph 2.3.2(e).

157 RCA Representations, paragraph 2.3.2(f).

158 In brief, prices are omitted from the revenue equation, the model predicts negative revenues for some races, quantities of other products (rather than prices or characteristics) are used as variables and there is potential endogeneity (e.g., if the real reason that a race is not televised is because it is unattractive then the model might incorrectly ascribe low betting turnover on that race to the fact it is not televised, rather than its low quality).

159 BHB Submission, Volume I, paragraphs 143(5)-143(6).

160 The RCA states that the success of betting exchanges was '*unforeseen.*' RCA Representations, paragraph 5.1.4(b). As noted in footnote 83, whether a hypothetical monopolist can raise prices is determined by the views of buyers at the time the deal was struck (i.e., before the success of betting exchanges was anticipated).

to reflect their novel characteristics (unlike traditional bookmakers, punters can 'lay' a horse, in effect betting that it will not win)[161] and the superior odds available to punters.[162]

157. The OFT does not accept that the comparison between the Website and Totalbet (see paragraph 97) is misleading because interactive revenues are expected to grow strongly. The OFT considers that a major reason why Attheraces' interactive revenues are expected to grow strongly is the availability of live pictures.[163]

158. The OFT is satisfied that it can rely on the NERA Report.[164] NERA's analysis was prepared in February 1999, well before the Notified Arrangement was negotiated. Ladbrokes chose to cite this report in a response to the OFT, implying that it considers that the report's conclusions tally with its own views and business experience.[165] Indeed, the BHB has also used this report to support its arguments.[166] The BHB has also misunderstood important aspects of the

---

[161] Further, repeatedly backing and laying horses potentially enables exchange users to arbitrage i.e., make a profit on a race irrespective of the outcome. Trying to do this may be one of the attractions of exchanges to some punters over traditional bookmakers.

[162] Leading exchange Betfair claims that odds are consistently 20% better. Betfair website www.betfare.co.uk viewed on 18 July 2003.

[163] As shown by OFT's other evidence regarding the impact of picture of betting turnover (paragraphs 98-112).

[164] First, the BHB states that this analysis omits prices. The price of a bet is the stake minus expected winnings (this is not the same as the odds). The price of a bet on a particular race is an unobservable variable - it will thus always be necessary to use proxies for the price. In fact, this analysis includes a number of proxies for the price of bets on a horserace, including the number of runners, the type of race (e.g. whether it is a handicap) (both of which affect bookmakers' percentage gross profits on a race i.e., the price; source: Ladbrokes section 26 notice response dated 29 November 2001, question 7) and a dummy variable reflecting a change in betting duty. Second, the BHB stated that the model uses lottery and scratchcard sales, rather than the prices or characteristics of these products. However, this does not compromise the results, as sales are a proxy for these variables. Third, the BHB stated that the model predicts negative betting revenues on certain races. This particularly affects races held in overseas countries other than Ireland. This is because very few bets are placed on these foreign races, despite them otherwise having attractive characteristics. This is a reason to be wary of the precise estimate of the effect of holding a race overseas (although not the conclusion that much less is bet on a foreign horserace than on an equivalent British race). However, this does not undermine the report's conclusions about the desirability of live pictures. Fourth, endogeneity (as described in footnote 158) is only problematic if the model omits variables reflecting the attractiveness of a race. This is not the case (e.g., there are variables for races at '*major*' and '*secondary*' meetings, prize money, the number of runners, and the type of race – see the NERA Report, Table 4.5).

[165] The OFT first became aware of this report when its findings were quoted in Ladbrokes section 26 notice response dated 29 November 2001, question 25.

[166] BHB submission dated 5 September 2003, Part X, footnotes 92, 93, 97 and Part XIII, footnote 255. Expert report of Professor B Lyons, dated 4 September 2003, footnote 15.

model.[167] In the Rule 14 Notice, the OFT did not use this study to assess cross-price elasticities of different bets. Rather, it was used to demonstrate the increased revenues that live sound and pictures would be likely to generate and that little is bet on foreign races. Further, the conclusion in NERA's analysis that pictures significantly increase betting turnover is consistent with the other evidence in paragraphs 97-109 and 112.

3.10 Feedback effects between customer groups

3.10.1 The BHB's view

159. The BHB stated to the OFT that

> 'the quality of the product purchased by [Attheraces] ... depends ... upon how many other consumers buy British Racing ...'[168]

> '... for example, if the price to ATR [Attheraces] was excessive and there was less television exposure of horseracing ... [then] there would be less media interest and less viewer interest ... [and thus lower] punter interest and betting turnover ...'[169]

160. This can generate feedback effects if a higher price to one customer group reduces demand by that group and this, in turn, reduces the attractiveness of horseracing and thus reduces the attractiveness of the products consumed by other groups. This can lead to falls in demand by those other groups, which reduces the attractiveness to the first group, leading to a further fall in demand and so on, in a vicious circle.

3.10.2 The OFT's finding

161. The BHB has presented no reasoning or evidence why such feedback effects arise in connection with the Non-LBO Bookmaking Rights i.e., why a decreased number of non-LBO bookmakers buying the Non-LBO Bookmaking Rights makes the sport of horseracing less attractive to racegoers, owners, etc.[170] Further, according to the BHB, such feedback effects only arise if the hypothetical

---

[167] The BHB incorrectly believes that this model estimates revenue (i.e., price of bets multiplied by quantity of bets) (see expert report of Dr P Davis, 5 September 2003, page 45; BHB Submission, Volume I, paragraph 143(6)(a)). In fact, the model estimates betting turnover i.e., total stakes or the quantity of bets. The NERA Report, page 2.

[168] BHB Submission, Volume I, paragraph 143(3).

[169] BHB Transcript, Mr Elliott, page 76, line 36 to page 77, line 1.

[170] Evidence that such feedback effects do not exist is the fact that the Courses licensed their Non-LBO Bookmaking Rights exclusively. If feedback effects existed, one would expect racecourses to try and enhance these by achieving wide distribution to many non-LBO bookmakers.

monopolist's price rise leads to a fall in output.[171] As explained in paragraph 93, increasing the price of the Non-LBO Bookmaking Rights should not increase the price of horseracing bets. Thus there is no fall in demand for these bets.[172]

4. The OFT's conclusion on relevant product market definition

162. On the basis of the evidence set out above, the OFT considers that sound and pictures substantially boost demand for bets. The bulk of punters who are attracted to place bets on horseracing by pictures of British horseracing are not attracted by pictures of other sports and betting opportunities. This implies that the value of the additional demand that can only be attracted by pictures of British horseracing is large. This demand will be lost if a bookmaker ceases to purchase these pictures. Accordingly, a non-LBO bookmaker would be likely to continue to purchase pictures of British horseracing following a small, significant price increase above competitive levels.

163. The OFT therefore considers that a hypothetical monopolist could increase the price of live pictures of British horseracing to UK non-LBO bookmakers above the competitive level. As explained in paragraph 91, this implies that a hypothetical racecourse monopolist could increase the price of the rights that are used to produce programming of British horseraces for combination with UK non-LBO bookmaking services. The OFT therefore considers that the supply of the Non-LBO Bookmaking Rights is a relevant product market.

164. The RCA considered that the OFT's analysis is based on '*very little empirical evidence*'[173] and that the OFT has assessed possible substitutes separately, rather than together.[174] The OFT, however, is satisfied that it has sufficient evidence to support its conclusion to the relevant standard, after assessing all the available evidence as a whole.[175]

---

171 BHB Transcript, Mr Elliott, page 76, line 37. Also page 77, lines 38-39.

172 A point accepted by the BHB (e.g. BHB Submission, Volume I, paragraphs 143(8)(d) and 143(9)). This is an inconsistency in the BHB's position.

173 RCA Representations, paragraph 2.3.2. The BHB made a similar claim. BHB Submission, Volume I, paragraphs 83, 138(1).

174 RCA Representations, paragraph 2.3.2 (c).

175 In its judgment in Case 1009/1/1/02 *Aberdeen Journals v OFT* ([2003] CAT 11) ('*Aberdeen Journals 2*'), the Competition Appeal Tribunal ('CAT') indicated (at paragraph 125) that the relevant standard of proof for the OFT's analysis of the relevant product market is that it must be '*robust and soundly based*.'

V. MARKETS RELEVANT TO THE SUPPLY OF BRITISH HORSERACING PROGRAMMING TO TV CHANNEL DISTRIBUTORS

165. TV channel distributors' demand for content and channels derives from viewers' demand. If two programmes attract very similar audience profiles then those programmes are likely to be close substitutes from the perspective of distributors, i.e., in the same relevant market. The OFT considers that horseracing does not hold particular appeal for viewers that TV distributors otherwise find hard to attract.[176] This suggests that other TV programming can attract a similar viewing audience to horseracing. Accordingly, in the Rule 14 Notice the OFT concluded that there may be close substitutes for programming of British horseracing from the perspective of TV channel distributors. The RCA agreed with this conclusion.[177]

166. The OFT is satisfied that the market relevant to the provision of these programme services is sufficiently broad for the Notified Arrangement not to have an appreciable effect on competition on the relevant market within the meaning of the Chapter I prohibition.

VI. MARKETS RELEVANT TO PROVISION OF ACCESS TO (i) IN-VISION BETTING SERVICES VIA iDTV AND (ii) BETTING SERVICES IN CONJUNCTION WITH LIVE PICTURES OF BRITISH HORSERACING VIA THE INTERNET

167. As explained in paragraphs 60-61, Attheraces supplies access to in-vision iDTV betting services via the Channel. Punters placing bets on a horserace via the Website are also able to view that race live.

168. With regard to the provision of these betting services, the OFT stated in the Rule 14 Notice that there is a chain of substitution from in-vision iDTV betting, to betting with telephone bookmakers, to betting with LBOs.[178] That is to say, sufficient in-vision iDTV punters would switch to telephone bookmakers to constrain a hypothetical in-vision iDTV monopolist from raising its prices, and similarly that sufficient iDTV and telephone punters would switch to LBOs to constrain a hypothetical monopolist of iDTV and telephone betting.[179]

---

176 Letter from BBC to the OFT dated 18 April 2002, response to question 3.1.

177 RCA Representations, paragraph 2.5(a). See also Form N, pages 71-72.

178 Chains of substitution are discussed in *Market Definition*, OFT Guideline 403, March 1999, paragraphs 3.9 – 3.12.

179 Implicitly, this analysis first considered an increase in the price of in-vision iDTV bets and, second, considered an increase in the price of in-vision iDTV bets and telephone bets. There is an alternative (arguably more theoretically robust) way of applying the hypothetical monopolist test. This involves considering at the second step whether a price increase in

169. The OFT also considers that there is a chain of substitution from websites with live pictures to websites without live pictures, to telephone bookmakers, and ultimately to LBOs.[180] The RCA agreed with these conclusions.[181]

170. The OFT is satisfied that the markets relevant to the provision of these bookmaking services are sufficiently broad for the Notified Arrangement not to have an appreciable effect on competition within the meaning of the Chapter I prohibition.

VII. CONCLUSION ON RELEVANT PRODUCT MARKETS

171. For the reasons given above, the OFT considers that:

(i) the supply of the Viewing Rights;

(ii) the supply of the British horseracing programming to TV channel distributors for viewing;

(iii) the provision of access to in-vision betting services via iDTV; and

(iv) the provision of access to betting services in conjunction with live pictures of British horseracing via the internet

all occur in markets sufficiently broad for the Notified Arrangement not to have an appreciable effect on competition within the meaning of the Chapter I prohibition.

172. However, the supply of the Non-LBO Bookmaking Rights (as defined in paragraph 56) is a relevant product market in which the Notified Arrangement may have such an effect.

VIII GEOGRAPHIC MARKET RELEVANT TO THE NON-LBO BOOKMAKING RIGHTS

1. The Applicants' view

173. The Applicants argued that

> 'the geographic scope of the market for the supply of rights to video programming is national, or at most the UK and Ireland. Programming rights are, in general, defined on a territory-by-territory basis by rights

---

in-vision iDTV bets (only) is profitable for a hypothetical monopolist of in-vision iDTV and telephone bets.

[180] See the comments in footnote 179.

[181] RCA Representations, paragraph 2.5(a). See also Form N, page 75.

owners as a result of linguistic, regulatory and economic factors. Most rights that are substitutable from the point of view of the purchasers of programming rights are granted in respect for [sic] the UK and Ireland.'[182]

174. The RCA Representations were silent on this issue.

2. The OFT's conclusion

175. The OFT's definition of the relevant product market means that rights to foreign racing are not a close substitute (as the Non-LBO Bookmaking Rights relate to British horseraces only).[183] In addition, the manner in which rights are sold means that rights holders (racecourses) can charge different prices to UK and overseas bookmakers.[184] As a result the behaviour of overseas bookmakers will not constrain the price charged to UK non-LBO bookmakers for sound and pictures of British horseraces.

176. Insofar as the OFT need identify a relevant geographic market, it accepts the Applicants' argument that it is the UK, with regard to the Non-LBO Bookmaking Rights.[185]

---

[182] Form N, page 76.

[183] The question of whether foreign horseracing is a close substitute for British horseracing is considered in paragraphs 117-123. See also paragraphs 84-87.

[184] As rights are generally granted on a '*territory-by-territory basis* ...' Form N, page 76.

[185] This is the same conclusion that the OFT reached in the Rule 14 Notice.

PART FOUR THE APPLICANTS' POSITION IN THE RELEVANT MARKETS

177. The OFT has considered the Courses' and Attheraces' position in the relevant markets

I. MARKET SHARES

178. The OFT Guideline on the Chapter I Prohibition states that '*an agreement will generally have no appreciable effect on competition if the parties' combined share of the relevant market does not exceed 25 per cent ...*'[186]

1. The supply of (i) the Viewing Rights and (ii) British horseracing programming supplied to TV channel distributors for viewing

179. The RCA stated that Attheraces has '*no position of significance* ...' in these markets.[187]

180. The OFT considers that the Notified Arrangement does not have an appreciable effect on competition in the market relevant to the supply of British horseracing programming supplied to TV channel distributors for viewing, or in that for the Viewing Rights.[188]

2. The Non-LBO Bookmaking Rights

181. The OFT considers that the Notified Arrangement is capable of having an appreciable adverse effect on the market for the supply of the Non-LBO Bookmaking Rights.

182. The Courses' combined share of the relevant market is very high. It can be measured by the proportion of betting turnover on British horseraces staked on races held at the Courses. The 49 Courses accounted for 91% of Ladbrokes' betting turnover on British horseraces in 2000 and 90% in 1999.[189] If market share was measured according to the Courses' share of British horseracing fixtures (i.e., racedays) then the 49 courses have a share of approximately

---

[186] *The Chapter I Prohibition*, OFT Guideline 401, paragraph 2.19.

[187] RBB Report, page 5.

[188] Further, the Notified Arrangement is also unlikely to affect competition between distribution platforms adversely, since the Channel is a basic channel available 'free' as part of a bundle of other channels (Form N, page 29) and is available on most platforms. Attheraces has an interest in ensuring the Channel is available to a wide audience since its income is principally to be generated by betting revenues (Form N, page 31).

[189] OFT calculations. Figures taken from Section 26 Notice response by Ladbrokes dated 29 November 2001, question 6. See also Annex 4.

90%.[190] The other 10 racecourses (which sold their rights to GG Media) account for the remaining 9-10%.

183. Given the Courses' high combined market share, the OFT has considered the barriers to entry and expansion, and buyer power in this relevant market below, in paragraphs 187-205.

3. Access to (i) in-vision betting services via iDTV and (ii) betting services in conjunction with live pictures of British horseracing via the Internet

184. The RCA stated that Attheraces has '*no position of significance* ...' in these markets.[191]

185. The OFT considers that the Notified Arrangement does not have an appreciable effect on competition in the market relevant to the supply of access to Internet bookmaking services in conjunction with live pictures of British horseracing. In 2000, internet betting (in total) was estimated to account for 2.5% of off-course bets on horseracing placed by UK punters.[192] The Applicants' market share will be even lower.

186. The Notified Arrangement also does not have an appreciable effect on competition in the market relevant to the supply of access to in-vision bookmaking services via iDTV. The Applicants' market share is under 3%.[193]

II. POTENTIAL ENTRANTS AND BARRIERS TO ENTRY AND EXPANSION FOR THE NON-LBO BOOKMAKING RIGHTS

187. Potential competitors, i.e., '*undertakings that would be able to enter the market and gain market share at the expense of any existing undertaking that increased prices above competitive levels*', may constrain the competitive behaviour of the Courses.[194] '*Entry barriers are important in the assessment of potential competition. The lower the entry barriers, the more likely it is that potential*

---

190 Information request regarding the Attheraces Notification, responses of Coral Eurobet Plc, fax dated 24 April 2002, response to question 3.2(ii).

191 RBB Report, page 6.

192 Based on William Hill estimates that £5,543m was staked with off-course bookmakers by UK punters on horseraces (British and foreign). Of this, £140m (i.e., 2.5%) was staked via the internet. Section 26 Notice response by William Hill dated 26 October 2001, question 5.

193 One estimate is that, in 2001, all gambling (i.e., not just on horse racing) via the internet, iDTV and mobile phones (in total) made up 2 - 3% of UK gambling. *Gambling Review Report*, Cm 5206 (July 2001), paragraph 12.14. Accordingly, the Applicants' share will be just a small proportion of this 2 - 3% share. See also paragraph 7 of Annex 3, which stated that 2% of betting turnover on horseracing was staked via the Internet.

194 *Assessment of Market Power*, OFT Guideline 415, paragraph 3.3.

competition will prevent undertakings within the market from persistently raising prices above competitive levels.'[195]

188. Accordingly, the OFT has considered the entry barriers facing a new racecourse i.e., a potential competing supplier of the Non-LBO Bookmaking Rights.

1. Jockey Club licence

189. The Jockey Club and the BHB regulate horseracing in Britain. The Jockey Club licenses those involved with racing, including racecourses. All 59 British racecourses are currently licensed by the Jockey Club. The OFT considers that a new racecourse would wish to obtain a Jockey Club licence for two reasons.

190. First, without a Jockey Club licence the racecourse could only hold unrecognised race meetings (a practice known as 'flapping').[196] Flapping is perceived as having poor integrity in comparison with 'recognised meetings' (i.e., those held under the aegis of the BHB and the Jockey Club). This perceived lack of integrity will reduce an unlicensed racecourse's income (particularly from bookmakers). The BHB and the Jockey Club have stated to the OFT that '*the stigma of engaging in "flapping" is, in itself, a deterrent*.'[197] Further, the BHB has stated that '*an individual race only has value to the extent that it is run under the … Orders and Rules of British Racing, with all the integrity and prestige that implies*.'[198]

191. Second, owners, trainers, riders and officials involved with an unrecognised race meeting can be disqualified by the Jockey Club for up to twelve months.[199] Whilst disqualified, such individuals will be unable to have any connection with recognised racing.[200] Any horses running at an unrecognised meeting can never run in any recognised meeting.[201] As a result, an unlicensed racecourse will face difficulties in attracting participants. Arena stated that the Rules disqualifying

---

195 *ibid.*, paragraph 5.1.

196 Rule 81 states that an unlicensed racecourse cannot hold an '*authorised race meeting*.' The OFT assumes than an authorised meeting is the same as a recognised meeting. Rule 81 thus implies that an unlicensed racecourse can only hold unrecognised race meetings. *The Orders and Rules of Racing (2002)*, BHB and the Jockey Club

197 Extract from British Horseracing Board and the Jockey Club joint submission on the Orders and Rules, 23 August 2002, volume I, page 39. This statement was made in the context of a separate investigation.

198 BHB Submission, Volume I, paragraph 143(2).

199 Rule 204(ii), *The Orders and Rules of Racing (2002)*, BHB and the Jockey Club. The Jockey Club can grant exemptions from the effects of this Rule.

200 Rules 205 and 220(iv), *The Orders and Rules of Racing (2002)*, BHB and the Jockey Club.

201 Rule 181(i), *The Orders and Rules of Racing (2002)*, the BHB and the Jockey Club.

participants in unrecognised racing '[act] *as a disincentive to offer such races and we presently have no plans to hold unlicensed races*.'[202]

192. The OFT therefore considers that a new racecourse would wish to be licensed by the Jockey Club.[203] A licensed racecourse can only hold races on days when it has been allocated fixtures by the BHB.[204] As a result, every applicant for a licence for a new racecourse requires fixtures from the BHB, and invariably will require a substantial number to justify the investment.

2. Barriers to new racecourses

193. The BHB invited applicants who wanted fixtures for new racecourses to submit applications to it by 31 August 1998. These applicants had to meet various '*minimum requirements*' set by the BHB.[205] There were eight applicants.[206] In April 2000, the BHB decided '*in principle*' to grant fixtures to two of the applicants from 2002. The two successful applicants were London City racecourse at Fairlop Waters and a racecourse at Pembrey in Wales.[207] In their Form N, the Applicants stated that '*two new racecourses (Pembrey and Thurrock) are scheduled to start race meetings within the next two years*' i.e., by the end of 2003.[208] The OFT considers that '*Thurrock*' is a reference to the

---

202 Section 26 Notice response by Arena dated 9 October 2002, question 30.

203 The OFT notes that the Court of Appeal reached the same conclusion in 1993. It held that while the Jockey Club '*cannot … impose contractual conditions* [such as the Rules of Racing] *on those who do not seek any licence or permit from it … the club's sanction here lies … in its domination of the market. While unrecognised meetings do occur in some parts of the country, they are insignificant. No serious racecourse management, owner, trainer or jockey can survive without the recognition or licence of the Jockey Club … Thus … the Jockey Club can effectively control not only those who agree to abide by its rules but also those … who do not. For practical purposes the Jockey Club's writ runs in the British racing world …*' This case predates the creation of the BHB. *R. v. Jockey Club, Ex parte Aga Khan* [1993] 1 WLR 909 at page 915.

