



Competition Act 1998

Decision of the Office of Fair Trading

CA98/04/2013

Distribution of Mercedes-Benz commercial vehicles (trucks)

Case CE/9161-09

27 March 2013

Confidential information in the original version of this Decision has been redacted from the published version on the public register. Redacted confidential information in the text of the published version of the Decision is denoted by [C].

The names of individuals mentioned in the description of the infringement in the original version of this Decision have been removed from the published version on the public register. Names have been replaced by a general descriptor of the individual's role.

COMPETITION ACT 1998

Distribution of Mercedes-Benz commercial vehicles (trucks)

Decision No. CA98/04/2013

H & L Garages Limited

Northside Truck & Van Limited and S.A.H. Limited

27 March 2013

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SECTION I INTRODUCTION

A. The purpose of this document

- I.1 By this decision (the 'Decision'), the Office of Fair Trading ('OFT') has concluded that:
- Northside Truck & Van Limited and its ultimate parent S.A.H. Limited (together, 'Northside') and
 - H & L Garages Limited (in liquidation) ('H & L Garages') (each a 'Party', together the 'Parties') have infringed the prohibition imposed by section 2(1) (the 'Chapter I prohibition') of the Competition Act 1998 (the 'Act').
- I.2 The Chapter I prohibition provides that agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the United Kingdom (the 'UK') and which have as their object or effect the prevention, restriction or distortion of competition within the UK are prohibited unless they are excluded by or as a result of, or exempt in accordance with, the Act.

B. Summary of the infringement and the OFT's enforcement action

- I.3 The OFT has concluded that the Parties infringed the Chapter I prohibition by participating between 13 June 2008 and 26 January 2010 in an agreement and/or concerted practice which had the object of preventing, restricting or distorting competition for the sale of trucks to customers based in the Parties' areas (the 'Infringement' or 'Infringement 4').
- I.4 At a meeting on 13 June 2008, Northside and H & L Garages entered into an anti-competitive agreement and/or concerted practice that consisted of two elements. The Parties agreed that a H & L Truck Sales Executive should cease targeting customers based in Northside's area. The Parties also agreed that they would not prospect within each other's areas and that they would each pass to the other Party enquiries from customers based in the other Party's area. The Parties subsequently contacted each other on a number of occasions in relation to specific customers under the terms of the agreement and/or concerted practice.¹

¹ See Section VI (The Conduct of the Parties and Legal Assessment).

- I.5 By this Decision, the OFT is imposing financial penalties under section 36 of the Act, subject to the application of the OFT's leniency policy.
- I.6 Northside applied for and was granted full immunity from financial penalties under the OFT's leniency policy.² Northside is not therefore required by this Decision to pay a penalty under section 36 of the Act.

² OFT Guidance 423 *OFT's guidance as to the appropriate amount of a penalty* (December 2004) (the '*2004 Penalty Guidance*'). This guidance was replaced in September 2012 by OFT Guidance 423, *OFT's guidance as to the appropriate amount of a penalty* (September 2012) (the '*2012 Penalty Guidance*'). See also paragraphs VII.5 to VII.6 (The OFT's Action).

SECTION II COMPANY PROFILES

A. Introduction

- II.1 This section sets out the details of the undertakings which the OFT finds liable for the Infringement, including where applicable the joint and several liability of the parent company or companies within the undertakings involved in the Infringement.
- II.2 This section describes each of the Parties' primary activities and corporate structure. It also sets out the Parties' total turnover and profit/loss figures (including consolidated turnover, where applicable) relating to each business year spanning the 'Relevant Period',³ as well as the latest available total turnover and profit/loss figures. This section also lists the Parties' directors for each of the years spanning the Relevant Period. Finally, this section sets out, for each Party, the OFT's conclusions on liability for the Infringement.