204 Order 1(i)(a) grants the BHB Directors the power to '*to fix the dates on which all* [race] *meetings will be held …*' Inter alia, a '*recognised meeting*' has to be granted a fixture by the BHB (definitions, page 93). Thus a meeting which has not been granted a fixture by the BHB is unrecognised, and those involved with it can be disqualified as described in paragraph 191. *The Orders and Rules of Racing (2002)*, BHB and the Jockey Club.

205 For example, new applicants must add an amount to prize money at least in line with that added by existing racecourses. They must also add to the net income of British horseracing industry. *Guidelines for the Development of New Racecourses*, BHB, September 1998, paragraphs 1, 2(iii). See also paragraph 2(c), (e) of the subsequent version of these BHB guidelines (attached to e-mail from BHB to the OFT dated 6 February 2003).

206 *BHB Confirms Board Will Consider Eight Applications For New Racecourses*, BHB press release dated 9 September 1998 available from the BHB website: www.britishhorseracing.com/inside_horseracing

207 *Prospect Of First New Racecourses In Great Britain For 75 Years*, BHB press release dated 3 April 2000 available the BHB website: www.britishhorseracing.com/inside_horseracing

208 Form N, page 106.

London City racecourse.[209] The opening of both these racecourses has been delayed (e.g., London City racecourse was refused planning permission). It is currently uncertain when either will open.

194. The OFT considers that these difficulties demonstrate the existence of considerable entry barriers for new racecourses. Of the eight applications made to BHB in 1998, none has yet entered the market.[210] This reflects difficulties in obtaining both planning permission and BHB fixtures.[211] Indeed, there has been no new racecourse in the UK since 1927.[212] Further, racecourses are large, expensive facilities: the estimated development costs of the London City racecourse were £100m.[213] Accordingly, the OFT considers that the threat of new entry will not constrain the behaviour of the Courses.[214]

3. Barriers to output expansion

195. If a racecourse wished to expand its output,[215] in principle it could (i) hold more fixtures; and/or (ii) hold more races per fixture. In practice, a racecourse cannot decide unilaterally to hold an additional fixture. As explained in paragraph 192, fixtures are currently allocated by the BHB. Accordingly, absent permission from

---

209 A new course near Thurrock in Essex was one of the eight applications submitted to BHB in August 1998. However, it '*came to nothing …*' *No shortage of suitors in the queue to build Britain's next track*, Racing Post, 6 February 2002.

210 Indeed in November 2002 the BHB re-opened the application process, setting a deadline for expressions of interest after which no further applications would be considered in 2002-2003 (Source: *Evaluation of new racecourse fixture applications is underway*, BHB press release, 19 February 2003). In June 2003 the BHB approved a new racecourse at Great Leighs (Source: *Great Leighs given go-ahead*, BHB press release, 24 June 2003. Both these press release are available at the BHB website: www.britishhorseracing.com/inside_horseracing). This racecourse has not yet opened.

211 Further, a new racecourse may well have to acquire fixtures from existing racecourses (including the Courses). 'The BHB expects that to a material degree investors seeking fixtures for any new racecourse will have to acquire them from other racecourses …' Guidelines for the Development of New Racecourses, BHB, September 1998, paragraph 4. An identical statement is at paragraph 3 of the subsequent version of these BHB guidelines (attached to e-mail from BHB to the OFT dated 6 February 2003).

212 *Prospect Of First New Racecourses In Great Britain For 75 Years*, BHB press release dated 3 April 2000 available the BHB website: www.britishhorseracing.com/inside_horseracing

213 No shortage of suitors in the queue to build Britain's next track, Racing Post, 6 February 2002.

214 Even if new entry did occur the Courses' market share will remain extremely high. As calculated in paragraph 442 below, even if a new entrant had 60 fixtures it would only reduce the Courses' market share by approximately 5% (i.e., from approximately 90% to 85%). The OFT's conclusions on appreciability would be unaltered.

215 Other BHB Orders affect racecourses' incentives to expand output. For example, Order 90(iii)(b) allows the BHB to set minimum prize monies. Arena has stated that imposing such minimum values '*restricts our ability to run as many races as we would perhaps like* …' Section 26 Notice response by Arena dated 9 October 2002, question 20.

the BHB, a racecourse cannot hold additional fixtures in response to demand. Similarly, BHB and the Jockey Club set a maximum number of races per fixture (although this limit is not reached at all fixtures).[216] There are also constraints on the timing of races, which generally prevent different British racecourses holding races simultaneously.[217] Accordingly, there are significant barriers to racecourses expanding their output of Non-LBO Bookmaking Rights.[218]

III. BUYER POWER FOR THE NON-LBO BOOKMAKING RIGHTS

196. The OFT recognises that '*buyer power may offset the potential market power of … seller*[s] *…*'[219] Buyer power requires, inter alia, that '*a buyer should be large in relation to the relevant market …*'[220]

1. Evidence and analysis from the Rule 14 Notice

197. The Applicants stated that

> '… there was effective actual competition from Carlton and also (at a later stage) from GG Media, to whom a number of British racecourses (10 in all) have decided to sell their media rights in preference to Attheraces … There was also potential competition from other broadcasters, rights brokers and others who could have bid for the Rights … Indeed, SIS made a bid in Summer 2000 and TVG, an American company that provides interactive TV betting on horseraces in the US, stated that it was thinking about bidding for the Rights, although it did not, in fact, do so.'[221]

198. Since there were several credible potential buyers of Non-LBO Bookmaking Rights, in the Rule 14 Notice the OFT concluded that any one of those individual buyers was in a relatively weak position in relation to the Courses.

---

[216] Orders 91(iv)(d)3, 92(v)(d)1 and 93, *The Orders and Rules of Racing (2002)*, BHB and the Jockey Club. The BHB can grant exemptions from these Orders.

[217] For example, on afternoons or evenings when there are three fixtures, wherever possible there should be an interval of 10 minutes between all races occurring that afternoon/evening. BHB General Instruction 2.8(3). See also BHB General Instructions 2.8(4), 2.10(3).

[218] The OFT has issued a Rule 14 notice to the BHB and the Jockey Club in which it states that various Orders and Rules, including those referred to in this paragraph, infringe the Chapter I prohibition and do not meet the exemption criteria set out in section 9 of the Act.

[219] *Assessment of Market Power*, OFT Guideline 415, paragraph 3.3.

[220] *ibid.*, paragraph 6.1.

[221] Form N, page 106.

2. The BHB's view

199. The BHB submitted to the OFT that there may well be a high degree of buyer power.[222] First, the other bidders may not have been credible or may only have been willing to offer a much lower price than Attheraces. Second, had Attheraces made a 'take it or leave it' offer to the racecourses then it is likely that the Notified Arrangement would not have been agreed, thereby causing both sides to lose out. Third, the racecourses are an '*uneasy*' coalition.[223] The BHB considers that the RCA might concede a lower price, rather than risk the possibility that some courses might break away. Fourth, Arena controls racecourses and is also a parent of the bidder (Attheraces).[224]

200. This view was not expressly supported by the Applicants or the RCA.

3. The OFT's finding

201. The OFT does not accept that all buyers other than Attheraces lacked credibility. BHB's speculation about the credibility of buyers is unsupported by evidence and appears to be at odds with the Applicants' statement quoted in paragraph 197.[225] The Applicants' statement is supported by contemporary documents[226] and the fact that GG Media successfully bid for certain racecourses rights.

202. The BHB stated that, if a bid is not agreeable to the whole of the RCA, certain courses may break away, and thus (to avoid this threat) the RCA will concede a lower price. This is not logically consistent, as a lower price is even less likely to be agreeable. As explained in paragraphs 304-305, collective selling increased the total price of the Non-LBO Bookmaking Rights. Providing a racecourses' share of this higher price is greater than the amount it could obtain by selling individually, that racecourse has no incentive to break away i.e., collective selling is stable. The threat of courses breaking away only constrains the distribution of the proceeds from collective selling.

203. The BHB also implied that because Arena is both a bidder and a seller, this may give Attheraces an advantage over other bidders due to its 'toehold'. The BHB

---

222 BHB Submission, Volume I, paragraph 143(7)(b)(ii).

223 BHB Submission, Volume I, paragraph 143(8)(c).

224 BHB Submission, Volume I, paragraph 143(8)(c).

225 Indeed, the BHB appears to have little knowledge of the process by which the Courses' Rights were sold. BHB Transcript, Mr Elliott, page 72, line 39 – page 73, line 2 refers to BHB '*know*[ing] *there was some form of tender but mostly, as we understand it, it was a discussion* ...'

226 For example, RCA advice to racecourses regarding the Attheraces and Carlton offers stated that '[t]*hese are both very serious proposals* ...' *Advice re Go Racing and Carlton Offers*, RCA note dated 8 November 2000, page 2. This note was provided in Cartmel section 26 notice response dated 14 December 2001.

referred to the MMC report on a proposed merger between BSkyB and Manchester United football club.[227] However, the BHB has provided no evidence or factual reasoning to demonstrate why this case is relevant.

204. Further, buyer power must be assessed relative to the seller power of the Courses. As explained in paragraphs 182 and 189-195 the Courses have a very high market share and there are significant barriers to entry and output expansion i.e., sellers' market power is strong.

205. The OFT considers that there is insufficient buyer power to offset the market power possessed by the Courses.

IV RCA REPRESENTATIONS ON MARKET POSITION

206. The RCA made no representations on the issues analysed in this Part.

V THE OFT'S CONCLUSION

207. The OFT considers that the Courses collectively hold market power in the market for the supply of Non-LBO Bookmaking Rights. Accordingly, the Notified Arrangement is capable of having an appreciable effect on competition in that relevant market, sufficient for the Chapter I prohibition to be applicable. In the next Part the OFT sets out the evidence and analysis that demonstrate that such an effect exists.

[227] *British Sky Broadcasting Group plc and Manchester United PLC: a report on the proposed merger*, Cm 4305 (April 1999).

PART FIVE THE PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION WITHIN THE UK

208. The Chapter I prohibition forbids agreements between undertakings, decisions by associations of undertakings or concerted practices which (i) may affect trade within the United Kingdom and (ii) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom, unless they are exempt.[228]

209. The 49 Courses have sold their rights by means of the Rights Agreement, which they have each signed. The OFT considers that:

(i) the Courses are undertakings;

(ii) they have participated in an agreement and/or concerted practice within the meaning of the Chapter I prohibition to collectively sell their Non-LBO Bookmaking Rights;

and that such an agreement and/or concerted practice does not fall outside the scope of section 2 of the Act either:

(iii) because it involves rights to sporting events or it promotes a legitimate objective; or

(iv) because it was necessary to form a new product or service.

The OFT considers that such an agreement and/or concerted practice:

(v) may or may not have had the object of preventing, restricting or distorting competition (the OFT does not reach a conclusion on this point); however it

(vi) had the effect of preventing, restricting or distorting competition; and

(vii) may affect trade within the UK.

These points are considered in turn in the following sections. Exemption is considered in Part 6.

[228] Section 2 of the Act.

I. UNDERTAKINGS

210. The European Court of Justice has stated that '*the concept of an undertaking encompasses every entity engaged in economic activity* ...'[229] The Courses are undertakings because they are engaged in economic activity, including the licensing of their Rights. This is not disputed by the Applicants.[230]

II. AGREEMENT AND/OR CONCERTED PRACTICE

211. Collective conduct is likely to constitute an agreement, a decision of an association of undertakings, and/or a concerted practice within the meaning of the Chapter I prohibition. The European Commission has held that an agreement exists within the meaning of Article 81 of the EC Treaty ('Article 81')

> 'if the parties reach a consensus on a plan which limits or is likely to limit their commercial freedom by determining the lines of their mutual action or abstention from action in the market.'[231]

212. In *Suiker Unie v Commission,* the European Court of Justice held (with regard to concerted practices) that EC competition law precluded:

> 'any direct or indirect contact between ... operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor, or to disclose to such competitor the course of conduct which they themselves have decided to adopt or contemplated adopting on the market.'[232]

213. Further, the Court of First Instance has stated (with regard to agreements) that '*it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way.*'[233]

214. The boundary between the concepts of 'an agreement' and 'a concerted practice' is not precise. It is not necessary for the OFT to determine whether an arrangement is one or the other; a dual classification is sufficient.[234]

---

[229] Case C-41/90 *Höfner and Elser v Macrotron GmbH* [1991] ECR I-1979, [1993] 4 CMLR 306, paragraph 21.

[230] The BHB had no view. BHB Transcript, Mr Vaughan QC, page 25, lines 28-32.

[231] *Polypropylene* OJ 1986 L230/1, [1988] 4 CMLR 347, paragraph 81.

[232] Cases 40/73, etc *Coöperatieve Vereniging 'Suiker Unie' UA and others v Commission* [1975] ECR 1663, [1976] 1 CMLR 295, paragraph 174.

[233] Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, [1992] 4 CMLR 84, paragraph 256.

1. Evidence that the Courses sold their rights collectively

215. The OFT is satisfied that the 49 Courses' conclusion of the Rights Agreement, negotiated on their behalf by the RCA, amounts to an agreement and/or concerted practice between those Courses within the meaning of the Chapter I prohibition, for the following reasons.

1.1 Execution of a single agreement

216. The concluding pages of the Rights Agreement dated 11 May 2001 (conformed copy dated 25 June 2001 provided to the OFT) are signature pages setting out the names of all the Courses executing the Rights Agreement. Each Course would therefore have seen the names of all the other Courses listed when signing the Rights Agreement.

217. When signing, each Course knew that every other Course signing would be committing itself to adopt identical conduct with regard to the disposition of its rights for the duration of the Rights Agreement. In signing the Rights Agreement, having a clear indication that the other Courses named in the agreement were also intending to sign it, the Courses effectively expressed their joint intention to conduct themselves on the market in a specific way.

1.2 Licence fee distribution formula

218. Schedule 14 to the Rights Agreement sets out the 'Course Distribution Formula', defined as the formula determined by the RCA and the Courses for the distribution between the Courses of any monies payable by Attheraces to the RCA as agent for the Courses pursuant to the Rights Agreement. This formula may be varied or replaced by the RCA (as agent for, and by agreement with, the Courses) (Clause 1.1). According to Schedule 14, the Formula provided is to be reviewed every two years, but shall not be amended without the consent of 90% of the Courses.

219. The RCA's solicitors confirmed that the Courses had discussed the Distribution Formula among themselves via the agency of a Distribution Group.[235] This was an informal discussion group formed to discuss the issue and make suggestions to the courses concerning the Distribution Formula. It was chaired by John Sanderson (Vice Chairman of the RCA) and included Stephen Atkin (Chief Executive of the RCA), Andrew Gould (Racecourse Holdings Trust ('RHT')), Ian Penrose (Arena), Stephen Jones (Northern), Tim Hale (Exeter), Clive Buckle

---

[234] See Cases T-305/94 etc *NV Limburgse Vinyl Maatschappij v Commission* [1999] ECR II-931, [1999] 5 CMLR 303, paragraphs 695-699; Case C-49/92P *Commission v ANIC* [1999] ECR I-4125, [2001] 4 CMLR 602, paragraphs 132-133; Case T-62/98 *Volksvagen AG v Commission* [2000] ECR I-2707, [2000] 5 CMLR 853, paragraph 237.

[235] E-mail from Denton Wilde Sapte to the OFT dated 20 November 2002.

(Leicester) and Douglas Erskine Crumb (Ascot). Leicester and Exeter racecourses both subsequently decided not to license their rights to Attheraces.

220. This shows that there was considerable discussion among the Courses concerning such issues as pricing and fund distribution before the execution of the Rights Agreement.

221. The Distribution Formula ensures price transparency between the Courses and eliminates price competition between them. It provides that the monies paid by Attheraces to the RCA are to be shared amongst the Courses. No such formula could be devised or implemented without the express horizontal agreement of the Courses.

222. The fact that any amendment to the formula requires the consent of 90% of the Courses reinforces the point that the Courses are limiting their commercial freedom by agreement and through mutual action with respect to the sale of Rights on the relevant market.

1.3 The Courses have entered into an agreement negotiated on their behalf by the RCA

223. The RCA is the Courses' trade association, owned and controlled by the 59 UK courses, that seeks to further their collective interests. Each course was aware that the RCA was acting in this way in negotiating the Rights Agreement, even though it was not bound to accept the outcome. The Rights Agreement was conditional on acceptance by a sufficient number of courses (i.e., courses accounting for not less than 70% of the total annual UK off-course betting revenue) (Clause 2.2.2(ii)).

224. There was therefore considerable contact between the Courses (at the least indirect, via the RCA, if not direct) in seeking to determine their future conduct in licensing their rights, especially given that the Rights Agreement could not have been implemented unless the conditional criteria regarding acceptances had been met. This required knowledge between the Courses of each others' conduct and participation in the Rights Agreement. The OFT therefore infers that there was contact between the Courses.

1.4 Purpose of realising 'full value'

225. The Applicants stated to the OFT that one reason for the centrally negotiated agreement was to realise the '*full value*' of their Rights (Form N, page 105, paragraph 2).

226. The fact that the Applicants consider that the value realised in collectively selling the rights to Attheraces was greater than might have been achieved through

individual sale indicates that there was horizontal co-ordination between the courses, via the agency of the RCA, and that this co-ordination raised prices.

227. The RCA modified this position in the RCA Representations, stating that, rather than the collective sale being for the purpose of realising the '*full value*' of the rights, it was necessary to derive any value from their rights i.e., to conclude an agreement.[236] This argument is assessed at paragraphs 254-255, 259-262 and 394-404 below.

1.5 Solidarity

228. The Applicants referred to the '*principle of solidarity'*, by which financially stronger sporting participants support weaker ones. According to the Applicants, the European Commission has invoked this principle in support of collective sales of sports rights (Form N, page 105, paragraph 2).[237]

229. As the Applicants have referred to such '*solidarity*', the OFT considers that this implies collective action sufficient to fall within the Chapter I prohibition exists.

2. The Applicants', the RCA's, the BHB's and RHT's view

230. The Applicants denied that there was any agreement or arrangement amongst the Courses relating to the sale of their rights to Attheraces (Form N, page 50).

231. The RCA Representations were silent on this issue, and instead argued that collective negotiation was indispensable to the formation of the Notified Arrangement (see paragraphs 254-255 and 394-396), which the OFT considers implicitly accepts that there was collective selling. Further, the RCA's analysis relied on Courses discussing and agreeing relative prices between themselves.[238] Such discussions would constitute an agreement and/or concerted practice.

232. The BHB's Submission appeared predicated on the fact of collective selling,[239] although it stated to the OFT that it had no view as to whether or not there was agreement or concertation between the Courses.[240]

---

[236] RCA Representations, paragraph 1.1.5.

[237] See *Broadcasting of Sports Events and Competition Law*, A-M Wachtmeister, (1998) 2 EC Competition Policy Newsletter 18, section titled 'Collective selling', paragraph 8. Solidarity is analysed further at paragraphs 379-390.

[238] The RCA stated that, in a collectively negotiated deal, powerful racecourse groups '*... through the RCA, directly agree on the appropriate split of the upstream profits between themselves* ...' i.e., they directly agree on relative prices. As a result, the RCA considered that co-ordination problems are avoided and thus the Courses are more likely to sell their Rights. The RBB Report, pages 18-19.

[239] See, for example, BHB submission, volume 1, paragraphs 69, 95-136, 143(8)(b).

[240] BHB Transcript, Mr Vaughan QC, page 26, line 22.

233. Racecourse group RHT disputed that the Courses acted collectively in an unlawful manner for two reasons.[241] First, individual racecourses could choose how to license their rights, including whether or not to sign the Rights Agreement.[242] Second, '*the conduct of the courses was reactive to the bids, not proactive* … [S]*uch discussion as took place between the courses was only as a result of bidders having chosen to make … offers to all the courses in a manner that required them to co-ordinate a joint response*.'[243]

3. The OFT's conclusion on agreement or concertation between the Courses

234. Even if there was no binding horizontal agreement between the Courses compelling them to sell collectively, this does not exclude agreement or concertation between those deciding to execute the Rights Agreement sufficient to bring their behaviour within the Chapter I prohibition.[244]

235. Even if, as RHT claimed, the Courses were simply reacting to the structure of the bids made, this is not relevant to the question of whether a horizontal agreement and/or concerted practice exists between the Courses. Indeed the RHT referred to the courses '*co-ordinat*[ing] *a joint response*'[245] and stated that without '*a co-ordinated response … the rights that the bidders would have acquired through an individual sale would have … been valueless …*'[246] This supports the OFT's evidence in paragraphs 215-229. Further, racecourses discussed previous bids for their Rights between themselves (see paragraphs 408-415). As explained in paragraph 418-419 this can influence bidders' subsequent behaviour. In such an environment, the structure of bids is unlikely to be relevant.

236. The 49 Courses that proceeded to sign the Rights Agreement operated through their association, the RCA, with full knowledge of each others' conduct, terms and conditions, the price at which the collective Rights would be sold and the respective apportionment of this payment between the participating Courses.

---

241 Witness statement of R Johnston dated 9 October 2003, paragraph 11.1.

242 *ibid.*, paragraphs 11.2, 11.3.4, 11.3.5.2, 11.4.2.

243 *ibid.,* paragraph 11.3.5. See also 11.1-11.2.

244 The ability of Courses to decide whether or not to enter into the Rights Agreement (referred to in Form N, page 104 and witness statement of R Johnston dated 9 October 2003, paragraphs 11.2, 11.3.4, 11.3.5.2, 11.4.2) does not mitigate the anticompetitive effects of collective selling. Self-interest, for example the likelihood of receiving a higher price for their rights by virtue of collective selling, means Courses are unlikely to decline to enter into the Rights Agreement. The choice of ten courses instead to sell their rights to GG Media probably reflects their dissatisfaction with their anticipated share of the revenue from Attheraces, rather than with the total amount paid for the Rights (see paragraphs 385-387).

245 Witness statement of R. Johnston dated 9 October 2003, paragraph 11.3.5.

246 *ibid.*, paragraph 11.5.1.

237. Accordingly, for the reasons given at paragraphs 215-229, the OFT is satisfied that the conclusion by the Courses of the Rights Agreement negotiated on their behalf by the RCA constitutes an agreement and/or concerted practice between the signatory Courses within the meaning of the Chapter I prohibition.

III. THE SCOPE OF SECTION 2 OF THE ACT AND COLLECTIVE SELLING OF SPORTS RIGHTS

238. The BHB submitted to the OFT that collective selling by the Courses could not fall within section 2 of the Act because (i) it takes place in a sporting context; and (ii) even if it adversely affects competition, it promotes legitimate objectives. The OFT considers these arguments in turn.

1. Sporting rules and rules which maximise the revenue of participants in the sport

1.1 The BHB's submission

239. The BHB submitted to the OFT that sporting rules are outside the scope of the Chapter I prohibition.[247] In addition, it claimed that such rules do not just include the rules of the sport or game itself and how it is conducted but also include '*rules designed to improve the financial … position of all participants and to encourage participation*' and '*rules designed to maximise the revenue of the sport and its distribution amongst those who participate in the sport*.'[248]

240. Accordingly, the BHB claimed that collective selling by the Courses does not fall within section 2 of the Act, regardless of any effect it may have on the price realised.[249] The RCA did not expressly support the BHB's argument.[250]

1.2 The OFT's finding

241. The OFT considers that there is no broad category of agreements between undertakings in the sporting sector that is, in principle, not subject to the Act. Subject to section 3 of the Act,[251] (within which Attheraces' collective sale does

---

247 BHB Submission, Volume I, paragraphs 110-118.

248 BHB Submission, Volume I, paragraph 115, points (7) and (11). The BHB considered that other examples of sporting rules include rules (i) restricting nationality in national teams; (ii) imposing transfer deadlines; (iii) relating to the territorial or geographic organisation of a sport; (iv) encouraging uncertainty of results; (v) improving and maintaining the quality of the sport and its participants and their health; (vi) providing for numbers of teams and selection for events; (vii) regarding financing and ownership; and (viii) anti-doping rules.

249 Letter from Addleshaw Goddard to the OFT, 13 October 2003, 'paragraph 4'.

250 Indeed, this appears to be one of the arguments suggested by that the BHB that the RCA chose not to include in its representations. BHB Submission, Volume I, paragraph 69.

251 Section 3 excludes certain specified agreements from the Chapter I prohibition.

not fall), whether an agreement falls within the scope of section 2 must always be assessed by reference to its effects on competition, unless it has as its object the prevention, restriction or distortion of competition.

242. The BHB's claim[252] that the raising of finance by racing entities is outside the scope of section 2 amounts to excluding the commercial activities of racecourses from the Act altogether. The OFT does not accept this. EC precedent shows that the collective sale of media rights in the sports sector falls within the scope of Article 81, and must be assessed accordingly.[253]

243. Accordingly (and contrary to the BHB's claims in paragraph 239), the OFT does not consider that an agreement may fall outside the scope of the Act simply because it is designed to '*maximise*', or does '*maximise*', the revenue of undertakings participating in a sport.

244. However, the OFT considers in the following section whether the Notified Arrangement may fall outside the scope of section 2 as a result of the fact that it, including the revenue generated by it, is necessary for the promotion of certain legitimate objectives in the sporting sector.

2. Promotion of legitimate objective

2.1 The BHB's view

245. The BHB submitted to the OFT that the Notified Arrangement:

'(1) ... [is] important for the financing of British Racing and the attainment of its distinctive qualities ... (integrity, fairness, solidarity, competitive balance etc);'

(2) enable[s] the RCA (and its members) ... to exercise countervailing powers [sic] against the strong position of the broadcasters, other media and bookmakers. This benefits all those involved in British Racing, such as breeders, trainers, owners, jockeys and the public (in their capacity as racegoers and viewers, whether or not they bet);

(3) add[s] cohesion and solidarity to those involved in British Racing through collective financing, and secure[s] their collective interests though [sic]

---

252 Letter from Addleshaw Goddard to the OFT, 13 October 2003, 'paragraph 4'.

253 See, for example, Case C-415/93 *Union Royale Belge des Sociétés de Football Association and others v Bosman* [1995] ECR I-4921, [1996] 1 CMLR 645, [1996] All ER (EC) 97; *UEFA Champions League* (see footnote 32 above); *Joint selling of the media rights to the German Bundesliga* OJ 2003 C261/13; Press release IP/03/1748 *Commission reaches provisional agreement with FA Premier League and BSkyB over football rights*.

equitable distribution of the proceeds not only to the racecourses concerned but also to the benefit of British Racing generally …;

(4) allow[s] the relevant bodies to deal on a centralised basis with the need to finance British Racing …'[254]

2.2 The OFT's finding

246. In certain cases in which an agreement has generated negative effects on competition, the European Court has taken into account in the framework of Article 81(1) the fact that the agreement was necessary for the promotion of a legitimate objective.[255] The OFT has therefore considered the extent to which the promotion of certain sporting benefits may be taken into consideration in the framework of section 2.[256]

247. The OFT considers that, if an agreement relating to sport causes an appreciable restriction on competition, it may fall outside the scope of section 2 on the basis that it promotes sporting objectives only if it is indispensable for attaining legitimate objectives deriving from the inherent nature of a sport.[257] This possibility is based on, and limited by, the distinctive characteristics of sport, in particular the necessary interdependence between sporting rivals, and the need to ensure uncertainty of the result of a sporting competition.[258]

248. However, the OFT considers that the Notified Arrangement does not contribute to the benefits specified by the BHB and listed in paragraph 245, or that, even if it did, the restrictions contained within it go beyond what is necessary to achieve them. In relation to points (3) and (4), the OFT's reasoning is set out in the

---

254 BHB Submission, paragraph 100.

255 Such legitimate objectives have tended to relate to or flow from the nature of the product and/or the structure of the market. See, for example: Case 26/76 *Metro v Commission (No1)* [1977] ECR 1875, [1978] 2 CMLR 1, paragraphs 20-22 ('*Metro (No1)*'); Case C-250/92 *Gøttrup Klim v Dansk Landbrugs Grovvareselskab AmbA* [1994] ECR I-5641, [1996] 4 CMLR 191, paragraphs 31-36.

256 In doing so, the OFT has taken account of its obligations under section 60 of the Act to ensure (so far as possible) consistency with Community law (see further paragraph 80). The OFT has also considered the '*Declaration on Sport*' annexed to the Treaty of Amsterdam (OJ 1997 C340), available at: http://europa.eu.int/eur-lex/en/treaties/dat/amsterdam.html#0136040046 and the '*Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies*', annexed to the conclusions of the Presidency European Council in Nice in December 2000, available at http://europa.eu.int/comm/sport/doc/ecom/decl_nice_2000_en.pdf

257 See the Opinion of Advocate General Cosmas in joined cases C-51/96 and C-191/97 *Christelle Deliège* [2000] ECR I-2549, paragraphs 110-112.

258 Which may require some financial redistribution between sporting rivals.

context of its assessment of whether the criteria specified in section 9 of the Act are fulfilled.

249. With regard to point (1), the OFT considers that the Courses would have sold their Non-LBO Bookmaking Rights absent collective selling (see further paragraphs 397-404) i.e., collective selling is not necessary or indispensable to ensuring that the sport of horseracing receives an income. As explained in paragraph 333, the Notified Arrangement actually reduces incentives for the Courses to improve the quality of their output. As explained in paragraph 391, the BHB claimed that racecourses' activities can affect other racecourses and that these effects do not take place in a market context (economists refer to such effects as 'externalities'). For example, large racecourses hold prestigious events, which are said to promote the sport as a whole and therefore benefit all racecourses. However, even if such effects exist, the OFT finds that the Notified Arrangement does not correct them (see paragraphs 392-393). Accordingly, there is no basis for BHB claiming that the Notified Arrangement enhances the distinctive characteristics of horseracing.

250. Regarding point (2), the OFT does not accept that buyers were in a '*strong position*', contrary to the BHB's claims (see paragraphs 197-198 and 201-205). Even if the BHB was correct, the OFT does not accept that it would be necessary for 90% of the racecourses to sell collectively in order to counterbalance buyer power.

251. Further, when considering whether an agreement which generates negative effects on the competitive process may fall outside the scope of Article 81(1) on the basis that it is necessary for the promotion of a legitimate objective, the European Court of Justice has stressed the need for the existence on the relevant market of workable competition[259] and the need to ensure that the operation of the relevant agreement does not render the relevant market excessively rigid[260] or significantly increase barriers to entry or expansion.[261] It follows from this case law that, if an agreement is inconsistent with workable competition, renders the relevant market excessively rigid or significantly increases barriers to entry or expansion, then the agreement will be caught by Article 81(1) even if it promotes

---

[259] See, *Metro (No1)*, paragraph 20.

[260] See Case C-399/93 *Oude Luttikhuis v Coberco* [1995] ECR I-4515, [1996] 5 CMLR 178, paragraph 16. See also the comments of Advocate General Tesauro, at paragraphs 17-18 of his Opinion in *Gøttrup Klim* (see footnote 255 above), and paragraphs 30-36 of his Opinion in *Luttikhuis*.

[261] Where the specific agreement under consideration makes a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context - Case C-234/89 *Delimitis v Henninger Bräu AG* [1991] ECR I-935, [1992] 5 CMLR 210, paragraphs 13-27.

legitimate benefits. In such circumstances, any legitimate benefits promoted by the agreement may be considered only in the framework of Article 81(3).

252. The OFT considers that the same approach is appropriate under sections 2 and 4 of the Act, namely that, if the operation of the relevant market in which an agreement operates is inconsistent with the concept of workable competition, any legitimate benefits promoted by the Notified Arrangement may be considered only under section 4.

253. The Courses have a market share of approximately 90% and are shielded by barriers to entry and barriers to output expansion (see paragraphs 185-195). By eliminating all competition between the Courses in the sale of their Non-LBO Bookmaking Rights, the collective sale is not compatible with the concept of 'workable competition.' See the analysis at paragraph 441-445.

IV. HORIZONTAL CO-OPERATION NECESSARY TO CREATE A NEW PRODUCT CANNOT RESTRICT COMPETITION?

1. The RCA's view

254. In their Form N, the Applicants (including the RCA) denied the existence of any collective sale.[262] Similarly, in March 2003 (i.e., prior to the Rule 14 Notice being issued), the RCA told the OFT that it did not accept that the Courses had jointly sold their rights.[263] In contrast, in the RCA Representations the RCA instead claimed that collective selling occurred but was necessary. While the OFT has examined this claim on its merits, the OFT notes that this shift in the RCA's position arguably gives the appearance that it was devised only in response to the Rule 14 Notice.[264]

255. The RCA Representations stated that an interactive racing channel (such as the Channel) and internet bookmakers require a critical mass of racing i.e., they

---

[262] For example, the Applicants stated that '*There is no agreement or arrangement between members of the RCA which requires them to sell their media rights … collectively. All British racecourses … have been free to negotiate and to sell their rights on an individual basis … and to decide whether to enter into the Rights Agreement*.' Form N, page 104.

[263] RCA briefing paper dated 4 March 2003, paragraph 1.3.4(a).

[264] The RCA argued that collective sale is indispensable because of 'opportunistic' behaviour by racecourses (see paragraphs 394-396). In December 2001 the OFT sent section 26 notices to all 59 racecourses asking '*How easy would it be for course owners to market their audio-visual rights individually? What are the benefits of BHB/RCA doing this for you?*' At that time (i.e., before the Rule 14 Notice was issued), no racecourse referred to opportunistic behaviour in its response. The OFT notes that in *NAPP Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1, [2002] CompAR 13, at paragraph 254, the CAT criticised ideas that '[flow] *not from any internal documents … but from the work done by … economic advisers for the purposes of the present case*.'

require a minimum amount of racing coverage to be commercially viable.[265] The RCA argued that collective negotiation was the only way to create a package of rights sufficient to meet buyers' demands for a certain critical mass.[266] Accordingly, it claimed that collective negotiation cannot be restrictive of competition.[267]

2. The BHB's view

256. The BHB also appeared to consider that cooperation between the Courses was indispensable, stating to the OFT that:

> '... the proposition that the public interest is best served by unrestrained competition in a completely free market environment simply *does not apply* in the sports sector ... Certain forms of coordination between competitors and other stakeholders are necessary for the creation of the sporting "product". The strength of the sport itself, and the interest and excitement of the sporting product for the public and other interested parties, derive from precisely the collective efforts and solidarity of its individual constituents. No single team, player or horse and no single match or race or even race meeting could create enough interest or value of itself.'[268] (Emphasis in original).

257. The BHB appeared to argue that the collective sale benefited 'British Racing', i.e. the 'whole show', and so did not restrict competition. It also appeared to argue that the collective sale created a product different from that which would be created by the assembly of a portfolio of the Courses' Rights through individual sale.[269] However, it did not clearly specify what that different product would be and the OFT considers that the BHB's reasoning remains somewhat opaque.

258. The BHB stated that the Rights have value because they relate to races that are run under the Orders and Rules of Racing, which implies '*prestige and integrity*

---

265 RCA Representations, paragraph 3.5.2.

266 RCA Representations, paragraph 3.4.9. Further, paragraph 3.4.9 states that buyers specifically structured deals as offers to all of the Courses. The RCA's arguments and evidence are set out in paragraphs 394-396, 405 and 416-417, in the context of whether the Notified Arrangement qualifies for an individual exemption

267 RCA Representations, section 3.12.

268 BHB Submission, Volume I, paragraph 108. See also paragraph 59(a), first sentence.

269 BHB Transcript, page 30, line 10 – page 34, line 10. See also page 84, line 7-page 86, line 10; BHB Submission, Volume I, paragraph 59(a), first sentence.

...'[270] The BHB considered that this implies that the quality of the product is greater when it is sold collectively.[271]

3. The OFT's finding

3.1 The OFT's finding concerning the RCA's view

259. The RCA cited examples of where the European Commission found that the horizontal cooperation between actual or potential competitors did not fall within Article 81.[272] However, the OFT considers that the cooperation that took place in the cases cited by the RCA was necessary because the specific participating undertakings had to cooperate to launch the project concerned (such as building the Channel tunnel, or forming an insurance pool able to insure the very largest risks).

260. In the examples cited by the RCA, the value created by undertakings through their cooperation was greater than if they each had supplied their output independently.[273] In contrast, the value to a buyer of the Courses' output (i.e., the Rights) is identical regardless of whether the buyer obtains that output from each Course acting independently or whether it obtains that same output from the Courses acting collectively.[274]

261. The RCA cited the European Commission's Notice entitled *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements*,[275] which states that '*co-operation between competing companies that cannot independently carry out the project or activity covered by the co-operation*' does not fall within Article 81.[276] The OFT considers paragraph 144 more relevant to this case:

---

[270] BHB Submission, Volume I, paragraphs 143(2) and 143(7)(b)(iii).

[271] BHB Submission, Volume I, paragraph 143(7)(b)(iii).

[272] *Eurotunnel* OJ 1988 L311/36, [1989] 4 CMLR 419; *P&I Clubs IGA* and *P&I Clubs Pooling Agreement* OJ 1999 L125/12, [1999] 5 CMLR 646; *Konsortium ECR 900* OJ 1990 L228/31, [1992] 4 CMLR 54; *Elopak/Metal Box-Odin* OJ 1990 L209/15, [1991] 4 CMLR 832.

[273] Value is used in this sentence to mean the worth of the output to consumers (rather than, say, the price).

[274] Although the OFT considers that the price to a buyer is higher in the case of collective selling than in the case of individual selling – see paragraphs 304-305. The BHB contested the OFT's view that the value to the buyer is not increased by collective selling. See the BHB view in paragraphs 256-258 and BHB Transcript pages 30, line 10 – page 34, line 10; page 84, line 7 – page 86, line 10.

[275] OJ 2001 C3/2 (the 'Notice on Horizontal Agreements').

[276] Notice on Horizontal Agreements, paragraph 24, referred to in RCA Representations, paragraph 3.11.1 and section 3.12.

'*5.3.1.2 Agreements that almost always fall under Article 81(1)*

The principal competition concern about a commercialisation agreement between competitors is price fixing. Agreements limited to joint selling have as a rule the object and effect of co-ordinating the pricing policy of competing manufacturers.'

262. The OFT accepts Attheraces' need for a 'critical mass' of rights (although this does not imply that the value to Attheraces of a volume of rights just falling short of this critical mass is (almost) zero). However, it finds that the collective selling by all the Courses together was not necessary to achieve this aim. See paragraphs 397-404. For example, buyers could assemble the necessary critical mass. Therefore the collective selling in this case cannot be excluded from the scope of section 2 of the Act on this ground. The OFT considers that the precedents and extracts of the Notice on Horizontal Agreements cited by the RCA do not apply on the facts of this case, and that the collective selling falls within the Chapter I prohibition.

3.2 The OFT's finding concerning the BHB's view

263. While the OFT accepts that certain forms of coordination between competitors and other stakeholders may be necessary for the creation of a sporting 'product' in certain circumstances, it does not find that such circumstances apply to this case. In particular, the BHB did not explain to the OFT how the principles it set out applied to the Courses' collective sale of their Rights, or made such collective sale necessary. Further, the OFT does not accept that collective selling of the Non-LBO Bookmaking Rights is necessary for the creation of the sporting event i.e., for the running of horseraces. Horseraces have been held in Britain for centuries, whilst the Non-LBO Bookmaking Rights have not been sold prior to the execution of the Rights Agreement. Indeed, the BHB itself has stated to the OFT that '*British Racing is a different product from that which results from the ATR* [Attheraces] *transaction and antecedent to* it.'[277]

264. Even if the value of a race to a non-LBO bookmaker is increased by the existence of other races (as claimed by the BHB), racecourses do not have to cooperate in the sale of their Non-LBO Bookmaking Rights to create that value. The horseracing calendar exists regardless of how the Courses sell these rights.[278] Similarly, even if the Orders and Rules 'brand' adds to the attractiveness of the Courses' Rights, this is not affected by the manner in which those Rights are sold. Also, the value of the brand would be taken into account in any individual negotiation for the sale of the Rights.

---

[277] Letter from Addleshaw Goddard to the OFT, 13 October 2003, 'paragraph 6'.

265. Further, BHB's arguments that a better product is created by collective selling appear to stem from its view that the Notified Arrangement corrects what it claims are '*the extensive externalities … between racecourses*.'[279] As noted in paragraphs 392-393, the OFT finds that this is not the case.[280]

266. The OFT thus finds that collective selling of the Non-LBO Bookmaking Rights is not necessary for the creation of a sporting 'product.'

V. ANTICOMPETITIVE OBJECT OF COLLECTIVE SELLING

267. In the Rule 14 Notice, the OFT stated that the collective selling by the Courses had an anticompetitive object, primarily since it aimed to increase the price of the Non-LBO Bookmaking Rights above the level that would have occurred if the rights had been sold individually.[281]

268. The RCA and the BHB considered that the sale of the Courses' rights did not have an anticompetitive object.[282]

269. As is explained in the next section (see paragraphs 270-337), the OFT has concluded that the collective sale of the Non-LBO Bookmaking Rights had an appreciable effect in preventing, restricting or distorting competition. It is not therefore necessary for the OFT to reach a conclusion, in the circumstances of this case, as to whether the collective sale by the Courses had the object of preventing, restricting or distorting competition, and this issue is left open.[283]

---

278 In paragraph 333 the OFT concludes that collective selling had an adverse effect on the Courses' incentives, including the incentive to supply additional races.

279 BHB Transcript, Mr Elliott, page 32, lines 1-2. See also page 31, line 36 - page 32, line 12.

280 See further paragraphs 379-390 and 394-404, when other BHB arguments concerning the benefits of the collective sale are assessed.

281 Rule 14 Notice, paragraphs 189-193.

282 RCA Representations, paragraphs 3.4.2 and 3.4.5. BHB Submission, Volume I, paragraph 144(3).

283 The Chapter I prohibition prohibits agreements, decisions and concerted practices which have as their '*object or effect*' the prevention, restriction or distortion of competition. That these are alternative, and not cumulative requirements is well established case law of the European Court (see e.g. Case 56/65 *Société Technique Minière v. Maschinenbau Ulm* [1966] ECR 235, page 249, [1966] CMLR 357, page 375).

VI. ANTICOMPETITIVE EFFECTS OF COLLECTIVE SELLING

270. The Rule 14 Notice stated that collective selling had three anticompetitive effects, each of which is analysed below, namely:[284]

(i) increased prices (due to a restriction of price competition between the Courses);

(ii) restriction of incentives for non-price competition between the Courses; and

(iii) bundling attractive with unattractive rights.

1. Increased prices

271. The Rule 14 Notice stated that collective selling reduced competition between the Courses in selling their rights and increased their collective market power. Consequently, the price paid by Attheraces for the Non-LBO Bookmaking Rights was increased.

272. Beyond arguing that collective selling was necessary (see paragraphs 394-396), the RCA and BHB argued that:

(i) certain Courses could effectively veto any agreement and thus possessed the same market power as a monopolist. Hence collective selling did not increase prices;

(ii) the Courses' rights are complements, implying that collective selling lowered prices;

(iii) there is no evidence that prices were increased; and

(iv) even if they prices were increased, such an increase amounted to a transfer from Attheraces to the Courses without any impact on final consumers, and so did not infringe the Chapter I prohibition.

These arguments are assessed in turn below.

[284] The RCA and BHB have argued that collective negotiation reduced transaction (negotiation) costs (RCA Representations, paragraphs 3.6.13 – 3.6.15; the RBB Report, page 21, first bullet; BHB Submission, Volume I, paragraph 143(7)(b)(ii)). These points are considered in paragraphs 358-364 and 426-429.