B. The OFT's approach to assessing liability

- II.3 The Chapter I prohibition applies to agreements or concerted practices between 'undertakings',⁴ which is a concept used to designate an economic unit. As such, it is distinct from that of legal personality and may consist of several persons, natural or legal.⁵ In determining who is liable for an infringement and, therefore, who can be subject to any financial penalty which the OFT may impose, it is necessary to identify the legal or natural persons who form part of the undertaking involved in the Infringement.
- II.4 In certain circumstances, the conduct of a subsidiary may be imputed to the parent company where the parent company and its subsidiary form a single undertaking for the purposes of the Act. In such circumstances, a decision may be addressed to the parent company without having to establish its direct involvement in the infringement.⁶

³ The Relevant Period corresponds to the duration of Infringement 4, that is, between 13 June 2008 and 26 January 2010; see paragraph VI.82 (The Conduct of the Parties and Legal Assessment).

⁴ See paragraph V.9 (Legal Background).

⁵ Case C-170/83 *Hydrotherm Gerätebau GmbH v Compact del Dott Ing Mario Andreoli & C Sas* [1984] ECR 2999, paragraph 11.

⁶ C-628/10 P *Alliance One International and Standard Commercial Tobacco v Commission Alliance* judgment of 19 July 2012 (not yet published) ('Alliance One'), paragraphs 43 to 44.

- II.5 In order for the parent company to be liable, it must have exercised decisive influence over the subsidiary. In determining this, the economic, organisational and legal links which tie the subsidiary to the parent company are taken into consideration.⁷
- II.6 Where a parent company has a 100 per cent shareholding in a subsidiary, this establishes that the parent company has the ability to exercise a decisive influence over the conduct of the subsidiary. It also creates a rebuttable presumption that the parent company does, in fact, exercise a decisive influence over the conduct of its subsidiary.⁸
- II.7 In order to rebut the presumption that it exercises decisive influence over a subsidiary, a parent must adduce evidence relating to the economic and legal organisational links between the two legal entities, in order to demonstrate that the subsidiary operates autonomously on the market.⁹
- II.8 In order to establish the exercise of decisive influence, additional indicia other than the parent's shareholding in the subsidiary, may be relied on.¹⁰ Such indicia have been found to include a parent being active on the same or adjacent markets to its subsidiary,¹¹ direct instructions being given by a parent to a subsidiary¹² or the two entities having shared directors.¹³
- II.9 Financial penalties that are imposed both on a parent and a subsidiary may be imposed jointly and severally.¹⁴
- II.10 In this case, for each Party which the OFT has found to have infringed the Act, the OFT has first identified the legal entity directly involved in the Infringement during the Relevant Period. It has then determined

⁷ *Alliance One* (fn6), paragraph 45.

⁸ Case C-97/08P *Akzo Nobel v Commission* [2009] ECR I-8237 ('*Akzo Nobel*'), paragraphs 60 to 61 and *Alliance One* (fn6), paragraphs 46 to 47.

⁹ *Akzo Nobel* (fn8), paragraphs 73 to 74.

¹⁰ *Durkan Holdings Limited and Others v OFT* [2011] CAT 6 ('*Durkan*'), at [22]; *Akzo Nobel* (fn8), paragraph 62 and Case C-286/98 P *Stora Kopparbergs Bergslags AB v Commission* [2000] ECR I-9925, paragraphs 28 to 29.

¹¹ Opinion of Advocate-General Mischo in Case C-286/98 P *Stora Kopparbergs Bergslags AB v Commission* [2000] ECR I-9925, paragraph 49.

¹² Case T-48/69 *Imperial Chemicals Industries v Commission* [1972] ECR I-619 ('*Dyestuffs*'), paragraphs 132 to 133.

¹³ *Sepia Logistics Limited v Office of Fair Trading* [2007] CAT 13, at [77] to [80].

¹⁴ Cases 6 and 7/73 *Commercial Solvents* [1974] ECR 223, paragraph 41; Case T-9/99 *HFB Holding für Fernwärm 技术 Beteiligungsgesellschaft and Others v Commission* [2002] ECR II-1487 ('*HFB Holding*'), paragraphs 522 to 532 and paragraphs 54 to 68; upheld on appeal and Joined Cases C-189/02 P etc. *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425 ('*Dansk Rørindustri*'), paragraphs 103 to 130.

whether liability for the Infringement should be shared with another legal entity on the basis that both form part of the same undertaking.