1.1 Veto holding courses

1.1.1 The RCA's view

273. The RCA considered that certain Courses' rights are essential to the viability of Attheraces, i.e., that these Courses effectively had a 'veto' on any agreement as their non-participation would prevent agreement being reached. Where a single racecourse (or group of courses under common ownership) has a veto, it effectively has the same market power as a monopolist. Thus if one or more courses have a veto, the RCA considered that individual negotiation will result in the same overall price as collectively selling (namely, the monopoly price).[285] Collective selling thus has no effect on the overall price.

274. The RCA considered that there are many veto holders. First, racecourse group RHT, which accounts for a large share of off-course betting turnover.[286] Second, the 17 courses (the 'TRG Courses' defined in paragraph 277 below) whose races were covered on terrestrial television and on whose participation the Rights Agreement was conditional. The RCA considered that, '*in theory*' this conditionality grants these 17 courses a veto.[287] Note that seven of the TRG Courses are owned by RHT. There may also be other veto holders.[288]

1.1.2 The OFT's finding

275. The OFT accepts that Attheraces required a significant portfolio of British horseracing for its service to have a 'critical mass' (although see the first sentence of paragraph 262). However, the OFT considers that no single racecourse or racecourse group had a veto.

276. It was a condition of the Rights Agreement that courses accounting for at least 70% of off-course betting turnover signed.[289] Attheraces confirmed to the OFT that its '*business plan was formulated on the basis that the rights of 70% of* ...

---

[285] The RBB Report, page 17. See also pages 2, 18, 21 and 27.

[286] RBB Report, pages 23-24.

[287] RBB Report, page 26, penultimate paragraph. See also letter from Denton Wilde Sapte dated 28 June 2003, page 2.

[288] First, the RCA considered that virtually all racecourses required high levels of terrestrial television coverage, as this promotes racing. As a result, in addition to the formal requirement in the Rights Agreement that the TRG Courses participate, other major Courses may hold a veto by virtue of their control of their terrestrial rights (RBB Report, pages 21-22). Second, other Courses (including Northern, Arena, Ascot, Newbury, Goodwood and Doncaster) may also have been in a strong position, even if they did not hold a veto (RBB Report, pages 26 – 27). Third, the RCA referred to small courses responding to others' vetoes by forming groups that are large enough to behave '*opportunistically*' (i.e., presumably to exercise a veto). (Source: RCA Representations, paragraph 3.6.10).

[289] Rights Agreement, clause 2.2.2(ii). Schedule 16 sets out each course's share of off-course betting revenue.

[c]*ourses was sufficient for it to commence operations*.'[290] Annex 4 sets out each racecourse and racecourse group's share of off-course betting turnover. At the time the Rights Agreement was executed, the largest racecourse group (RHT) had a share of [*less than 30%*].[291] Thus even RHT, under the terms of the agreement, did not have a veto as a result of its share of betting turnover. Any one course, or group of courses, was therefore at risk of not being included in the completed transaction.

277. Clause 2.2.2(i) of the Rights Agreement provides that Aintree, Ascot, Cheltenham, Doncaster, Epsom Downs, Goodwood, Haydock Park, Kempton Park, Newbury, Newmarket, Sandown Park, York, Ayr, Chepstow, Chester, Newcastle and Uttoxeter (collectively, the 'TRG Courses') must sign for the Rights Agreement to come into force. The RCA argued that each corporate group owning one or more of these 17 courses '*in theory*' held a veto.[292] The RCA considered that these courses have a veto because they are well known, with popular fixtures.[293]

278. However, Attheraces stated that it did not consider that the TRG Courses each held vetoes over the Notified Arrangement:[294]

> '... I can confirm that it was not essential for Attheraces to have signed up with <u>all</u> of these courses, so that the ATR channel and website could have been viable without some of them. Having said that, obviously

---

[290] Fax from Attheraces to the OFT dated 15 August 2003, paragraph 11. Note that in some of its representations the RCA questioned whether Attheraces would have been viable at the 70% threshold (RBB Report, footnote 21; RCA Representations, paragraphs 3.5.2 and 3.5.8; paper from Denton Wilde Sapte, 20 November 2003, paragraph 5.3; note from Denton Wilde Sapte, 1 December 2003, third bullet). However, in other representations the RCA and RHT appear to have accepted that Attheraces would be viable even at the 70% threshold (although they also argued that Attheraces preferred to have as many courses' Rights as possible). Witness statement of S Atkin dated 3 October 2003, paragraphs 5.3, 5.6; witness statement of Richard Johnston dated 9 October 2003, paragraph 5.3, third sentence.

[291] See Annex 4. The RCA claimed that RHT's share is [...]% or [...]% (RBB Report, Table 1, page 23). The OFT does not accept these figures. They incorrectly include Carlisle racecourse (RHT did not control this racecourse at the time it executed the Rights Agreement). The latter figure also understates Arena's share (RBB Report, page 23, 'source'). It thus overstates other racecourses' share, particularly that of RHT.

[292] RBB Report, page 26, penultimate paragraph. See also letter from Denton Wilde Sapte dated 28 June 2003, page 2.

[293] Letter from Denton Wilde Sapte dated 28 June 2003, page 2.

[294] Letter from Attheraces dated 7 August 2003. Similarly Arena has stated that Attheraces would still have been able to proceed, even if it had not acquired the rights from all of the TRG Courses. *Observations on the RCA's response of 25 June 2003 to the OFT's Rule 14 Notice of 8 April 2003*, attached to e-mail from Freshfields Bruckhaus Deringer to the OFT dated 13 August 2003, paragraph 23. Letter from Freshfields Bruckhaus Deringer to the OFT dated 21 November 2003, page 4, first paragraph.

> some courses would have been more ttractive [sic] to Attheraces than others in terms of fixtures ..., particularly because they provide most of the racing traditionally screened on the free to air terrestrial channels. If a number of such courses and/or more than a small number of the ... [TRG Courses] had chosen not to sell their rights to Attheraces, the deal may have been less attractive.' (Emphasis in original).

279. While the OFT accepts that the TRG Courses hold many of the best known and most popular races (and are the leading 'brands' in British racing), it does not accept that without the agreement of each of these courses no venture equivalent to 'Attheraces' could be launched. For example, Ayr racecourse accounts for only [*less than 5%*] of betting turnover[295] and only [*less than 5%*] of the viewers of British horseracing.[296] Given the magnitude of these figures, the OFT does not accept that Ayr had a veto. Thus, notwithstanding Clause 2.2.2(i) of the Rights Agreement, the OFT does not accept that each of the TRG Courses (which include Ayr) held a veto.

280. The RCA also stated that the major courses effectively had a veto because terrestrial coverage of British racing advertises and promotes the sport.[297] The OFT does not accept this. If a major racecourse refuses to sell its terrestrial rights to Attheraces, it would have a strong incentive to sell those rights to another broadcaster instead.[298] This implies that its races will still be televised on terrestrial television and will thus still promote the sport.

281. In conclusion, the OFT considers that only groups of courses acting collectively could have vetoed the Notified Arrangement. As the RCA's argument in paragraph 273-274 relies on there being one or more veto holders even when racecourses do not act collectively, the OFT does not accept this argument.

1.2 The Courses' rights are 'complements'

1.2.1 The RCA's view

282. The RCA argued that there is no meaningful competition between the Courses in the supply of the Non-LBO Bookmaking Rights. First, no single Course or group of Courses under common ownership has sufficient critical mass to meet buyers' needs alone. Second, racecourses generally do not hold races at exactly the

---

295 See Annex 4.

296 The RBB Report, Table 2, page 25.

297 The RBB Report, pages 21–22.

298 Because the cost of making those terrestrial rights available is likely to be small, selling them is likely to increase the racecourse's profits.

same time. The RCA thus considers that the Courses' Non-LBO Bookmaking Rights are complementary.[299]

1.2.2 The BHB's view

283. The BHB argued that Attheraces needs to purchase the Non-LBO Bookmaking Rights of many courses, implying these rights are complements.[300] Where products are complements then individual selling can result in higher prices than collective selling.[301] The BHB argued that, given the largely complementary nature of the Non-LBO Bookmaking Rights, it is difficult to envisage meaningful competition in their supply.[302]

1.2.3 The OFT's finding

284. The sense in which a lay-person might use the term 'complements' should be distinguished from its economic sense. Good A is a complement to good B (in the economic sense) if demand for good A decreases when the price of good B increases. Except where noted, when the OFT uses the term 'complements' in this decision, it does so in the economic sense. The OFT accepts that, where products are complements in this economic sense, then economic theory implies that collective selling can lead to a lower price than individual selling.[303]

285. However the OFT does not accept that the Non-LBO Bookmaking Rights are complements in the economic sense. Both BHB and the RCA have claimed that, because Attheraces requires a critical mass of rights then this implies that the Courses' rights are complementary. The OFT accepts that Attheraces required a certain critical mass of rights to be viable - see paragraph 275. However the need for a critical mass of products, in itself, does not imply that those products

---

299 RCA Representations, section 3.5, in particular paragraphs 3.5.1, 3.5.3 and 3.5.4. The RCA also argued that collective selling removes incentives for courses to over-price their rights to such an extent that no buyer would wish to buy them. It is not entirely clear whether this analysis stems from the alleged complementarity of the courses' rights. Insofar as it does not, this RCA argument is considered in paragraphs 398-399.

300 BHB Submission, Volume I, paragraph 143(8)(a). See also paragraph 143(2).

301 BHB Submission, Volume I, paragraph 143(8)(a). Also letter from Addleshaw Goddard to the OFT, 13 October 2003, 'paragraph 3'.

302 BHB Submission, Volume I, paragraph 143(2).

303 The intuition is as follows. When supplier A lowers its price, this increases the sales of complements supplied by other firms B, C etc. However, supplier A will not take these extra sales to B, C etc into account when deciding what price to charge. Thus prices are set higher than is in the firms' collective interest. This issue was originally studied by Augustin Cournot in the nineteenth century. For a modern treatment of the concept see technical annex to *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard-Setting*, Shapiro C, Competition Policy Centre Working Paper CPC00-11, May 2000 available at http://groups.haas.berkeley.edu/iber/cpc/pubs/publications.html

are complements.[304] For example, a bookshop requires sufficient number and variety of books to be viable. However a bookshop is likely to have a wide choice of titles with which to fill its shelves. If the price of one particular title increases then the bookshop could instead stock another i.e., products can be substitutes (in the economic sense) even for buyers that need critical mass.[305]

286. In the context of the Notified Arrangement, the issue of complementarity is linked with the absence of veto holding courses. Since no racecourse is a veto holder, racecourses' rights are substitutes. This is confirmed by the RCA's own economic analysis, which shows that, if no racecourse has a veto, collective selling will increase prices (although the RCA claimed that there are in fact veto holders).[306] This is because the courses' rights are substitutes.[307]

287. Absent collective selling, if no racecourse has a veto then buyers can readily decline to buy any racecourse's rights should it demand too high a price. The maximum that buyers will be prepared to pay for any racecourse's rights is the incremental value that those rights generate.[308] The logic of the point can be seen from the following hypothetical example. It is likely that, if a buyer has the rights to 58 racecourses, the 59th racecourse adds comparatively little i.e., the incremental value of the final racecourse is relatively low.[309] Accordingly, absent collective selling, no individual course can charge more than the (relatively low) incremental value that it would add as the 59th course. Any individual course risks finding itself 'at the back of the queue'. This principle also applies to racecourse groups that control several courses. Thus, absent collective selling, each course's pricing is constrained by rivalry.

---

304 The RCA has also argued that the Courses' rights are complements because horseraces are rarely held at the same time. However, simply because consumers can choose to consume both product A and product B (rather than being forced to choose either A or B) does not imply that A and B are complements.

305 Good A is a substitute for good B (in the economic sense) if demand for good A increases when the price of good B increases.

306 See the model presented in the RBB Report, figure 1, page 16. In this model, the RCA stated that '... collective selling is likely to lead to a higher price than individual selling because collective selling deprives ATR [Attheraces] of the ability to play one group of courses off against another.' The RBB Report, page 16.

307 In the RCA's model, if a course increases its price then Attheraces is more likely to decide that its rights are surplus to requirements and instead choose the rights of another course (i.e., the economic definition of substitutability).

308 The RCA analysis referred to in footnote 306 assumed that, once a buyer has obtained a critical mass of rights, additional rights add no value. However it is possible to generalise the RCA's model, as described in this paragraph. The OFT's analysis in this paragraph refutes the RCA's claim that buyers could not play the Courses off against one another because not buying the rights of any Course would diminish the value of the buyer's interactive service (RCA Representations, paragraph 3.6.5).

309 As suggested by the NERA Report, Table 4.7 (where additional races cannibalised bets from other races held on the same day).

288. Collective selling prevents this normal competitive process from disciplining the price that all racecourses can charge. First, it hinders buyers' ability to exercise choice and strike deals with individual Courses or sub-groups of Courses (see paragraphs 286-287). Attheraces stated that it '*would not have been able to bid for the* [R]*ights individually, given that the RCA was only interested in offering the* [R]*ights in a single package*.'[310] Second, it ensures price transparency between the Courses (see paragraph 221). Accordingly, the OFT considers that collective selling raised the price of the Non-LBO Bookmaking Rights.

289. In conclusion, because the OFT considers that there are no veto holders, it rejects the BHB and RCA's claims that racecourses' Non-LBO Bookmaking Rights are complements. Rather, the OFT considers that these rights are substitutes. Racecourses thus impose a constraint on each others' pricing. This constraint on the Courses' pricing is eliminated by collective selling, which allows the Courses to act as a bloc and substituting cooperation for competition.

1.3 Evidence that prices were increased

1.3.1 The RCA's view

290. The RCA stated that there is no evidence that prices are higher as a result of collective selling. It stated that the OFT has not explained or demonstrated what the price would have been if there had been individual negotiation.[311] Further, the RCA considered that the net cost of the Non-LBO Bookmaking Rights is not high compared to Attheraces' projected revenue or costs.[312] Neither Attheraces nor rival bidder Carlton increased their bids during negotiations,[313] and neither of these companies complained that the price of the Courses' rights was increased as a consequence of the way they were sold.[314] The RCA stated that buyers were only interested in negotiating with a single body and were not interested in playing off the Courses against each other.[315]

---

[310] Fax from Attheraces to the OFT dated 15 August 2003, paragraph 3. See also paragraphs 418-419.

[311] RCA Representations, paragraphs 3.7.2(a) and 3.7.4.

[312] RCA Representations, paragraphs 1.1.3(a) and 3.7.3.

[313] RCA Representations, paragraph 3.7.2(c).

[314] RCA Representations, paragraph 1.1.3(a).

[315] RCA Representations, paragraph 3.5.7. See also paragraph 3.6.5 and witness statement of R Johnston dated 9 October 2003, paragraph 10.7, final sentence.

1.3.2 The BHB's view

291. The BHB considered that collective selling may not have increased the price of the Non-LBO Bookmaking Rights above the competitive level.[316] First, the '*substantial*' transaction costs of individual selling might, in principle, outweigh any increase in the price of these rights.[317] Second, suppliers' collective seller power might be outweighed by buyer power (so the price still remains below the competitive level).[318]

1.3.3 The RHT's view

292. Racecourse group RHT stated that the manner in which the Courses sold their rights did not increase the price paid by Attheraces. First, the price paid by Attheraces was lower than an estimate of the value of the Rights made by Arena in July 2000.[319] Second, 12 major racecourses (the 'Super 12 Courses') received a similar amount under the Rights Agreement to a previous offer they had received for their Rights.[320]

1.3.4 The OFT's finding

(i) RCA and RHT's evidence not persuasive

293. The OFT does not accept the evidence used by the RCA and RHT to justify their claim that collective selling did not increase prices.[321]

294. The OFT considers that the Courses collectively could exercise the market power that they do not hold individually. The fact that Attheraces and Carlton did not increase their bids is not relevant to whether or not those bids were above the competitive level.[322]

---

316 The BHB criticised the OFT's use of the term '*competitive price*'. BHB Transcript, pages 74, line 25 – page 75, line 18; Mr Vaughan QC, page 7, lines 33-34.

317 BHB Submission, Volume I, paragraph 143(7)(b)(ii). Also letter from Addleshaw Goddard to the OFT, 13 October 2003, 'paragraph 3'.

318 BHB Submission, Volume I, paragraph 143(7)(b)(ii).

319 Witness statement of R Johnston dated 9 October 2003, paragraphs 10.1-10.2

320 The Super 12 Offer, discussed in paragraphs 405-415. Witness statement of R Johnston dated 9 October 2003, paragraphs 10.3-10.6.

321 The OFT does not consider it necessary to provide an estimate of what the competitive price actually is in order to find that the Chapter I prohibition has been infringed. The OFT has not provided such an estimate. The RCA noted that doing so would be difficult given the nature of the Courses' rights (RCA Representations, paragraph 3.7.2(a)).

322 Further, Arena made separate offers for the racecourses' rights in July 2000 and September 2000. The RCA stated that the latter offer '*has been considerably improved since the 31 July offer* ...' Note from RCA to all racecourse managers/chairmen, 21 September 2000,

295. The OFT does not accept the relevance or accuracy of the RCA's comparison of the cost of the Non-LBO Bookmaking Rights with Attheraces' costs.[323] RHT's comparisons with previous bids in paragraph 292 are also not relevant. First, because those bids were made in an environment where racecourses were discussing offers amongst themselves (rather than necessarily being the result of individual negotiation).[324] Second, because RHT has misinterpreted the figures involved.[325]

296. Attheraces does not accept the RCA's claim that buyers were not interested in playing off courses against one another.[326] The OFT agrees. The RCA's claim is unsupported by evidence, and runs counter to the buyers' interests (i.e., to secure the Courses' rights for a lower price). See also paragraphs 418-419.

297. The OFT does not accept the BHB's arguments on pricing, for the reasons set out in paragraphs 201-205 and 361-364.

'key facts', point (ii). This note was provided in Arena section 26 response dated 18 January 2002, question 14.

323 The RCA compared the cost of the Non-LBO Bookmaking Rights with Attheraces' costs (RCA Representations, paragraphs 1.1.3(a) and 3.7.3). This comparison is not relevant to whether the price of these rights are excessive (indeed it is not mentioned as a benchmark in the RCA Representations, paragraph 3.7.2(a), nor is it suggested by the RCA as an appropriate way of defining the competitive price of these rights in the RBB Report, page 7). Further, the RCA's figure of a £[...] cost for the Non-LBO Bookmaking Rights is incorrect (Source: RCA Representations, paragraph 3.7.3 and footnote 2). It is based on an incorrect figure for the cost of the terrestrial sublicences (Form N, page 33 stated that this is £[...], not £[...]) and should not exclude top-up revenue (as this was part of the expected price of the Rights to Attheraces at the time the Notified Arrangement was agreed). Arguably, the £[...] that Attheraces had committed to spend on marketing should also be included (see footnote 325).

324 See paragraphs 406-415.

325 First, the July 2000 Arena bid referred to in paragraph 292 offered £[...] for the 59 racecourses' non-terrestrial rights. It did not include a bid for the terrestrial rights, although it did make an estimate of their value (witness statement of R Johnston dated 9 October 2003, paragraph 10.2). Attheraces actually bid £[...] for all 59 racecourses' non-terrestrial rights (Clause 12.1.6 of the Rights Agreement) i.e., 10% more. Further, Attheraces' offer (unlike the previous Arena bid) included a commitment to spend £[...] on marketing, a proportion of which should arguably be included in the price (Form N, page 103, stressed that this marketing will benefit Courses and racing more generally; similarly Arena stated that this £[...] was demanded by the RCA and, rather than being designed to increase betting revenue, was designed to promote racing in general. *Observations on the RCA's response of 25 June 2003 to the OFT's Rule 14 Notice of 8 April 2003*, attached to e-mail from Freshfields Bruckhaus Deringer to the OFT dated 13 August 2003, footnote 7). Second, regarding the Super 12 Offer referred to in footnote 463, RHT claimed that the Super 12 Courses receive £[...] under the Notified Arrangement compared to £[...] under the Super 12 Offer. However, that £[...] figure includes £[...] of marketing expenditure, whereas the Attheraces figure does not include its marketing expenditure (see fax from RHT to RCA dated 4 February 2000, third paragraph. This fax is document 24 of the items relating to R Johnston's witness statement dated 9 October 2003).

326 Fax from Attheraces to the OFT dated 15 August 2003, paragraph 3.

(ii) Parties believed that the Courses could collectively raise prices

298. The OFT's conclusion that collective selling increases prices is supported by documentary evidence. Arena stated that Attheraces '*and its shareholders are the victims of the unlawful behaviour identified by the Office* ...'[327]

299. In the context of a previous offer for racecourses' rights,[328] the RCA told racecourses that:

> 'the "42" [racecourses] owe it to each other to avoid fragmentation and so maintain the considerable strength they have'[329]

and referred to these racecourses'

> 'determination ... to stick together and exploit their considerable leverage. If everyone keeps their nerve and sense of purpose I am confident a remunerative conclusion will be reached.'[330]

The RCA[331] and racecourses thus considered collective negotiation to be '*remunerative*'[332] and to enhance their bargaining position. The OFT considers that this implies that collective selling by the Courses will result in higher prices.

300. Similarly, in the context of this previous offer, the managing director of Ripon (one of the Courses) stated:

> '[what] I would have liked to have seen was 59 Racecourses banding together ... I believe that more money could have been wrung out of the media by someone negotiating ... on behalf of all the Courses ...'[333]

---

327 Letter from Freshfields Bruckhaus Deringer to the OFT dated 26 June 2003, page 3. This refutes the RCA's claim (e.g. RCA Representations, paragraph 4.4.18) that Attheraces has never suggested that the price for the Courses' Rights was increased.

328 The Super 12 Offer described in footnote 463.

329 *Media Rights*, note from RCA to racecourse chairmen (excluding Super 12 Courses and RHT), 6 March 2000. This note was provided in Cartmel section 26 notice response dated 14 December 2001.

330 *Media Rights*, note from RCA to racecourse managers (excluding Super 12 Courses and RHT), 6 March 2000. This note was provided in Cartmel section 26 notice response dated 14 December 2001.

331 The RCA's media rights advisors '[felt] *there is strength in the 42* [racecoures] *remaining as one group or better still all 59 courses*.' File note of meeting with the RCA on 27 April 2000, produced by D Knight (Cartmel racecourse), dated 2 May 2000, point 1(a). This note was provided in Cartmel section 26 notice response dated 14 December 2001.

332 Similarly, Form N stated that central negotiation allows the Courses to '[realise] *the full value of their rights*.' Form N, page 105, second paragraph.

333 Letter from M Hutchinson (managing director of Ripon) to P Savill (BHB Chairman), 6 March 2000. Similar views were expressed in a letter from M Hutchinson to the RCA, 9 March

301. The BHB stated to the OFT that it seeks to '*maximise the revenue available for the sport* ...'[334] and stated that it encourages the racecourses (and others) to *'... act in any way they see possible to increase the revenue that they can get ...*'[335] Further, the BHB stated that '*the principle of collective selling ... is essential if the* [racing] *industry is to prosper. Collective selling ensures realisation of the true value of British Racing's assets* [and is a] ... *fundamental influence on industry revenues* ...'[336] It has stressed the impact of the Notified Arrangement on the funding of the racing industry.[337] The BHB appears from this to consider that collective selling has increased the price of the Non-LBO Bookmaking Rights,[338] although it subsequently stated that it had no view on this point.[339]

1.4 Increased prices are a competitively-neutral transfer from Attheraces to the Courses

1.4.1 The RCA's and the BHB's view

302. The RCA argued that, even if the price of the Non-LBO Bookmaking Rights was increased, such an increase amounts to a transfer from Attheraces to the Courses and therefore that punters (final consumers) are not worse off and output is not restricted. The RCA considers that the OFT has not explained why such a price increase raises competition concerns.[340]

2000. These letters were provided in Ripon section 26 notice response dated 10 January 2002.

334 BHB Submission, Volume I, paragraph 54. See also paragraphs 139, 142; Volume III, witness statement of G Nichols, paragraph 4.1; witness statement of M Harris, paragraph 5.7

335 BHB Transcript, Mr Vaughan QC, page 14, lines 27-28.

336 BHB Submission Volume III, witness statement of G Nichols, paragraph 4.1. See also Volume I, paragraphs 59(c), 62(3), 69-70, 100(2), 143(7)(b)(iii). The BHB's support for collective selling, given its objective of maximising the sport's revenue, appears to contradict its suggestion that collective selling will lower prices, relative to individual selling (as set out in paragraph 291). The BHB stated that it did not mind how the Rights were sold '*provided that the maximum amount of money comes back into British Racing*': BHB Transcript, Mr Vaughan QC, page 31, lines 10-12. See also page 12, lines 19-25.

337 e.g., BHB Submission Volume I, paragraph 57.

338 Further, in the context of racecourses supplying data that allows bookmakers to accept bets on their races, the BHB has stated that competition would drive down prices (paragraph 58). This is because buyers *'... do not want to contract with all courses ...* [and this strengthens buyers'] *bargaining position as they can credibly play one* [course] *off against the other*' (paragraph 59). Expert report of Professor B Lyons, dated 4 September 2003.

339 BHB Transcript, Mr Vaughan QC, page 26, line 22.

340 'Profit shifting between vertically related firms which has no impact on the level of output or consumer prices in the final market, is a matter about which competition law should be neutral.' RBB Report, page 2. See also page 12 and RCA Representations, paragraphs 1.1.3(b), 2.4.3 – 2.4.4, 2.5(b) and 3.8.2. BHB Submission, Volume I, paragraphs 143(8)(d) and 143(9).

1.4.2 The OFT's finding

303. While the OFT aims to use its powers to ensure that markets work well for consumers, a finding of direct detriment to final consumers is not a condition of finding an infringement of the Chapter I prohibition. The key legal question is whether an agreement prevents, restricts or distorts competition on a relevant market within the UK: that market need not be a retail market.[341] For the reasons set out in this document, the OFT concludes that this has occurred in this case.

1.5 The OFT's conclusion on increased prices

304. Competition economics indicates that suppliers co-operating may enjoy a level of market power that they do not hold individually (since any purchaser is unable to switch to another supplier offering a lower price), and that they are likely to exercise such power to raise prices. The OFT considers that this applies to the Courses' collective sale of the Non-LBO Bookmaking Rights in this case.

305. For the reasons given above at paragraphs 271-301, the OFT is satisfied that the effect of the collective selling was to increase the price of the Non-LBO Bookmaking Rights above the competitive level.

2. Restriction of incentives for non-price competition between Courses

306. The OFT considers that the structure[342] of the price resulting from the collective sale that occurred in this case restricts incentives for non-price competition between the Courses.[343]

2.1 The Rule 14 Notice analysis

307. Money from Attheraces for the Non-LBO Bookmaking Rights is allocated between the 49 Courses according to a pre-set formula which allocates each Course a

---

341 By analogy, in order to satisfy the criteria for an individual exemption under Article 81(3), an agreement must (inter alia) allow consumers a fair share of any benefits. In this context, a consumer includes an immediate customer buying the product in the course of its business and is not limited to the end-consumer. See footnote 423.

342 The system by which Courses receive payments from Attheraces (namely, Attheraces paying the RCA, which then distributes those monies according to a formula recommended by a Distribution Group composed of the RCA and racecourses) directly reflects the Courses' collective sale.

343 When the Courses license their Rights, they have a (collective) interest in ensuring that any licensing agreement does not intensify competition between them. The OFT considers that, as the Courses acted collectively, they used that market power to dampen the Notified Arrangement's effect on incentives, and thereby avoided intensifying upstream competition.

share of the total income.[344] Payments by Attheraces to the Courses are largely fixed.[345]

308. The Notified Arrangement therefore reduces incentives for a Course to improve the attractiveness of its output (by making changes to the nature, timing or quality of the racing it holds) relative to that of rival Courses, as such improvements do not significantly affect that Course's income from Atthraces.

309. If Attheraces' revenue is sufficiently high it pays 'top-up revenue' to the Courses. If that top-up revenue is distributed according to the Distribution Formula, then an individual Course only receives a small fraction of any increase in the total revenues. The remainder is allocated to the other 48 Courses. Thus the prospect of top-up revenue is unlikely to incentivise individual Courses to make their output more attractive to Attheraces, because they recoup only a small fraction of the benefits.

310. The Notified Arrangement stated that '*where it is possible for the RCA to determine the amount which any Course has contributed to … top-up revenue …* [that amount] *shall be payable to the Course in question and shall not be shared with other Courses …*'[346] The RCA argued that this preserves racecourses' incentives. While in theory this might retain appropriate incentives (at least in relation to top-up revenue), the OFT considers that this is unlikely to be the case in practice.

311. First, top-up revenue is only paid when Attheraces' income is above a certain threshold. It seems unlikely that it will be possible to distinguish those Course actions that contribute to the portion of Attheraces' income lying below the threshold from those actions that contribute to the portion of Attheraces' income lying above the threshold (and thereby contributing to top-up revenue). Second, the RCA is a trade association. It seems poorly placed to decide that one Course should receive a particular amount of top-up money, at the expense of other member Courses.

312. This anticipated distortion of incentives is supported by evidence provided to the OFT. In the context of another case, Arena made submissions to the OFT discussing the benefits of holding more racing at its racecourses. This would allow racing to be held at times attractive to Attheraces. However,

---

344 Rights Agreement, Schedule 14, Income distribution formula – interactive minimum guarantees.

345 Over [*90*]% of the expected payments by Attheraces to the Courses are fixed - see paragraph 322.

346 Rights Agreement, Schedule 14, Notes to Course Distribution Formula, paragraph 1.

'... to effect this change from a racecourse perspective, the allocation of the Attheraces payments would need to be performed on a commercial basis which rewarded all such initiatives (eg: Morning, Lunchtime and Evening racing). The current method bears no correlation to betting turnover or provision of fixtures at media friendly times.'[347]

313. Thus Arena, an Applicant, stated that the payments made under the Notified Arrangement do not provide incentives to racecourses to supply racing attractive to customers.

314. This anticompetitive effect is exacerbated by the 10-year duration of the Notified Arrangement. Given the significant market shares of the Courses (see paragraph 182), the Rule 14 Notice concluded that the restriction of incentives for non-price competition between the Courses has an appreciable anticompetitive effect on the market for the supply of Non-LBO Bookmaking Rights.

315. The Applicants suggested that the Orders and Rules of Racing limit competition between the Courses so that they are unable to vary their output, regardless of the incentives they face. However, the Courses have some freedom to vary their output under the Orders and Rules, including the characteristics of the racing they stage.[348] Thus opportunities for competition between racecourses exist that the Notified Arrangement adversely affects.[349]

2.2 Analysis of the RCA's criticisms

316. In response to the Rule 14 Notice, the RCA argued that: (i) the correct competition assessment should compare the Notified Arrangement with the situation that would exist absent any agreement; (ii) the Courses retained incentives to improve output; and (iii) that the Notified Arrangement's impact on

---

[347] Arena response to the Section 26 Notice dated 9 October 2002, question 1, point (iv).

[348] For example, Arena, whilst arguing that certain Orders and Rules are '*limiting factors*', stated that '*we have made substantial progress in recent years in increasing the efficiency of our fixtures*.' This implies that racecourses do currently have some freedoms. Arena response to the Section 26 Notice dated 9 October 2002, question 7. Similarly the RCA has told the OFT that '*within the constraints of the BHB Rules ... and turf constraints, Courses have been working to improve their offer* [for example by] ... *experimenting with lunchtime racing*.' RCA briefing paper dated 4 March 2003, footnote 1. See also footnote 379.

[349] This is not to imply that the Orders and Rules (which are the subject of a separate Notification) do not infringe the Act, merely that racecourses have some competitive freedom at present.

Course incentives was in any event too small to affect their conduct. These arguments are assessed below.[350]

2.2.1 Comparing the Notified Arrangement with no agreement

(i) The RCA's view

317. The RCA argued that the Notified Arrangement only restricts competition if it provides disincentives to the Courses, compared to the position before the Notified Arrangement was entered into.[351]

(ii) The OFT's finding

318. As explained in paragraphs 397-404, the OFT does not accept that collective selling is necessary for the Courses to sell their Non-LBO Bookmaking Rights. Absent collective selling, given both a willing buyer and willing sellers aiming to exploit their rights profitably, the Courses would have reached agreements (individually or in small groups) with buyers.[352] It is these alternative rights agreements that the OFT considers to be the relevant counterfactual.

2.2.2 Preservation of incentives

(i) The RCA's view

319. The RCA argued that the Notified Arrangement preserves incentives in two ways.

320. First, the RCA argued that it can detect which Courses have contributed to 'top-up revenue' by setting targets for each Course.[353] This could involve comparing each Course's share of the payments from Attheraces with its share of Attheraces' betting revenue and adjusting its share of top-up revenue accordingly.[354] Alternatively, the RCA could identify which Courses have held additional fixtures.[355]

---

350 The BHB claimed that a distribution formula is integral to solidarity. The OFT has assessed solidarity in the context of exemption, see paragraphs 379-390. See also paragraphs 245-253. BHB Submission, Volume I, paragraph 144(4).

351 RCA Representations, paragraph 3.10.2.

352 Footnotes 460-461 explain why willing buyers and sellers exist in this case.

353 RCA Representations, paragraph 3.10.4.

354 The RCA has not explained what '*adjusted accordingly*' means. Fax from Denton Wilde Sapte to the OFT, 29 August 2003.

355 RCA Representations, paragraph 3.10.5.

321. Second, the RCA stated that if Attheraces wishes the Courses to alter their output (by adding or modifying fixtures) then it could pay them to do so.[356] Such side-payments would preserve incentives. Such payments could be made from top-up revenues (to avoid double payment).[357]

(ii) The OFT's finding

322. The RCA has not stated that the fixed, guaranteed payments (which account for over [*90*]% of the payments from Attheraces to the Courses) generate any positive incentives.[358]

323. The RCA stated that '... *the distribution* [between the Courses] *of guaranteed payments* [from Attheraces] ... *has no impact on courses' forward looking incentives* ...'[359] because these are payments for racing which '*was occurring in any event.*'[360] This confirms the OFT's view that collective selling has restricted the incentives for the Courses to improve the quality of their output and restricted competition between them[361] as, absent collective selling, buyers would not reach agreements with the Courses that had such little impact on incentives.[362]

324. The RCA has argued that top-up revenue preserves incentives as it could set targets to incentivise racecourses.[363] No such targets are, however, in place nor

---

356 The RBB Report, pages 34, 35. The Rights Agreement (Schedule 14, Notes to Course Distribution Formula point 2) states that where a Course introduces new races or fixtures and Attheraces agrees to pay additional fees, then these additional fees are payable to that Course alone.

357 The RBB Report, page 36.

358 The Courses receive a guaranteed £[...] share of Attheraces' betting and other revenues over 10 years (Form N, page 33), compared to estimated total top-up payments of £[...] (Source: *Attheraces Holdings consolidated business plan 2001 to 2011*, 2 May 2001, page 3. This plan is set out at schedule 11 of the Shareholders' Agreement. This estimate assumed that all 59 racecourses would sign the Rights Agreement, and will thus overstate the estimated amount of top-up revenue paid to the 49 Courses). Calculating, [...]. This figure will be even lower if terrestrial rights payments to the Courses and Attheraces' marketing commitment are also included.

359 The RBB Report, page 33, first bullet.

360 The RBB Report, page 33, final paragraph.

361 The quote from Arena in paragraph 312 also supports this. The RCA rejected this evidence by stating that the distribution of money between the Courses is irrelevant, as those payments are for races that would occur anyway (the RBB Report, pages 33 - 34). The OFT considers that the RCA has misinterpreted Arena's evidence. Arena stated that the current allocation of Attheraces' payments did not reward racecourses for initiatives that benefited Attheraces i.e., these payments fail to generate incentives to make the Courses' output more attractive to Attheraces.

362 Obviously buyers would wish to incentivise suppliers to meet their needs.

363 There is no reference to such targets in the Rights Agreement or in Form N. This suggests that the Courses and the RCA did not envisage the use of such targets prior to receiving the

has there been any discussion of targets between the RCA and the Courses.[364] If no targets are in place then the Courses cannot be incentivised.

325. The Rights Agreement requires top-up revenue to be paid if the figure produced by applying a formula based on Attheraces' total annual income exceeds a certain threshold.[365] This target, based on total income, must be disaggregated in order to set an individual target for each Course.[366] As this is difficult to do correctly, the effect of such targets on incentives is likely to be reduced.[367]

326. The RCA suggested that it could identify the Courses responsible for top-up revenue by identifying those which have held additional fixtures. The OFT notes that this will not allow the RCA to distinguish the impact of extra fixtures on Attheraces' income from the impact of any other changes in the nature of the Courses' output and so cannot enable the RCA to identify those actions that contribute to the portion of Attheraces' income that lies above the top-up revenue threshold.[368]

327. The RCA argues that incentives are maintained because Attheraces could reach separate agreements with the Courses.[369] Attheraces, however, appears to contradict this:

> '... the parties who negotiated the Notified Arrangement on behalf of Attheraces have confirmed that their expectation, at the time the Rights Agreement was signed (and give the existing financial commitments of Attheraces under the Rights Agreement) was that no [additional]

Rule 14 Notice. The RCA's emphasis on top-up revenue as an important source of incentives appears to be contradicted by its claim that top-up fees should not be included in the price of the Rights to Attheraces '*as there is no certainty that they will be paid ...*' RCA Representations, paragraph 3.7.3, point (ii). Further, the RCA states that '*it is not anticipated that top-up fees will be paid ... for a number of years and ... Attheraces' business plan anticipates that this is the case*.' Fax from Denton Wilde Sapte to the OFT, 29 August 2003. See also Fax from Attheraces to the OFT dated 15 August 2003, paragraph 9.

364 Fax from Denton Wilde Sapte to the OFT, 29 August 2003.

365 Form N, pages 54-55.

366 Setting each Course's target could be contentious. This may create problems for a trade association such as the RCA, which is dependent upon its members.

367 If an individual Course's target is set too high then it must exert considerable (costly) effort to achieve that target. This disincentivises the Course, relative to the situation where the target is set at the correct level.

368 Further, the RCA has not told the Courses that it will use this method of identifying which Courses are responsible for top-up revenue. Clearly, if the Courses are unaware of this then they will not be incentivised. Fax from Denton Wilde Sapte to the OFT, 29 August 2003.

369 This claim by the RCA is inconsistent with its argument that transaction costs are high – see paragraphs 358-360. High transaction costs would mean that Courses and Attheraces are unlikely to conclude these separate agreements.

payments ... would be made to the Courses for varying output or introducing new fixtures.'[370]

328. Attheraces has not entered into any such contracts.[371] This is despite Attheraces' desire to alter the configuration of the Courses' output.[372] The OFT considers that this is evidence that such separate agreements are unlikely to be signed, implying they will have little impact on incentives.[373]

2.2.3 The Notified Arrangement's impact on the Courses' behaviour is small

(i) The RCA's view

329. The RCA argued that the incentives generated by the Notified Arrangement will be in proportion to the share of racecourses' total income accounted for by the Notified Arrangement.[374] As the Non-LBO Bookmaking Rights account for some 7% of racecourse income,[375] the Notified Arrangement's impact on racecourses' behaviour is likely to be '*very small ...*'[376]

(ii) The OFT's finding

330. The RCA stated that the income from the sale of the Non-LBO Bookmaking Rights is too small to significantly affect racecourse behaviour.[377] However, the RCA also stated that:

---

370 Fax from Attheraces to the OFT dated 25 July 2003, question 4.

371 RCA letter to the OFT dated 28 June 2003, question 4. Fax from Attheraces to the OFT dated 25 July 2003, question 4.

372 In February 2002, Attheraces met with the BHB and recommended a number of changes (e.g. staggering the timing of racing, to spread it throughout the afternoon; more evening meetings) (Source: *Attheraces' recommendations for the 2003 fixture list*, 6 February 2002, section E. Attached to e-mail from Attheraces to the OFT dated 21 August 2002). Currently, racing is generally not held at peak times for TV viewing (Source: *ibid.*, Section C). Following this meeting, Attheraces told the OFT that '*we made a little progress, but not as much as we had hoped for* ...' (Source: *RE: Evening racing*, e-mail from Attheraces to the OFT dated 20 August 2002). This demonstrates that Attheraces desires changes to the current configuration of racing.

373 Attheraces and the RCA suggested that, because the Orders and Rules of Racing limit the scope for Courses to change the date and timing of fixtures, this effectively precludes side agreements at present (Source: RCA letter to the OFT dated 28 June 2003, question 4; fax from Attheraces to the OFT dated 25 July 2003, question 4). The OFT does not accept this explanation. The OFT rejected the argument that racecourses have no freedom to vary their output in paragraph 315 and received no representations disputing this analysis.

374 The RBB Report, page 37.

375 RCA estimate. The RBB Report, Table 3, page 38.

376 The RBB Report, page 38. See also RCA Representations, paragraph 3.10.6.

377 Note that the 7% figure quoted by the RCA in paragraph 329 may slightly understate the Courses' income from the Non-LBO Bookmaking Rights. This figure is for income from

'whilst the incentives arising from the Notified Arrangement may be limited, those incentives in conjunction with incentives arising from other areas of the Courses' business can be powerful. (For example, ... in conjunction with the incentives arising (say) from gate income, there may be a powerful incentive to hold an additional fixture).'[378]

331. The OFT agrees.[379] Properly directed, the £[...] guaranteed annual payment for the Courses' Non-LBO Bookmaking Rights could generate significant changes in their behaviour.[380] Further, the RCA and the BHB stressed the benefits of funding from Attheraces,[381] particularly given wider uncertainties about racecourse income.[382] These RCA statements do not accord with its claims that money from Attheraces is not material.

332. The Rights Agreement is the only source of incentives[383] for the Courses in the market for the supply of the Non-LBO Bookmaking Rights. Accordingly, the OFT considers that it is important to preserve incentives within this market.[384]

Attheraces for the Non-LBO Bookmaking Rights, as a percentage of 59 racecourses' income (rather than just the 49 Courses' income). The RBB Report, Table 3, page 38.

378 RCA Representations, paragraph 1.1.10.

379 The sale of the rights needed to televise horseraces in LBOs, according to the RCA, accounts for 11% of total racecourse income (Source: the RBB Report, Table 3, page 38). Under the agreement to licence these LBO rights, the Courses are paid a fee per race screened (with some exceptions) but LBOs will only screen a certain number of fixtures. Thus racecourses who supply less attractive races are less likely to have them screened, and are thus less likely to get paid. As the parameters in this agreement have subsequently been mirrored by the Levy Board (a significant funding source for racecourses), press reports suggest that this has led to courses *'...jostl*[ing] *to replace existing ... dates ... with advantageous slots ...*' (Source: *272: The number of days planned for an unbroken run of racing ...*, Racing Post, 7 July 2003). This confirms the scope for relatively small sources of income to be amplified by other income sources, resulting in powerful incentives.

380 The Courses receive a minimum £[...] share of Attheraces' betting and other revenues over 10 years. Form N, page 33.

381 E.g., the RCA has listed various new facilities at the Courses partially funded by income from Attheraces. RCA Representations, paragraph 4.2.4. See also Form N, page 102. See also BHB Submission, for example Volume I, paragraphs 59(a), 62(1), 100(1) and Volume III, witness statement of G Nichols, paragraphs 6.2-6.3.