- II.11 The OFT considers that both Parties constitute undertakings for the purposes of the Chapter I prohibition.
- II.12 The Parties to whom the Decision is addressed are set out in paragraph I.1 (Introduction). They comprise:
- the companies which the OFT considers had direct involvement in the Infringement and
 - the legal entities (if any) which the OFT presumes exercised decisive influence over the companies during the Relevant Period.¹⁵

C. H & L Garages Limited and Dusted Powder Limited

- II.13 The Statement of Objections ('Statement')¹⁶ issued on 28 June 2012 was addressed to H & L Garages Limited (in administration) and its parent company, Dusted Powder Limited (together, 'H & L'). Since then, Dusted Powder Limited was struck off the Companies House register on 8 January 2013 and no longer exists as a legal entity.¹⁷ In addition, H & L Garages entered into liquidation on 2 December 2012.¹⁸ The OFT considers that H & L Garages was directly involved in, and as part of the undertaking that committed the Infringement, is liable for, the Infringement. This Decision is addressed solely to H & L Garages Limited (in liquidation).¹⁹

¹⁵ See paragraphs II.25 and II.38 to II.39.

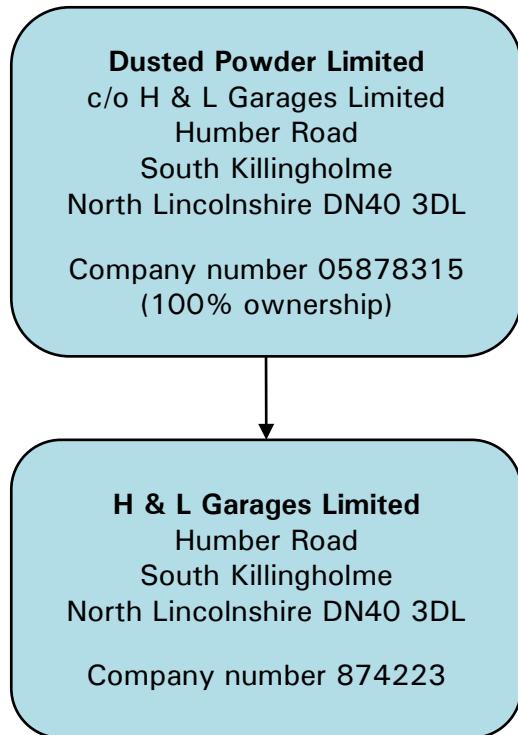
¹⁶ See paragraph III.1 (The OFT's Investigation).

¹⁷ The OFT has no evidence that there is functional and economic continuity ('undertaking identity') between Dusted Powder Limited and any other entity (see Commission Decision 89/190/EEC of 21 December 1988 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.865 - PVC) (OJ 1989 L74), paragraph 42 and Joined Cases C-40/73 and others *Suiker Unie v Commission* [1975] ECR 1663 ('*Suiker Unie*'), paragraphs 75 to 87). Dusted Powder Limited did not have any assets other than the shares in H & L Garages (see H & L Garages Limited Report and Financial Statements to 31 December 2010 ('H & L Garages Limited Report 2010'), OFT Document Reference 4086, page 9 and Dusted Powder Limited Report and Financial Statements to 31 December 2010 ('Dusted Powder Limited Report 2010'), OFT Document Reference 2668, page 9 and H & L Garages is now in liquidation.

¹⁸ Notice of move from administration to creditors' voluntary liquidation for H & L Garages Limited dated 2 December 2012, OFT Document Reference 5033.

¹⁹ For the avoidance of doubt, in this document 'H & L Garages' refers to H & L Garages Limited (in liquidation), whereas 'H & L' refers to the entire undertaking that the Statement was addressed to: H & L Garages Limited together with Dusted Powder Limited.