382 RCA Representations, paragraph 4.2.6. See also Form N, page 102.

383 Since the OFT considers that the possibility of separate, side contracts will have little practical impact on incentives (see paragraph 327-328).

384 The Courses' Non-LBO Bookmaking Rights had not been exploited prior to the Notified Arrangement. Accordingly, the pre-existing configuration of racing does not reflect the preferences and needs of UK non-LBO Bookmakers at all. Accordingly, the effects of restricting incentives are greater than if Attheraces' preferences were already partially reflected.

2.3 The OFT's conclusion on restriction of incentives for non-price competition between the Courses

333. The OFT concludes that collective selling has led to a Rights Agreement which restricts incentives, within the relevant market,[385] for the Courses to improve the quality and nature of their output, and that (absent collective selling) such incentives would exist. This effect is exacerbated by the 10-year duration of the Notified Arrangement.

3. Bundling attractive and unattractive rights

3.1 The RCA's and the BHB's submissions

334. The RCA stated that '... *if the Courses could sell their media rights individually ... it is likely that some Courses would not be able to sell their media rights because of the unattractive date of the fixtures that have been allocated to those Courses* [by the BHB] ...'[386] In the Rule 14 Notice the OFT concluded that this implied that collective selling by the Courses bundled unattractive rights with attractive rights.

335. The RCA has subsequently reversed its position, stating that '*there are no unattractive races*.'[387] Further, it stated that, even if there are valueless races, then: (i) bundling these with attractive races will not increase the price a buyer is willing to pay; and (ii) the buyer does not have to broadcast them.[388]

3.2 The OFT's finding

336. On the basis of the RCA's representations, the OFT accepts that the Notified Arrangement does not have the anticompetitive effect of bundling attractive and unattractive rights.

VII. CONCLUSION ON EFFECTS OF COLLECTIVE SELLING

337. The OFT considers that the collective sale of their Non-LBO Bookmaking Rights by the Courses had the effect of appreciably preventing, restricting, or distorting competition within the market for the supply of these rights by: (i) increasing the price of these rights; and (ii) restricting incentives within this market to improve the Courses' output.

---

385 i.e., the supply of the Non-LBO Bookmaking Rights

386 Letter from Denton Wilde Sapte on behalf of RCA to the OFT dated 4 March 2003, page 1.

387 RCA Representations, paragraph 3.9.2. See also the RBB Report, page 13, first bullet.

388 The RBB Report, page 13, second bullet. The BHB also disputed the Rule 14 Notice's conclusion that there was unlawful bundling. BHB Submission, Volume I, paragraph 144(4).

VIII. EFFECT ON TRADE WITHIN THE UK

338. An agreement will only be subject to the Chapter I prohibition if it affects trade within the UK. This is comparable to the requirement in EC law that an agreement will not be subject to Article 81 if it does not affect trade between EC Member States. For an agreement to affect trade between EC Member States

> 'it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States ...'[389]

339. Applying this test domestically, by analogy, the OFT is satisfied that the Notified Arrangement, including the Courses' collective selling of their Non-LBO Bookmaking Rights, may have an influence, direct or indirect, actual or potential, on the pattern of trade within the UK, due to its effect on the conduct of the Applicants, the Courses, and their commercial rivals and customers within the UK. The Applicants have not made any representations on whether the Notified Arrangement affects trade within the UK.

340. The OFT considers that the collective sale has an effect on trade within the UK such that the Chapter I prohibition applies.

IX. CONCLUSION

341. The RCA and the BHB considered that the OFT's analysis failed to meet the requisite standard of proof.[390]

342. The OFT is satisfied that, for the reasons set out in above, it has strong and compelling evidence that the collective sale of their rights by the Courses has the effect of appreciably preventing, restricting, or distorting competition in the UK in the market for the supply the Non-LBO Bookmaking Rights by: (i) increasing the price of these rights; and (ii) restricting incentives within this market to improve the Courses' output. It therefore infringes the Chapter I prohibition.

343. The following Part assesses whether this restriction of competition, namely the collective sale, qualifies for an individual exemption under section 4 of the Act.

---

[389] This has consistently been stated by the European Court of Justice. See, for example, Case 42/84 *Remia BV and others v Commission* [1985] ECR 2545, [1987] 1 CMLR 1, paragraph 22.

[390] RCA Representations paragraph 3.3.6. BHB Submission, Volume I, paragraphs 83, 138(1).

PART SIX INDIVIDUAL EXEMPTION

344. The OFT may grant an individual exemption from the Chapter I prohibition to an agreement under section 4 of the Act if a request for an exemption has been made by a party to the agreement and if the agreement:

(a) contributes to (i) improving production or distribution or (ii) promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; but

(b) does not (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives or (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.[391]

345. In the Form N, the Applicants applied for an individual exemption from the Chapter I prohibition on the basis that the above criteria are fulfilled, to the extent that the OFT did not accept the Applicants' contention that the Notified Arrangement contains no restriction on competition falling within the scope of the Chapter I prohibition.

346. The only appreciable restriction on competition identified by the OFT relates to the collective selling by the Courses of their Non-LBO Bookmaking Rights. The OFT accepts that such an arrangement is capable of being exempted from the Chapter I prohibition, but only if all the conditions of section 9 of the Act are fulfilled.[392] The OFT assesses such criteria below.

I. CONTRIBUTION TO IMPROVING PRODUCTION OR DISTRIBUTION OR PROMOTING TECHNICAL OR ECONOMIC PROGRESS

1. Contribution to improving production or distribution

1.1 The Applicants' and the RCA's views

347. According to the Applicants, as a result of the Notified Arrangement, there will be improved coverage of British horseracing on television, it will be more widely distributed and it will be cheaper for consumers to access.[393] The RCA argued

---

391 Section 9 of the Act.

392 Contrary to the representation of the OFT's views contained in the RCA briefing paper dated 4 March 2003, paragraph 2.1 and BHB Submission, Volume I, paragraph 128.

393 Form N, pages 100-101. RCA Representations, paragraph 4.2.3.

that the Notified Arrangement preserves a high level of terrestrial free-to-air television coverage of British horseracing.[394]

1.2 The OFT's finding

348. The OFT accepts that the Notified Arrangement as a whole produces these benefits, but considers that the collective selling in this case does not contribute to these benefits: its effect was to restrict competition between the Courses and raise the price that Attheraces must pay for the necessary portfolio of Rights (see paragraph 337).

2. Contribution to promoting technical or economic progress

349. The Applicants', the BHB's and the RCA's arguments concerning the promotion of technical or economic progress are considered below.

2.1 Income stream for the Courses

2.1.1 The Applicants', the RCA's and the BHB's views

350. The Applicants stated in the Form N that the Courses' income from Attheraces, as well as Attheraces' marketing expenditure, would contribute to supporting the economic development of the British horseracing industry, including the development of improved facilities at racecourses.[395] The Applicants stated that, if the Courses had not sold the Rights under a centrally negotiated agreement, they would not have realised the '*full value*' of their rights.[396] The RCA stated that the Notified Agreement provides the Courses with a certain, secure income stream.[397]

351. The BHB has stressed the importance of ensuring that '*all sections of British Racing are as well financed as possible.*'[398] The BHB and the Applicants consider that payment from Attheraces to the Courses '*trickles down*' to other parts of the horseracing industry (owners, jockeys etc) via increased prize money.[399] This helps retain existing horse owners and attract new ones.[400] The Applicants

---

394 RCA Representations, paragraphs 4.2.9 - 4.2.13.

395 Form N, pages 101-103. RCA Representations, paragraph 4.2.4.

396 Form N, page 105.

397 RCA briefing paper dated 4 March 2003, paragraphs 3.2 and 3.3(d). RCA Representations, paragraph 4.2.6.

398 BHB Submission, Volume I, paragraph 139. See also paragraph 142; Volume III, witness statement of G Nichols, paragraph 4.1; witness statement of M Harris, paragraph 5.7.

399 BHB Submission, Volume III, witness statement of G Nichols, paragraph 6.3. Form N, page 36.

400 Form N, pages 36, 102.

stated that it is hoped that this increased revenue (and media interest) will create a '*virtuous circle*' of public interest and participation in British horseracing.[401]

2.1.2 The OFT's finding

352. The Courses may exploit their Rights and apply the proceeds as they see fit, provided that this complies with the Act. The OFT does not consider that funding the Courses and horseracing in Britain justifies collective selling that raises prices of the Non-LBO Bookmaking Rights and restricts incentives for non-price competition between the Courses.

353. Accordingly, the OFT does not consider that this result of the Notified Arrangement promotes technical or economic progress, to the extent that it considers that the collective selling raised prices above competitive levels.[402] Rather, the OFT considers this to be an anticompetitive effect of that collective selling (see paragraph 337).[403] Higher income for the Courses is at the expense of Attheraces and its shareholders, thereby denying them the opportunity to spend and invest that money in ways that promote technical or economic progress. The fact that some of the income from this increase in prices flows to other sections of the racing industry (i.e., those involved in supplying inputs to the Courses) is not relevant under the Act. Raising prices above the competitive level may not be justified by applying the proceeds to meritorious causes.

354. The relevance of the possible beneficiaries of revenues paid by Attheraces is discussed in paragraphs 379-390.

---

401 Form N, pages 36, 103-104. See also BHB Submission, Volume I, paragraph 143(3).

402 If collective selling did not increase prices above competitive levels then the RCA may not claim increased income as a benefit of the collective selling involved within the Notified Arrangement.

403 It is questionable whether the virtuous circle referred to in paragraph 351 exists (the RCA representations do not expressly support this claim; major bookmakers are sceptical about the benefits of increasing prize money, see section 26 notice responses by Ladbrokes (dated 29 November 2001), William Hill (dated 26 October 2001) and Coral (dated 27 November 2001), question 25). Even if a virtuous circle did exist, then if the increase in the price of the Rights is outweighed by the benefits to the buyer (because that increased income is re-invested), buyers would be willing to pay that increased price for the Rights. Thus the competitive price will reflect this i.e., collective selling is not indispensable to attaining these benefits. If, however, the benefits to the buyer are less than the amount the buyer must pay, then that price increase is value destroying and does not benefit the buyer i.e., it is does not promote technical or economic progress or allow consumers a fair share of the resulting benefits.

2.2 Launch of innovative products

2.2.1 The Applicants' and the RCA's views

355. The Applicants and the RCA stated that the Notified Arrangement permits viewers of the Channel and users of the Website to access interactive functionality, including information on races, runners and riders and form and also to access interactive betting services. The interactive pool betting service offered by Attheraces in conjunction with the Channel and the Website is novel and innovative. The Notified Arrangement therefore also results in an improvement in the distribution of betting services and in technical progress, through the use of new technology to provide such services.[404]

2.2.2 The OFT's finding

356. The OFT considers that the Notified Arrangement as a whole is likely to promote technical and economic progress by permitting the supply of a new product, interactive pool betting services, via the Channel and the Website, and by widely supplying coverage of British horseraces with (and without) interactive functionality.

357. However, the collective selling by the Courses has not contributed to this benefit, but rather, the OFT finds, has hindered and threatened the realization of this benefit by increasing Attheraces' costs (see paragraphs 337 and 429).

2.3 Reduced transaction costs

2.3.1 The Applicants', the RCA's and the BHB's views

358. The Applicants, the BHB and the RCA stated that the involvement of 49 British racecourses in the Rights Agreement increases efficiency and reduces transaction costs by preventing the duplication of activity and avoiding the individual negotiation and conclusion of agreements by each Course.[405] The Applicants stated that, absent negotiation by the RCA on behalf of the Courses, smaller Courses may not have been offered the opportunity to licence their media rights at all, or may have only achieved significantly worse terms at significantly higher costs, to their disadvantage. The Notified Arrangement therefore has enabled the Courses to sell their rights in a more efficient manner.[406]

359. The RCA disputed the OFT's analysis in the Rule 14 Notice that collective negotiation increased transaction costs. The RCA considered that, absent

---

[404] Form N, page 103. RCA Representations, paragraph 4.2.2.

[405] Form N, page 103. RCA Representations, paragraph 3.6.13. BHB Submission, Volume I, paragraphs 143(7)(b)(ii), 145(3).

[406] Form N, page 103.

collective negotiation, the Courses would have failed to sell their rights at all.[407] The RCA considered that individual negotiation would have led to duplication,[408] and cited racecourse views that individual negotiation would have been costly.[409] It considered the negotiation at very short notice of one-off contracts with the BBC for the terrestrial TV rights to two races was '*very time consuming …*'[410] The RCA implied that some racecourses are unused to commercial negotiations.[411]

360. In the Rule 14 Notice, the OFT suggested that collective selling may have increased transaction costs in this case. The RCA disagreed. It considered that there is no evidence that a single, lengthy, more complex agreement is more costly to negotiate than 37 shorter, individual agreements.[412] The RCA considered that the OFT must show that the additional transaction costs of individual negotiation are outweighed by any reduction in the price Attheraces pays for the Courses' Rights.[413]

2.3.2 The OFT's finding

361. The Applicants, Attheraces and the RCA have not provided strong evidence that the costs associated with the Notified Arrangement would be higher or lower than the total costs of individual negotiations with sufficient Courses to provide Attheraces with the rights needed to compile the Channel. In particular, the Applicants and the RCA have not taken into account the costs of the internal negotiation between the RCA and the Courses in devising the distribution formula under which the money paid by Attheraces is allocated amongst the Courses.[414]

362. Attheraces stated to the OFT that

---

[407] RCA Representations, paragraph 4.2.16. The RCA's reasoning is set out in paragraphs 394-396 below.

[408] RCA Representations, paragraphs 3.6.13.

[409] RCA Representations, paragraphs 3.6.13, 4.2.17–4.2.18.

[410] RCA Representations, paragraph 4.4.16. The RCA has not provided any figures or documents to substantiate this claim.

[411] RCA Representations, paragraph 4.4.12.

[412] RCA Representations, paragraphs 4.2.17 and 4.2.19. At the time the Rights Agreement was executed the 49 Courses were controlled by 37 different entities.

[413] RCA Representations, paragraph 4.2.16.

[414] For example, a letter regarding a new proposed formula for calculating the division of income between racecourses, refers to '*the many Meetings* [sic] *we have had to attend*.' Letter from Ripon to the RCA, 14 October 2000, page 1. This letter was provided in Ripon section 26 notice response dated 10 January 2002.

'the ... Rights Agreement ... took approximately 7 months to negotiate. Negotiations took considerably longer than anticipated, as the RCA sought to negotiate various measures which benefited specific courses ...'[415]

This statement appears inconsistent with the RCA's claims that collective selling reduced transaction costs (indeed it suggests that such costs were increased).

363. The OFT considers that individual negotiations may be simpler to negotiate than a single over-arching agreement that seeks to reconcile the interests of 49 Courses.[416]

364. The RCA claimed that the Notified Arrangement (including the collective sale by the Courses) promotes technical or economic progress by reducing transaction costs. However, the OFT is not satisfied that there is sufficient evidence to show that the collective sale has reduced transaction costs. Accordingly, the OFT does not find that the Notified Arrangement promotes technical or economic progress by reducing such costs.

3. The OFT's conclusion on improving production or distribution or promoting technical or economic progress

365. The OFT finds that the Notified Arrangement as a whole improves production or distribution by improving the coverage and distribution of televised British horseracing, and promotes economic or technical progress by permitting the supply of the Channel and Website and the interactive services and content accessible via them. The collective selling of the Non-LBO Bookmaking Rights does not contribute to either such benefit.

366. However, the OFT does not accept all contributions to economic or technical progress that have been ascribed to the Notified Arrangement by the RCA, BHB and/or Applicants. Specifically, the OFT finds that the Notified Arrangement does not contribute to economic or technical progress either by reducing transaction costs or by increasing the price of the Non-LBO Bookmaking Rights.

II. ALLOWING CONSUMERS A FAIR SHARE OF THE RESULTING BENEFIT

367. The arguments concerning whether consumers receive a fair share of the benefits assessed in paragraphs 347-366 are considered in turn.

---

[415] Fax from Attheraces to the OFT dated 15 August 2003, paragraph 6.

[416] As suggested by the Attheraces statement quoted in paragraph 362.

1. The services supplied by Attheraces

1.1 The Applicants' and the RCA's views

368. The Applicants in Form N and the RCA stated that consumers (such as television viewers, racing spectators, punters and participants in the racing industry) will benefit, as a result of the Notified Arrangement, from the introduction of the Channel and Website. British racing will also continue to be broadcast via universally available terrestrial television coverage on the BBC and Channel 4. The Channel is expected to cost far less for pay-television subscribers than the former Racing Channel.[417] Consumers will benefit from the new ways of placing bets (including through the interactive services associated with the Channel and the Website) and from improved access to information about races, runners and riders, form, etc.[418]

1.2 The OFT's finding

369. The OFT accepts that viewers and punters will receive a fair share of the benefits from the Channel, Website and terrestrial coverage of horseracing. Such end-consumers will be offered products that were not previously available at prices likely to be at the competitive level.[419]

370. However, it does not accept that the Courses' collective selling makes any contribution to these benefits in which consumers may share.

2. Increased income for the Courses

2.1 *The Applicants', the RCA's and the BHB's views*

371. The Applicants, the RCA and the BHB have all stated to the OFT that the racing industry will benefit from the Courses' increased income.[420] This will, in turn, benefit racegoers etc (e.g. from the improved facilities funded by that increased income).[421]

---

417 The Racing Channel was operated by SIS and televised horseracing via DSat and cable. It closed in January 2003.

418 Form N, page 104. See also RCA Representations, paragraphs 3.11.3, 4.2.2-4.2.3, 4.3.2(a)-(d).

419 This follows from the conclusion that the provision of bookmaking services and the supply of programming to TV distributors by Attheraces lie in wide markets. See paragraphs 180 and 184-186.

420 Form N, page 104. RCA Representations, paragraph 4.2.4. BHB Submission, for example, Volume I, paragraphs 57(3), 62(3), 69, 100(3); Volume III, witness statement of G Nichols, paragraph 4.1; witness statement of M Harris, paragraph 5.7.

421 Form N, page 104. BHB Submission, Volume I, paragraph 57(3). BHB Transcript, Mr Vaughan QC, page 15, lines 20-21. RCA Representations, paragraph 4.3.2(e)-(f).

2.2 The OFT's finding

372. As explained in paragraph 352-353 above, the OFT does not accept that, by increasing prices, the Notified Arrangement promotes technical or economic progress. As noted above, raising the price of Non-LBO Bookmaking Rights above the competitive level may not be justified by applying the proceeds to meritorious causes. Therefore the increased income for the Courses resulting from the collective sale is not a relevant benefit for the purposes of section 9 of the Act.

373. In any event, in accordance with EC precedent,[422] the OFT must take account of the impact of the restriction of competition arising from the collective selling arrangement on the immediate purchaser of the collectively sold rights, i.e. Attheraces, when applying this condition. This is because the concept of 'consumer' in Article 81(3) includes an immediate customer buying the product in the course of its business and is not limited to the end-consumer.[423]

374. Any increase in the Courses' income above the competitive level, as a result of the collective sale of the Non-LBO Bookmaking Rights, is at the expense of Attheraces, as the customer that purchases these rights.[424] Accordingly, it appears that Attheraces has not received any benefit from the collective sale (which must be distinguished from Attheraces' benefits from licensing the Rights), rather, as stated by one of the Applicants, it has been the victim of anticompetitive conduct.[425]

III. RESTRICTIONS WHICH ARE INDISPENSABLE TO THE ATTAINMENT OF THE OBJECTIVES

375. In paragraphs 259-266, the OFT assessed whether the Courses' collective sale was necessary to launch Attheraces and so should be considered to fall outside the scope of the Chapter I prohibition. It rejected that argument. In the following sections, it assesses the arguments that the collective sale that

---

422 Pursuant to section 60 of the Act, the OFT has an obligation to ensure that, so far as possible, cases are handled in a way which is consistent with Community law (see further paragraph 80).

423 See, for example, Case T-29/92 *SPO and others v Commission* [1995] ECR II-289, paragraph 300; Re *ACEC/Berliet Agreements* OJ 1968 L201/7, [1968] CMLR D35; *Kabel- und Metallwerke Neumeyer AG and Etablissements Luchaire SA Agreement* OJ 1975 L222/34, [1975] 2 CMLR D40.

424 Indeed the BHB stated that '*the resulting revenue* [from the collective sale of the Courses' Rights] *was to be distributed in (and only in) the interests of British Racing as a whole* ...' i.e., the not in Attheraces' interests. BHB Submission, Volume I, paragraph 59(d). The BHB defined British Racing in paragraph 53.

425 Letter from Freshfields Bruckhaus Deringer to the OFT dated 26 June 2003, page 3.

occurred in this case was nevertheless indispensable within the meaning of section 9 of the Act.

1. Collective sale

1.1 The Applicants' and RHT's views

376. The Applicants and RHT stated that there is no agreement or arrangement between members of the RCA which required them to sell their Rights collectively. All British racecourses (including the Courses) were free to negotiate and to sell their rights on an individual basis and to decide whether to enter into the Rights Agreement.[426]

377. The RCA's Representations did not expressly support this view (see paragraph 231).

1.2 The OFT's finding

378. Contrary to the Applicants' and the RHT's views, the OFT considers that an agreement and/or concerted practice, within the meaning of the Chapter I prohibition, exists between the Courses to collectively sell their Rights (see paragraph 237).

2. Solidarity

2.1 The Applicants' view

379. The Applicants stated that the sale of the Rights through the Rights Agreement was the only way in which all the Courses were able to achieve the distribution of the proceeds between racecourses in a manner which best secures the viability of individual racecourses and of British racing generally, in accordance with the principle of 'solidarity', which (according to the Applicants) has been recognised by the European Commission as potentially rendering indispensable the collective selling of sports media rights.[427]

2.2 The BHB's view

380. The BHB claimed that the principle of solidarity justifies redistribution of funds throughout the racing industry, not just to racecourses.[428] The BHB also disputed

---

[426] Indeed, ten racecourses decided sell their rights to GG Media, rather than Attheraces. Form N, page 104. Witness statement of R Johnston dated 9 October 2003, section 11.