- II.14 The registered company details and corporate structure of Dusted Powder Limited²⁰ and H & L Garages²¹ during the Relevant Period are outlined below:



H & L Garages Limited (in liquidation)

- II.15 Until H & L Garages went into administration on 2 December 2011, its principal activity comprised that of a Mercedes-Benz commercial vehicle dealer operating out of six sites covering North Yorkshire, Humberside and Lincolnshire.²²
- II.16 Paul Bates and Francis Newton of BDO LLP were appointed as administrators for H & L Garages on 2 December 2011.²³ H & L Garages ceased trading on that date.²⁴ H & L Garages moved from administration

²⁰ Dusted Powder Limited Report 2010, OFT Document Reference 2668. The company number was recorded at Companies House (www.companieshouse.gov.uk) as at 26 March 2013.

²¹ H & L Garages Limited Report 2010, OFT Document Reference 4086. The current registered address listed is that of H & L Garages' administrators and now liquidators, PJ Bates and FG Newton, at BDO LLP at 1 Bridgewater Place, Water Lane, Leeds LS11 5RU. The company number was recorded at Companies House (www.companieshouse.gov.uk) as at 26 March 2013.

²² H & L Garages Limited Report 2010, OFT Document Reference 4086, page 2.

²³ Notice of appointment of an administrator by company or director(s) for H & L Garages Limited dated 2 December 2011, OFT Document Reference 3884.

²⁴ Email from Walker Morris to OFT dated 5 December 2011 regarding entry by H & L Garages into administration, OFT Document Reference 3883.

into Creditors' Voluntary Liquidation on the 2 December 2012. Paul Bates and Francis Newton of BDO LLP were appointed as the liquidators.²⁵

Dusted Powder Limited

- II.17 During the Relevant Period, the principal activity of Dusted Powder Limited was that of the parent company of a corporate group engaged in the operation of a Mercedes-Benz commercial vehicle dealership.²⁶
- II.18 On 25 September 2012 Peter Worsnup, a director and shareholder of the company, filed a First Notice of Strike Off Action with Companies House to give notice that Dusted Powder Limited would be struck off the register and dissolved three months after the notice was filed. Dusted Powder Limited was subsequently dissolved on 8 January 2013.²⁷
- II.19 During the Relevant Period, the shares in Dusted Powder Limited were held by the following individuals:²⁸

Name	Shares held
Peter Worsnup	8,000,000 ordinary shares
Brett Whittingham	12,000,000 ordinary shares

²⁵ Notice of move from administration to creditors' voluntary liquidation for H & L Garages Limited dated 2 December 2012, OFT Document Reference 5033.

²⁶ Dusted Powder Limited Report 2010, OFT Document Reference 2668, page 2.

²⁷ Final Gazette Notice: Dissolved Via Voluntary Strike Off, dated 8 January 2013, OFT Document Reference 5035.

²⁸ Dusted Powder Limited Annual Return 2010, OFT Document Reference 4090; Dusted Powder Limited Annual Return 2009, OFT Document Reference 4089 and Dusted Powder Limited Annual Return 2008, OFT Document Reference 4088.

Turnover and profit/loss of H & L Garages Limited

- II.20 H & L Garages' turnover and profits for the financial years 2008 to 2010²⁹ were as follows:

Year ending	31/12/10³⁰	31/12/09³¹	31/12/08³²
Turnover	£34,643,000	£33,576,000	£42,861,000
Gross profit (loss)	£7,782,000	£7,882,000	£8,800,000
Operating profit (loss)	£638,000	£533,000	£611,000
Profit (loss) on ordinary activities before taxation	£371,000	£247,000	£384,000
Profit (loss) for the financial year	£282,000	£166,000	£260,000

Consolidated turnover and profit/loss of Dusted Powder Limited

- II.21 Dusted Powder Limited's consolidated turnover and profits for the financial years 2008 to 2010³³ were as follows:

²⁹ H & L Garages Limited did not submit any further accounts to Companies House after it went into administration on 2 December 2011.