[427] Form N, page 105.

[428] BHB Transcript, Mr Vaughan QC, page 15, lines 16-21. Letter from Addleshaw Goddard to the OFT dated 13 October 2003, 'paragraph 5'.

that solidarity requires redistribution from the economically strong to the weak,[429] although it provided no explanation or authority for this claim. The BHB dismissed quotes from certain racecourses that the OFT cited as evidence in the Rule 14 Notice, on the grounds that there are inevitably racecourses who think they deserve more then they actually obtain.[430]

381. The BHB claimed that the principle of solidarity was broader than financial redistribution.[431] However, it did not provide any examples of solidarity that (in its opinion) stemmed from the Notified Arrangement but did not involve financial redistribution.[432]

2.3 The RCA's view

382. The RCA's Representations did not expressly support the Applicants' or the BHB's views.

2.4 The OFT's finding

383. In the context of exemptions for the collective sale of sports broadcasting rights, the European Commission has referred to '*solidarity between economically stronger or weaker participants, and between professional and amateur sport and sport played by young people*.'[433]

384. In the case of horseracing, the participants are racehorses and jockeys. If the principle of solidarity were applicable here, then it could imply redistribution from stronger to weaker owners or from professional jockeys to amateur riders and apprentice jockeys. The OFT considers that the principle of solidarity does not apply to sporting venues or their owners (i.e., racecourses). This is implicitly supported by the European Commission statement quoted above.[434]

---

[429] BHB Transcript, Mr Vaughan QC, page 15, lines 11-13. Letter from Addleshaw Goddard to the OFT dated 13 October 2003, 'paragraph 5'.

[430] BHB Submission, Volume I, paragraph 144(2).

[431] BHB Transcript, Mr Vaughan QC, page 15, lines 14-16.

[432] BHB Transcript, page 87, line 17 – page 89, line 10.

[433] See Written Question E-0146/01 to the European Commission, *Sale of television broadcasting rights for sporting events,* OJ 2001 C235E/128, Commission's response, paragraph 2. See also *Broadcasting of Sports Events and Competition Law*, A-M Wachtmeister, referred to in footnote 237 above. Similarly, in *UEFA Champions League*, at paragraph 165, the Commission stated that it was in favour of financial solidarity because cross-subsidy from rich to poor may help achieve balance between football clubs (i.e., ensure more evenly matched sporting adversaries). This competitive balance may enhance the excitement and value of football matches.

[434] Neither the Applicants nor the BHB have provided any evidence, analysis or authority to dispute this finding.

2.4.1 No solidarity in fact

385. Even if the principle of solidarity justified redistribution between racecourses, the OFT does not consider that the Notified Arrangement redistributes income from economically stronger racecourses to weaker ones.

386. Hamilton (one of the Courses) stated that '*the Attheraces income went quite disproportionately to the top 17 courses* ...'[435] GG Media stated that one reason why some courses became disillusioned with the RCA's negotiations with Attheraces was '*the poor value offered to the smaller independent horse racecourses, because the proposed distribution of funds was slanted in favour of the large racecourses ...*'[436] Similarly Kelso (one of the GG Media racecourses) stated that the Attheraces' '*deal was desperately disadvantageous to small racecourses that were not part of a larger group ... The GG Media* [agreement] *offered greater financial rewards ...*'[437]

387. The absence of 'solidarity' is demonstrated by the fact that ten of the economically weakest racecourses[438] felt that they could obtain a better deal by opting out of the (collectively sold) Notified Arrangement and instead selecting GG Media. Accordingly, the redistribution embodied in the Notified Arrangement is inconsistent with the principle of solidarity.[439]

2.4.2 Collective selling not necessary to show solidarity

388. In any event, the OFT does not consider that collective selling is indispensable to financial redistribution and therefore considers that it is not indispensable to solidarity. For example, financial redistribution could be carried out using the proceeds raised by a sport's governing body levying a charge on certain participants. Further, only 49 (of 59) racecourses are parties to the Notified Arrangement. Accordingly, redistribution is only possible between these 49 racecourses, and not the other ten. These ten racecourses are amongst the

---

435 *Hard reality from the Hamilton chief*, Owner magazine, Issue 34, September – October 2002, page 30.

436 *GG Media's response to the Attheraces Notification under section 14 (Chapter I) of the Competition Act 1998*, 29 April 2002, question 1, point (a).

437 Section 26 Notice response by Kelso dated 13 December 2001, question 15.

438 For example, if racecourses are ranked according to their share of Ladbrokes' betting turnover on British horseraces in 2000, then none of the GG Media courses is in the top 15, and seven are in the bottom 15. Section 26 Notice response by Ladbrokes dated 29 November 2001, question 6.

439 The BHB considered that the racecourse quotes in paragraph 386 are not a sufficient basis for disputing solidarity (Source: BHB Submission, Volume I, paragraph 144(2)). The OFT does not accept this. In any event, neither the RCA nor the majority of the racecourses (on who's behalf it made representations) disputed the conclusion in the Rule 14 Notice that the Notified Arrangement did not embody solidarity.

economically weakest (see footnote 438). Again, this implies that the Notified Arrangement is inconsistent with the principle of solidarity.

389. The BHB stated that solidarity extended beyond redistribution of funds, but did not specify how such non-financial solidarity was relevant to the collective sale by the Courses, nor how such collective sale was indispensable for such non-financial solidarity.[440]

390. Accordingly, the concept of solidarity does not appear relevant to assessing the collective sale by the Courses under sections 4 and 9 of the Act.

3. Externalities between racecourses

3.1 The BHB's and the RCA's view

391. The BHB and RCA considered that the wider activities of racecourses can affect (positively or negatively) other racecourses. For example, large racecourses hold prestigious events, which promote the sport as a whole and therefore benefit small racecourses.[441] Similarly, low-grade meetings held at small racecourses maintain interest in the sport when the larger racecourses are not racing and help to develop horses and jockeys etc.[442] The BHB considered that such externalities can lead to market failures, and thus they provide a justification for the redistribution of income from large racecourses to small racecourses.[443]

3.2 The OFT's finding

392. The BHB has not seen the Course Distribution Formula, hindering its ability to comment on the effects of financial redistribution.[444] Even if externalities exist (which the OFT does not necessarily accept), simple redistribution between racecourses does not correct these externalities. For example, the BHB claimed that when a small racecourse puts on a low grade meeting, this benefits larger racecourses. If this is correct, then it implies that low grade meetings will be underprovided. However, simply redistributing a lump sum from large racecourses to small racecourses would not correct this underprovision. This is because that lump sum would not affect the small racecourses' incentives, and thus they would not hold more meetings. For that underprovision to be

---

440 See paragraph 381.

441 BHB Submission, Volume I, paragraph 143(8)(b).

442 BHB Submission, Volume I, paragraph 143(8)(b). Paper from Denton Wilde Sapte, 20 November 2003, paragraph 4.2.

443 BHB Submission, Volume I, paragraph 143(8)(b). BHB's claims that collective selling will produce a different product from individual selling appear to stem from these externalities and the redistribution of income to resolve them. BHB Transcript, Mr Elliott, page 31, line 38 – page 32, line 12.

444 BHB Transcript, page 69, line 36 – page 70, line 3.

corrected, small racecourses would need to receive an additional payment if and only if they hold a low grade meeting. The Notified Arrangement does not make such payments, and in fact restricts incentives (see paragraph 333).

393. In any event, collective selling is not indispensable to redistribution (see paragraph 388). Further, as explained in paragraph 385-387, the Notified Arrangement does not redistribute income from larger courses to smaller courses (including the GG Media courses). The Notified Arrangement thus does not carry out the redistribution advocated by the BHB.

4. Collective sale essential to ensure that the Courses' rights are sold

4.1 The RCA's view

394. The RCA argued that collective negotiation was necessary because it was the only way to create a package of rights to meet buyers' demands for a certain critical mass.[445] The RCA considered that individual negotiation would result in the Non-LBO Bookmaking Rights not being sold.

395. As explained in paragraph 274, the RCA considered that certain Courses' rights are essential to the viability of Attheraces: these Courses effectively had a 'veto'. If several Courses hold vetoes then this could lead to co-ordination problems and there is a risk that no deal is achieved.[446] The RCA also stated that, if the Courses negotiated individually, then each '*opportunistically*'[447] demands an excessive price:

> 'each will set its asking price without regard to the effect … on the total price to be paid by a buyer of the required critical mass of rights. The result will be [a total price so high] … that no deal will be done. Nor will any individual course or group be prepared … to reduce its asking price to enable a deal to be done, for it will not be prepared to take the "hit" … unless other courses will be doing the same …'[448] (Footnotes omitted).

396. The RCA cited the failure of a previous offer for racecourses' rights as supporting evidence (see paragraph 405). Collective negotiation allows the veto holders to agree prices between themselves, thus avoiding the situation where each

---

[445] RCA Representations, paragraph 3.4.9. See also paragraphs 4.4.4 – 4.4.7. Form N, pages 104-105, argued that central negotiation was necessary to put together a sufficiently attractive package of rights. See also BHB Submission, Volume I, paragraph 59(a), first sentence, and 59(b).

[446] RBB Report, pages 18-19 and 27.

[447] RCA Representations, paragraph 3.6.7.

[448] The RCA Representations, paragraph 3.6.7.

demands too high a price.[449] It is difficult, risky, costly and maybe impossible for buyers to solve this coordination problem.[450] As a result, the RCA claimed that buyers were only prepared to negotiate if presented with a sufficiently large package of rights.[451]

4.2 The OFT's finding

397. In the following paragraphs the OFT rejects the RCA's claim that horizontal co-ordination was essential to ensuring that the racecourses' rights are sold. First, because the OFT finds that there were no veto holders in fact. Second, by implication, buyers should be able to compile the necessary critical mass without collective selling by racecourses i.e., buyers can handle the practical and logistical aspects of assembling the necessary portfolio of rights.

4.2.1 There are no veto holders in fact

398. As explained in paragraph 284, collective selling of complements may reduce prices. As a result, it is possible that collective selling of complements might facilitate the conclusion of a deal by lowering prices (although this does not necessarily imply that it is indispensable to the conclusion of a deal). It is somewhat unclear whether the RCA's analysis (as set out in paragraphs 395) is different to this 'complements analysis'. To the extent that it differs, the OFT does not accept the RCA's argument.[452]

399. As explained in paragraph 281, the OFT considers that no single racecourse or racecourse group had a veto. If there are no veto holders then racecourses' rights are substitutes (see paragraphs 286-287). Thus the 'complements analysis' is not applicable. Further, if there are no veto holders then no course can demand an excessive price for its rights (contrary to the RCA's analysis as quoted in paragraph 395). As explained in paragraphs 286-287, a buyer can choose not to buy any racecourse's rights,[453] so all racecourses are therefore

---

449 RBB Report, pages 18-19 and 27.

450 RBB Report, page 27.

451 For example, RCA Representations, paragraph 4.4.20. RBB Report pages 27-28. See also paragraphs 416-417.

452 First, one interpretation of the RBB Report is that sharing pricing information resolves the problems identified by the RCA (RBB Report, pages 18-19). However, the over-pricing that occurs when firm A and B's goods are complements is driven by their incentives (because A does not take into account the impact of its pricing on B), not an absence of information about prices. Simple information sharing may not resolve the issue. Second, the RCA claimed that a racecourse will lower prices only if others do the same (final sentence of the quote in paragraph 395). However, if firm A lowers its prices then this boosts demand for firm B's (complementary) output, thereby creating an incentive for firm B to increase prices, rather than reduce them.

453 The RCA's representations contain a model where this is the case. The RBB Report, section 4.2. The OFT's hypothetical example in paragraph, 287 generalises this model. In this

constrained from pricing excessively. Accordingly, the OFT does not accept the RCA's claim that collective selling was essential to ensuring that the Courses' rights were sold.

4.2.2 Buyers can assemble the necessary portfolio of rights

400. The Applicants and the RCA argued that central (i.e., RCA) negotiation was necessary to assemble the portfolio of rights required by Attheraces. Attheraces does not accept this,[454] a view with which the OFT agrees.

401. First, potential buyers (rather than the sellers) could have assembled the necessary package of rights themselves.[455] If buyers assembled the necessary rights themselves, they could have made any contracts conditional on obtaining rights from sufficient courses (as in fact occurred in the Notified Arrangement, itself a conditional agreement). Such 'conditional contracts' could also have allowed Attheraces to assemble the necessary portfolio of rights prior to launch.[456] Both BSkyB and Channel 4 produce TV channels and therefore have considerable experience of assembling the packages of rights necessary to launch channels by negotiating with many suppliers. Indeed Attheraces has stated that '*it would be highly unusual and unrealistic for a television channel not to obtain programming rights from multiple rights sources, were it free to do so.*'[457]

402. Second, potential buyers would not have needed to negotiate with a large number of separate suppliers. The RCA has stated that, when the Notified Arrangement was signed, 37 corporate groups owned the 59 racecourses. This is the highest number of separate suppliers with which a potential buyer would need to negotiate. It is possible that modest groups of courses could have offered their rights as a package or intermediaries could have been used without

---

more general case, racecourses still have a strong incentive not to charge an excessive price.

454 '... [T]*he RCA suggests that ATR* [Attheraces] *sought the joint sale of the rights by the RCA, and that the single source of media rights was an essential pre-requisite to its bid. Not only is this argument incorrect, it is also unrealistic and at variance with ATR's business plan* ...' Fax from Attheraces to the OFT dated 15 August 2003, paragraph 7. See also paragraphs 2-3.

455 A point supported by Arena. *Observations on the RCA's response of 25 June 2003 to the OFT's Rule 14 Notice of 8 April 2003*, attached to e-mail from Freshfields Bruckhaus Deringer to the OFT dated 13 August 2003, paragraph 23, final sentence.

456 Thus the OFT does not accept the RCA's claims that, in order to obtain funding, Attheraces had to secure sufficient rights at the outset, rather than gradually building a portfolio of rights (Source: RCA briefing paper dated 4 March 2003, paragraph 3.10).

457 Fax from Attheraces to the OFT dated 15 August 2003, paragraph 7.

infringing the Act.[458] Ten racecourses sold their rights to GG Media. GG Media then acted as an intermediary, contracting with SIS to exploit these rights.[459]

4.3 Conclusion on the indispensability of collective selling to ensure sale

403. The OFT considers that both willing buyers[460] and willing sellers of the Courses' Non-LBO Bookmaking Rights exist.[461] It thus considers that these rights would have been sold, absent collective selling.

404. In conclusion, the OFT does not accept that the restriction of competition arising from the collective selling of the Non-LBO Bookmaking Rights was indispensable to attaining the critical mass of rights that Attheraces required.[462]

5. Failure of Super 12 Offer demonstrates that individual negotiations would fail

5.1 The RCA's view

405. The RCA considered that the failure of a previous bid to buy the racecourses' rights (the 'Super 12 Offer')[463] demonstrates that opportunism would undermine

---

458 For example, the OFT considers that an agreement will generally have no appreciable effect on competition if the parties' combined market share is 25% or less. *The Chapter I Prohibition*, OFT Guideline 401, March 1999, paragraph 2.19.

459 *Economic Overview of the Attheraces Notification*, Europe Economics for GG Media, 29 April 2002, paragraphs 1.4 and 2.4.

460 The RCA has argued that '*all British horseraces are likely to have some attraction to ATR* [Attheraces] *and the rights would almost certainly be individually purchased if the … price were low enough*' (Source: the RBB Report, page 13, first bullet).

461 The RCA states that the marginal cost of making the Non-LBO Bookmaking Rights available is '*approximately zero*' (RBB Report, page 7, first line; see also RCA Representations, paragraph 3.6.6). This implies that selling these rights, even for a low price, increases the racecourse's profits. In combination with the evidence in the preceding footnote, this implies that both willing buyers and sellers of these rights exist.

462 The RCA argued that preserving free-to-air television coverage was conditional on an interactive deal. Therefore the RCA's own reasoning implies that, because collective selling is not indispensable to attaining an interactive deal, it is not indispensable to attaining any benefits that may stem from terrestrial free-to-air television coverage. RCA Representations, paragraph 4.4.24, final sentence. Similarly, the BHB licences certain data rights that Attheraces requires. As collective selling is not indispensable to Attheraces attaining critical mass, it is not indispensable to the BHB licensing this data (from which the BHB claimed that various benefits flow). BHB Submission, Volume III, witness statement of G Nichols, paragraphs 6.4-6.5. See also Volume I, paragraphs 5-6, 57(5).

463 On 4 February 2000, twelve major racecourses (known as the 'Super 12 Courses') announced a 10 year agreement with Channel 4, the BBC and Premium TV. This would involve a dedicated racing channel for digital TV viewers and interactive betting. The Super 12 Courses would be paid £200m plus £25m would be spent on marketing. *Super 12 to sign with C4 and BBC*, Racing Post, 5 February 2000. The offer to buy the racecourses' rights was withdrawn in July 2000, following a failure to obtain the rights of the sufficient courses outside of the Super 12 Courses. The RBB Report, page 29. The OFT considers

individual negotiation[464] i.e., that individual negotiation would fail due to coordination problems.[465]

5.2 The OFT's finding

406. In effect, this RCA argument supports its claim that collective selling was indispensable for the conclusion of the Rights Agreement. This claim was considered and rejected above, in paragraphs 397-404.

407. The RCA stated that '*the failure of the Super 12 deal demonstrates … that … critical mass could … not have been achieved through individual selling, but only through collective negotiation …*'[466] The RCA considered that the Super 12 Offer was '*based around individual negotiation …*'[467] For the RCA's analysis to be relevant to the Super 12 Offer, racecourses must have responded to this offer independently.

408. There were 42 racecourses not linked to the Super 12 Courses.[468] The OFT does not consider that these 42 courses acted independently in the context of the Super 12 Offer, for the reasons set out below.[469]

409. The RCA wrote to the 42 racecourses in March 2000[470] saying

> '… the [RCA] Area Meetings demonstrated an unanimous determination among the 42 to stick together and exploit their considerable leverage. If

---

that the Super 12 Offer is the same offer referred to in RCA briefing paper dated 4 March 2003, paragraph 3.7.

464 RCA Representations, paragraphs 3.6.7 – 3.6.9.

465 The RBB Report, pages 28 – 31.

466 RCA Representations, paragraph 3.6.2.

467 The RBB Report, page 20, final bullet.

468 Of the 47 courses outside the Super 12 Courses, five of these were owned by RHT. As RHT also controlled seven of the Super 12 Courses, these five were expected to agree to the Super 12 Offer. This left 42 other racecourses.

469 Further, the Super 12 Courses collectively account for [*30-40*]% of off-course betting turnover (or [*35-45*]% if the other 5 RHT courses are included) (calculated using figures from Rights Agreement, Schedule 16). It is also questionable whether this significant bloc of racecourses acted independently. The BHB Chairman stated that '*I am quite sure that for them* [the Super 12 Courses] *to have got closer together to negotiate as a group is one of the reasons why the income stream that will flow to those courses is substantially greater than it has previously been*.' Letter from BHB to Ripon racecourse, 29 February 2000, page 1. Provided in Ripon section 26 response dated 10 January 2002.

470 On the day the Super 12 Offer was announced, 15 courses '*decided to press the Racecourse Association to conduct future negotiations on behalf of every track*.' *Smaller tracks to press RCA for action*, Racing Post, 5 February 2000.

everyone keeps their nerve and sense of purpose I am confident a remunerative conclusion will be reached.'[471]

410. The RCA also suggested further meetings between the racecourses and the RCA. Another RCA note of the same day requested the 42 racecourses' chairmen to

> '... make no commitment to Channel 4 or any other offer until all "42" have been able to assess the options available ... The "42" owe it to each other to avoid fragmentation and so maintain the considerable strength they have.'[472]

411. Both these notes were sent to the 42 racecourses before Channel 4 and the other bidders had actually written to these courses[473] i.e., before these 42 courses has even been given the opportunity to evaluate independently the offer being made to them.[474] Indeed the RCA and the 42 racecourses appear to have favoured collective action even before the Super 12 Offer was announced.[475]

412. The RCA subsequently wrote to Channel 4, stating '*the "42" have asked the RCA to pursue all negotiations on their joint behalf*.'[476] In this letter the RCA stated '*the financial arrangements are not acceptable and the proposals* [i.e., the

---

471 *Media Rights*, note from RCA to racecourse managers (excluding Super 12 Courses and RHT), 6 March 2000. This note was provided in Cartmel section 26 notice response dated 14 December 2001.

472 *Media Rights*, note from RCA to racecourse chairmen (excluding Super 12 Courses and RHT), 6 March 2000. This note was provided in Cartmel section 26 notice response dated 14 December 2001.

473 Indeed, the RCA stated that it had '*no idea what the offers may be*.' *Media Rights*, note from RCA to racecourse managers (excluding Super 12 Courses and RHT), 6 March 2000. This note was provided in Cartmel section 26 notice response dated 14 December 2001.

474 This contradicts the RCA's claim that *'... the genesis of the decision collectively to sell the courses' rights arose ... following the failure of the* [Super 12 Offer] *...*' Witness statement of S Atkin dated 3 October 2003, paragraph 4.2.

475 In 1999, the RCA wrote to RHT stating '*I am getting feed back to me of universal concern that* [the Super 12 Courses] ... *could, if they conclude a deal ... covering ... "betting" rights (e.g. inter-active, internet), be doing a great disservice to all racecourses* ... [If] *a decent deal can only be done by selling a broader range of rights, should you not then make it a 59 racecourse deal? That is increasingly the way the other racecourses see it*.' (Letter from RCA to RHT, 24 December 1999). In a subsequent letter the RCA stated that most racecourses considered that *'...the convergence of media will shortly engulf all channels and that it is best to accept that and negotiate everything together from now. That route should ensure the best return for racecourses medium term ...*' (Fax from RCA to RHT, 30 January 2000). Both these documents were provided in RHT section 26 notice response dated 17 December 2001.