³⁰ H & L Garages Limited Report 2010, OFT Document Reference 4086, page 2. Page 11 states that '[t]urnover comprises revenue recognised by the company in respect of goods and services supplied, exclusive of Value Added Tax and trade discounts. Revenue is recognised to the extent that the company obtains the right to consideration in exchange for its performance. Revenue is measured at the fair value of the consideration received, excluding discounts, rebates, VAT and other sales taxes or duty'.

³¹ H & L Garages Limited Report and Financial Statements to 31 December 2009, OFT Document Reference 3921, page 2.

³² H & L Garages Limited Report and Financial Statements to 31 December 2008, OFT Document Reference 3922, page 9.

³³ As outlined in paragraph II.18, Dusted Powder Limited's only activity was through its subsidiary, H & L Garages Limited, which went into liquidation on 2 December 2012. Dusted Powder Limited did not submit accounts to Companies House for 2011.

Year ending	31/12/10³⁴	31/12/09³⁵	31/12/08³⁶
Turnover	£34,643,000	£33,576,000	£42,861,000
Gross profit (loss)	£7,782,000	£7,882,000	£8,800,000
Operating profit (loss)	£635,000	£531,000	£611,000
Profit (loss) on ordinary activities before taxation	£398,000	£198,000	£307,000
Profit (loss) for the financial year	£303,000	£131,000	£223,000

- II.22 According to its published reports, Dusted Powder Limited's entire turnover during the Relevant Period arose within the UK.³⁷

Appointments

- II.23 During the Relevant Period, the same directors made up the Board of Management for H & L Garages³⁸ and Dusted Powder Limited³⁹ as follows:

Name	Appointment	Position in January 2010
Anthony Timmins	Prior to 2008	In post
Brett Whittingham	Prior to 2008	In post
Peter Worsnup	Prior to 2008	In post

Liability

- II.24 H & L did not apply for leniency.

³⁴ Dusted Powder Limited Report 2010, OFT Document Reference 2668, page 9. Page 13 states that '[t]urnover comprises revenue recognised by the company in respect of goods and services supplied, exclusive of Value Added Tax and trade discounts'. Page 13 states that the report consolidates the financial statements of Dusted Powder Limited and all of its subsidiary undertakings.

³⁵ Dusted Powder Limited Report and Financial Statements to 31 December 2009 ('Dusted Powder Limited Report 2009'), OFT Document Reference 3926, page 9.

³⁶ Dusted Powder Limited Report and Financial Statements to 31 December 2008 ('Dusted Powder Limited Report 2008'), OFT Document Reference 3927, page 9.

³⁷ Dusted Powder Limited Report 2010, OFT Document Reference 2668, page 14; Dusted Powder Limited Report 2009, OFT Document Reference 3926, page 14 and Dusted Powder Limited Report 2008, OFT Document Reference 3927, page 15.

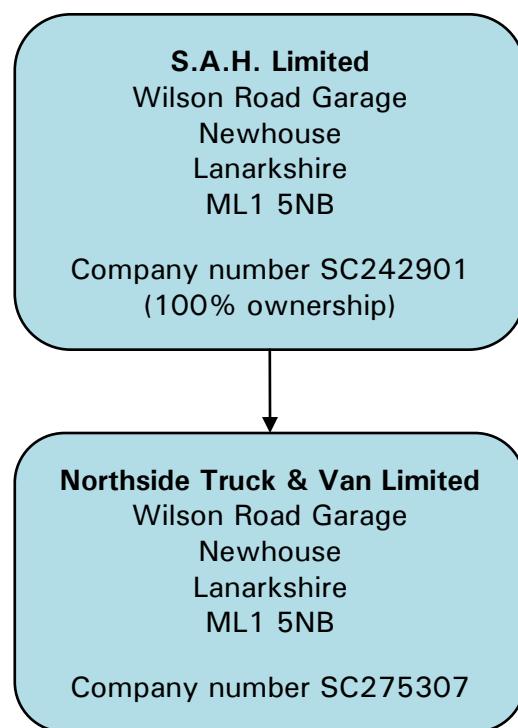
³⁸ H & L Garages Limited Financial Analysis Made Easy ('FAME') Report containing financial accounts to year-end 31 December 2010, OFT Document Reference 4011. FAME is a database for company information.