476 This letter follows a meeting between Channel 4 and the RCA, where the RCA briefed Channel 4 on '*the views of the "42".*' Letter from RCA to Channel 4, 11 April 2000, point (iii). This note was provided in Arena section 26 notice response dated 18 January 2002.

offers made to individual racecourses] *are therefore rejected*'[477] and implies that these courses need to '*collectively be satisfied as to the best way ahead*.'[478]

413. The RCA also responded on behalf of the 42 courses to other offers made to them.[479] Further

> 'The ... advice from the RCA was that if any approaches are made to individual racecourses then we should state that the 42 are looking for £[...] per year as a guaranteed sum.'[480]

Thus, even if offers were made to individual courses, it is questionable whether they would have responded in an individual manner.[481]

414. The Super 12 Offer shows that buyers were not in a position to play courses off against one another, because the racecourses were acting collectively. The OFT notes that such co-ordinated action appears to comprise the knowing substitution of practical co-operation for the risks of competition and, as such, may itself have fallen within the Chapter I prohibition. The OFT has not investigated this case and so has no concluded view on the matter.

415. However, since the racecourses were not apparently acting independently,[482] the Super 12 Offer does not provide evidence that independent negotiations could not assemble a critical mass.

---

477 *ibid.*, point (i).

478 *ibid.*, point (ii).

479 Arena wrote to each if the 42 racecourses individually in June 2000 (Source: letter from RCA to chairmen and managers of the 42 racecourses, 22 June 2000, second paragraph). At a meeting on 19 June 2000, these racecourses mandated the RCA to respond on their behalf (Source: Resolution 3 of the note attached to letter from RCA to chairmen and managers of the 42 racecourses, 22 June 2000). Subsequently The RCA declined Arena's '*offer*' '*on behalf of the "42"* ...' (Source: Letter from RCA to Arena, 22 June 2000). Both these documents were provided in Arena section 26 notice response dated 18 January 2002. This apparently contradicts the RCA's claim that bidders did not try to acquire rights individually (RCA Representations, paragraph 4.4.22).

480 File note of meeting with the RCA on 27 April 2000, produced by D Knight (Cartmel racecourse), dated 2 May 2000, page 2. This note was provided in Cartmel section 26 notice response dated 14 December 2001.

481 Arena, referring to comments it made in January 2002, stated that '*nothing in British racing could be done unilaterally, due to the way the racing industry worked at that time*.' Letter from Freshfields Bruckhaus Deringer to the OFT dated 21 November 2003, page 4.

482 Further, the fact that the RCA have implied that the negotiations surrounding the Super 12 Offer were individual when they were in fact collective (with the RCA as a leading player), harms the credibility of other evidence that it has presented.

6. Bidders sought collective sale

6.1 The RCA's view

416. From the failure of the Super 12 Offer, the RCA infers that buyers did not want individual negotiations.[483] On withdrawing its offer, Channel 4 wrote:

> 'In withdrawing we would like to think that the racing industry (or its major groupings) might come back to us with a coherent and united product and that we could still be part of such a solution.'[484]

417. With regard to the Attheraces bid, the RCA stated:

> 'The ATR consortium announced on 11 October 2000 that it intended to bid for all 59 courses' rights ... Nothing would have prevented ATR and its shareholders, and indeed Carlton, from making offers directly to the courses, or suggesting an alternative means of acquiring the courses' rights. In my view, this happened because pragmatically it knew that a bidder which wanted to buy a sufficiently large quantity of rights to establish an interactive service could not realistically do so other than by making an offer to acquire the rights of all courses.'[485]

6.2 The OFT's finding

418. The OFT considers that the relevant question is whether collective selling was indispensable for an undertaking seeking to compile sufficient rights to launch an iDTV channel and website. It accepts the RCA's view that at the time of bidding, pragmatism might dictate that Attheraces make a collective bid to all the courses, rather than seek individual negotiation (or indeed, complain to the OFT). For example, Arena stated that:

> 'the unsatisfactory experiences of bidders who had previously attempted to negotiate individual deals with smaller groups of courses demonstrated that the courses expected offers to be made to them all jointly via the RCA and its advisers ... To the extent that there was any "consensus" between bidders that joint selling ... was the only way to reach agreement ... [as claimed by the RCA], this would have been the reaction to the

---

483 RCA Representations, paragraph 3.6.2. RBB Report, page 30.

484 Letter from Channel 4 to RHT dated 11 July 2000, page 2. This letter is document 18 of the items relating to R Johnston's witness statement dated 9 October 2003.

485 Witness statement of S Atkin dated 3 October 2003, paragraph 4.22.

actions and requirements of the courses, not an independently-taken business decision.'[486]

419. However, this bid must be seen in light of the previous failure of the Super 12 Offer, and the history of co-ordination rather than competition between courses in the sale of their rights (see paragraphs 408-415). Accordingly, the structure of the bid does not demonstrate that collective selling was indispensable to the sale of the Courses' Non-LBO Bookmaking Rights.

7. Conditional contracts

7.1 The RCA's view

420. In the Rule 14 Notice, the OFT argued that conditional contracts would allow buyers to assemble the necessary critical mass of rights (see paragraph 401). Before receiving the Rule 14 Notice, the RCA stated that, if it had not negotiated on behalf of the Courses, conditional contracts were not the most likely outcome. Instead, Attheraces would have concentrated on concluding agreements only with the largest, most successful courses.[487]

421. The RCA Representations did not maintain this view. Instead the RCA put forward a different argument, namely that conditional contracts contain a financial instrument known as an option.[488] As such they '*would not have been acceptable to the Courses*', would be costly for buyers (as the Courses would require a fee for signing such a contract) and would be too uncertain for terrestrial broadcasters.[489] The RCA considered that agreeing conditional contracts with a large number of sellers would entail significant transaction costs (in particular, duplication of negotiations and uncertainty).[490]

7.2 The OFT's finding

422. The OFT does not accept that Attheraces would have concentrated on concluding agreements only with the largest courses (indeed this RCA claim may

---

[486] Letter from Freshfields Bruckhaus Deringer to the OFT dated 21 November 2003, page 3. See also page 2.

[487] RCA briefing paper dated 4 March 2003, footnote 12. The RCA also suggested that conditional contracts effectively result in links between the Courses and transparency in the market.

[488] In a conditional contract, the buyer will provisionally offer to purchase a course's rights at an agreed price subject to various conditions. The RCA argued that, if the value of the rights to the buyer falls, then this allows the buyer to withdraw from the deal. The RCA considers that the risk of this happening imposes a cost on the course. RCA Representations, paragraph 3.6.11.

[489] RCA Representations, paragraphs 3.6.11 – 3.6.12.

[490] RCA Representations, paragraph 4.4.12. RBB report, page 28.

be inconsistent with Attheraces' need for critical mass). Paragraphs 431-433 reject the argument that some Courses might have been unable to sell their Rights had the RCA not negotiated on behalf of all the Courses.[491]

423. The RCA stated that conditional contracts would either be costly or unacceptable to buyers and sellers.[492] It provided no evidence to substantiate this claim.[493] Further, the Notified Arrangement was itself conditional on acceptance by sufficient racecourses (see paragraph 276).[494] Similarly, the Super 12 Offer appears, in effect, to have been conditional (as the buyers reached agreement with the Super 12 Courses, then sought the agreement of the other courses they needed).[495] This suggests that conditional contracts are acceptable to both buyers and sellers in this market.

424. The RCA's analysis claims that conditional contracts contain a costly financial instrument called an option.[496] It is questionable whether the option actually imposes a significant cost on courses.[497] In particular, the option will be more

---

491 The RCA has suggested that conditional contracts effectively result in links between the Courses and transparency in the market. The OFT does not accept this argument. In particular, such contracts need not allow a racecourse to observe the price for which rival racecourses were selling their rights. Conditional contracts need not lead to the anticompetitive effects set out in paragraph 337 that result from the Notified Arrangement. For example, Attheraces could have struck deals with individual racecourses, played off the Courses against each other and readily declined to buy an individual Course's (or racecourse group's) rights.

492 The OFT notes that, if an option is costly to the Courses because there is a significant possibility that buyers will pull out, then this implies that it is valuable (i.e. attractive) to buyers (because they are more likely to be able to pull out of any deal).

493 The RCA did not make this claim in its submissions on conditional contracts prior to receiving the Rule 14 Notice.

494 The RCA Representations did not dispute this point.

495 This contradicts the RCA's claim that no buyer ever suggested the use of conditional contracts as a means of achieving sufficient critical mass. RCA Representations, paragraph 4.4.11.

496 The RCA's claim that this option is costly is inconsistent with its claim that transaction costs are high. As explained in footnote 488, the RCA considers that the option creates a risk that buyers will pull out of a deal because the value of the rights has fallen. This risk will only be costly for the course if buyers are actually willing to pull out of a deal (i.e., if buyers will actually 'exercise' the option). However, if individual selling imposes high transaction costs (as claimed by the RCA) this means that buyers would be unwilling to pull out (because striking a new deal, to take advantage of the lower value of the rights, would be costly). Thus, the higher transaction costs are, the lower the cost of the option to the course.

497 Compare the situation of racecourse A, which has signed a conditional agreement, with the situation of racecourse B, which has not. The RCA has argued that, if the value of course A's rights falls, then buyers can pull out. Assuming that it is contractually possible for this to happen, then (following the buyer pulling out) both courses are free to sell rights. The only difference is that course A has incurred negotiating costs (in negotiating and entering into the conditional contract). Thus, the cost to racecourse A of the option described by the RCA is simply the cost of the wasted negotiations if the buyer pulls out.

costly if the value of a course's rights is likely to vary wildly during the period that the buyer is attempting to secure other courses' rights. The RCA have provided no evidence that this is the case.[498]

425. In conclusion, the OFT does not accept that conditional contracts are unworkable in practice.

8. Transaction costs

8.1 The Applicants' and the RCA's view

426. The RCA stated that collective selling was indispensable to achieve the reduced transaction costs claimed.[499] The RCA considers that start-up companies, such as Attheraces, generally have limited management resources available and thus would be particularly affected by transaction costs.[500]

8.2 The OFT's finding

427. The OFT does not accept the RCA's argument that collective selling reduced transaction costs (see paragraphs 361-364). It necessarily follows that it cannot accept that collective selling was indispensable on this ground.

428. As explained in paragraph 402, it is possible that modest groups of racecourses could have offered their rights as a package without infringing the Act. The RCA has not addressed this possibility. Rather, it has provided evidence that individual selling (i.e., no groups) is costly for certain racecourses (particularly, small courses),[501] and claimed that large groups of courses would have market power.[502]

429. Further, the OFT does not accept the RCA's argument that collective selling was indispensable because Attheraces is a start-up company supplying a new product. Collective selling is likely to be particularly harmful to such a company. Establishing a company (such as Attheraces) that supplies a new, innovative product is generally a risky proposition. Accordingly, investors may require a higher return, to compensate for that risk. If collective selling raises the new

---

498 The RCA is also incorrect to claim that conditional contracts give sellers with a large part of the rights leverage (Source: RCA Representations, paragraph 4.4.13). If a seller truly has sufficient rights to hold a veto then that seller's strong position is not increased by the existence of conditional contract. If that seller does not possess sufficient rights to hold a veto then the contract does not need to be conditional upon its participation.

499 RCA Representations, paragraphs 4.4.9-4.4.23.

500 RCA Representations, paragraphs 4.4.18.

501 See paragraph 359.

502 Contrary to the RCA's Representations paragraph 4.4.12, the OFT has not suggested that four negotiating groups could emerge.

company's input costs (i.e., the price of the Courses' Rights) then this is likely to be particularly harmful, given the need for a high return for a risky venture.

9. Some courses incapable of selling their rights individually

9.1 The Applicants' and the RCA's view

430. The Applicants stated that some of the Courses might not have been able to sell their Rights at all if they had been obliged to negotiate contracts with purchasers individually.[503] The RCA's Representations did not expressly support this view.[504]

9.2 The OFT's finding

431. The OFT does not accept the Applicants' arguments on this point. First, if racecourses' rights are attractive to buyers then the OFT considers it likely that those rights will be sold.[505]

432. Second, some courses are capable of concluding their own deals, as they are part of large groups.[506] Free-to-air rights have previously been negotiated either by individual racecourses or by small groups of racecourses.[507]

433. Third, if certain racecourses are incapable of conducting negotiations themselves then these racecourses could appoint agents to negotiate on their behalf. If this occurred, it is not indispensable that that agent also negotiates on behalf of other, more sophisticated courses. Ten relatively small racecourses successfully sold their rights to GG Media which then acted as an intermediary. The RCA rejected the OFT's comparison with the GG Media transaction because the buyer did not need sufficient critical mass to launch a dedicated iDTV channel.[508] However, the OFT considers that this transaction shows that small racecourses

---

503 Form N, page 105.

504 The RCA did cite quotes from racecourses about the costs of individual negotiation (see paragraph 359) and stated that, without collective selling, there would have been no sale at all (see paragraphs 394-396).

505 See footnote 460, which contains evidence that willing buyers exist.

506 For example, Arena Leisure owns six racecourses (including all three all-weather tracks), is a public limited company listed on the London stock exchange and had a turnover of £26.6m in 2001. See paragraph 13 and *Betting & gaming*, Keynote Market Report, October 2002, page 25. Attheraces has stated that it has been approached individually by Arena and Northern and that these Courses have indicated a willingness to negotiate separately with Attheraces should the Rights Agreement be rendered void. Fax from Attheraces to the OFT dated 15 August 2003, paragraph 12.

507 *The Future Funding Plan for British Racing*, BHB, October 2000, paragraph 4.3.9.1.

508 Whilst GG Media acquired all of the media and interactive rights of 10 racecourses, the RCA claimed that the intention of this transaction was acquiring these courses' LBO rights (i.e., the rights needed to screen races from these courses in LBOs). RCA Representations, paragraphs 3.9.3, 4.4.15 and 4.4.20.

are capable of concluding commercial deals for their rights without the RCA negotiating on their behalf.

10. 'The whole show'

10.1 The BHB's view

434. The BHB stated that an individual race has more value to Non-LBO Bookmakers when run as part of the wider calendar of British racing.[509] Further, the Rights have value because they relate to races that are run under the Orders and Rules, which imply '*prestige and integrity* ...'[510] See also the BHB's arguments in paragraph 256-258.

10.2 The OFT's finding

435. Even if the effects claimed by the BHB exist (which the OFT does not necessarily accept), the OFT does not accept that collective selling of the Non-LBO Bookmaking Rights contributes to them. See paragraphs 263-266.

11. Conclusion on indispensability

436. The OFT concludes that the restriction of competition produced by the collective selling that occurred in this case is not indispensable to attaining the benefits of the Notified Arrangement. In particular, it is not indispensable to ensuring that the Courses' Rights were sold.

437. The conditions of section 9 of the Act are cumulative. The failure to fulfil any one condition prevents the OFT granting an exemption. As a result, the Notified Arrangement is not eligible for individual exemption. However, for completeness, the OFT has also considered whether the Notified Arrangement affords the possibility of eliminating competition in respect of a substantial part of the products in question.

IV. THE POSSIBILITY OF ELIMINATING COMPETITION IN RESPECT OF A SUBSTANTIAL PART OF THE PRODUCTS IN QUESTION

1. The Applicants', the RCA's and the BHB's view

438. The Applicants considered that competition on the markets for the supply of rights to video programming, the supply of television channels to distributors and the supply of betting and gaming services is not adversely affected by the

---

509 BHB Submission, Volume I, paragraphs 120 (final sentence),143(2).

510 BHB Submission, Volume I, paragraphs 143(2) and 143(7)(b)(iii).

Notified Arrangement because of their low shares of those markets.[511] The RCA has also told the OFT that the Courses face competition from the GG Media courses when supplying their rights.[512]

439. The RCA disputed the OFT's view set out in the Rule 14 Notice that the Notified Arrangement eliminated competition. First, Attheraces' need for critical mass means the Courses' Rights are complementary. Second, the Notified Arrangement results in the creation of a new product. Third, it does not eliminate the Courses' incentives to innovate and thereby compete.[513]

440. The BHB referred to

> 'the need for financing and distribution of [that] financing, the entry of new racecourses, the possibility of increased numbers of racing fixtures [and] the possibility of racecourses adapting their arrangements with the existing Orders and Rules [of Racing].'[514]

2. The OFT's finding

441. The Applicants have argued that the sale of Rights did not eliminate competition, as the Courses have a negligible share of the relevant market (applying the Applicants' market definition). As the OFT does not accept the Applicants' market definition (see Part 3), the OFT does not accept this argument.

442. The Applicants referred to the expected entry of two new racecourses before 2003.[515] This has not occurred to date. The weak constraint imposed by the possibility of new entry was considered in paragraphs 189-194. Further, the 49 Courses' market share will still be very high, even if new racecourses open. For example, in 2000 there were 1,132 fixtures.[516] The highest number of racedays at a single course in 2000 was 60.[517] Even if a new entrant had 60 fixtures, it would only reduce the Courses' market share by approximately 5%.[518]

---

511 Form N, pages 106-107.

512 RCA briefing paper dated 4 March 2003, paragraph 3.15.

513 RCA Representations, paragraph 4.5.2.

514 BHB Submission, Volume I, paragraph 145(5).

515 Form N, page 106. See also BHB Submission, Volume I, paragraph 145(5).

516 *The Racing Industry Statistical Bureau Statistics (2000)*, table D1, page 15.

517 At Southwell. Section 26 Notice response by Ladbrokes dated 29 November 2001, question 6.

518 The new course's market share, measured by number of fixtures, would be 60/(1132+60) = 5%.

443. The Applicants have argued that individual courses were free to sell their Rights as they wished.[519] The OFT does not accept that this removes the possibility of eliminating competition. Self-interest (i.e., a higher price for their rights) provides a strong incentive for Courses not to opt out of an anticompetitive collective selling agreement.

444. The OFT considers that Courses with a market share of approximately 90% agreed to sell collectively their Non-LBO Bookmaking Rights.[520] As explained in paragraphs 304-305, this eliminated competition, including price competition, between the Courses in the supply of these rights. The OFT thus considers that collective selling by the Courses affords the possibility of eliminating competition in respect of a substantial part of the products in question. Accordingly, the Notified Arrangement is not eligible for individual exemption.

445. The OFT does not accept the RCA's additional arguments. First, as explained in paragraphs 286-287, the OFT considers that the Courses' rights are substitutes, not complements (in the economic sense of the word). The competitive constraint the Courses impose on each others' pricing is eliminated by collective selling. Second, in paragraphs 403-404 the OFT concludes that collective selling is not indispensable to selling the Courses' Rights. Third, in paragraph 333 the OFT concludes that the Notified Arrangement restricts incentives within the market for the supply of the Non-LBO Bookmaking Rights to improve the Courses' output.[521]

V. THE OFT'S CONCLUSION

446. The OFT accepts that the Notified Arrangement, as a whole, improves production and distribution and promotes technical and economic progress, while allowing consumers a fair share of the resulting benefit.[522]

447. However, the OFT considers that collective selling is not indispensable to attaining the benefits resulting from the Notified Arrangement. Collective selling also affords the possibility of eliminating competition with respect to a substantial part of the products in question (namely the supply of the Non-LBO

---

519 Form N, page 106.

520 The (weak) competitive constraint imposed by the other 10 racecourses if further weakened by the restrictions on these other courses expanding their output. See paragraph 195.

521 Accordingly the claim by the BHB that there is the possibility of additional fixtures or of racecourses '*adapting their arrangements* ...' is not valid. The Notified Arrangement restricts the incentives to do either of these things. BHB Submission, Volume I, paragraph 145(5).

522 Although, the OFT does not accept some of the contributions to technical or economic progress that have been ascribed to the Notified Arrangement (see paragraph 366).

Bookmaking Rights). Accordingly the Notified Arrangement is not eligible for an individual exemption.

PART SEVEN THE OFT'S DECISION

448. For the reasons given above, the OFT decides that the collective selling by the Courses of their Non-LBO Bookmaking Rights infringes the Chapter I prohibition and does not qualify for individual exemption. In particular, the following provisions of the Rights Agreement infringe the Chapter I prohibition:

(i) the collective grant by the 49 Courses of their Non-LBO Bookmaking Rights[523] (i.e., Clause 3 of the Rights Agreement insofar as it relates to the Non-LBO Bookmaking Rights); and

(ii) the payment for such grant of the Non-LBO Bookmaking Rights (i.e., Clause 12 of the Rights Agreement insofar as it relates to the Non-LBO Bookmaking Rights plus the Income Distribution Formula – Interactive Minimum Guarantees).[524]

[523] The term Non-LBO Bookmaking Rights is defined in paragraph 56.

[524] The Income Distribution Formula – Interactive Minimum Guarantees is part of Schedule 14 of the Rights Agreement.

PART EIGHT THE OFT'S ACTION

I. DIRECTIONS

449. Section 32(1) of the Act provides that if the OFT has made a decision that an agreement infringes the Chapter I prohibition, it may give to such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end. No directions are appropriate in this case, as the OFT is satisfied that Attheraces has given effect to its notice terminating the Rights Agreement (see paragraph 9).

II. PENALTIES

450. Section 14(4) of the Act provides that no penalty is to be imposed in respect of any infringement of the Chapter I prohibition by an agreement which has been notified to the OFT. This immunity from penalties begins from the date on which the notification was given and ends with such date as may be specified in a notice in writing given to the applicant(s) by the OFT when the application for a decision has been determined. The OFT has today notified the Applicants in writing that the specified date is the date of this decision. The OFT is not imposing any penalties on any Applicants in respect of the infringement.

VINCENT SMITH
DIRECTOR OF COMPETITION ENFORCEMENT DIVISION