³⁹ Dusted Powder Limited FAME Report containing financial accounts to year-end 31 December 2010, OFT Document Reference 4010.

II.25 The OFT considers that H & L Garages is liable for the Infringement and that it is liable for payment of the financial penalty being imposed by the OFT on account of its participation in the Infringement. This Decision is therefore addressed to H & L Garages.

D. Northside Truck & Van Limited and S.A.H. Limited

- II.26 The OFT considers that Northside Truck & Van Limited was directly involved in the Infringement. However given that its parent company, S.A.H. Limited, can be presumed to have exercised decisive influence over its subsidiary, this Decision is also addressed to S.A.H. Limited. The OFT considers that S.A.H. Limited forms part of the same undertaking and therefore is jointly and severally liable with Northside Truck & Van Limited for the Infringement.
- II.27 The registered company details of S.A.H. Limited⁴⁰ and Northside Truck & Van Limited,⁴¹ and their corporate relationship, are outlined below:



⁴⁰ S.A.H. Limited Directors' Report and Financial Statements for the year ended 31 December 2011 ('S.A.H. Limited Report 2011'), OFT Document Reference 4609, Company Information page. The company number was recorded at Companies House (www.companieshouse.gov.uk) as at 26 March 2013.

⁴¹ Northside Truck & Van Limited Directors' Report and Financial Statements for the year ended 31 December 2011 ('Northside Truck & Van Limited Report 2011'), OFT Document Reference 4607, Company Information page. The company number was recorded at Companies House (www.companieshouse.gov.uk) as at 26 March 2013.

Northside Truck & Van Limited

- II.28 Northside Truck & Van Limited is a dealer in Mercedes-Benz commercial vehicle services⁴² operating out of four locations in Bradford, Leeds, Sheffield and Doncaster.⁴³ At the end of 2011, it became the Mercedes-Benz commercial vehicle dealer in Hull and Immingham, following the administration of H & L Garages. It also established operations in York following the closure at the end of 2011 of the H & L Garages' location there.⁴⁴
- II.29 Northside Truck & Van Limited is a wholly-owned subsidiary of S.A.H. Limited.⁴⁵

S.A.H. Limited

- II.30 S.A.H. Limited's principal activity comprises that of a holding company and consequently the company did not trade during the Relevant Period.⁴⁶
- II.31 During the Relevant Period, the shares in S.A.H. Limited were held by the following individuals:⁴⁷

Name	Shares held
Peter Anderson	27,066 ordinary shares
Samuel Stewart Anderson	27,066 ordinary shares
Helena Anderson	16,656 ordinary shares
Jillian Anderson	8,328 ordinary shares
Jayne Anderson	8,328 ordinary shares
Samuel Irvine Anderson	8,328 ordinary shares
Jennifer Anderson	8,328 ordinary shares

- II.32 In addition to Northside Truck & Van Limited, S.A.H. Limited has the following wholly-owned subsidiaries: Sam Anderson (Newhouse)

⁴² Northside Truck & Van Limited Report 2011, OFT Document Reference 4607, page 1.

⁴³ Northside Truck & Van Limited Report 2011, OFT Document Reference 4607, page 1.

⁴⁴ Northside Truck & Van Limited Report 2011, OFT Document Reference 4607, page 1.

⁴⁵ Northside Truck & Van Limited Report 2011, OFT Document Reference 3996, page 19 and S.A.H. Limited Report 2011, OFT Document Reference 3997, page 28.

⁴⁶ S.A.H. Limited Report 2011, OFT Document Reference 4609, page 1.

⁴⁷ S.A.H. Limited Annual Return 2010, OFT Document Reference 3940; S.A.H. Limited Annual Return 2009, OFT Document Reference 3941 and S.A.H. Limited Annual Return 2008, OFT Document Reference 3942.

Limited, T McMillian (Transport) Limited and F Short Limited (all haulage contractors) and Anderson Commercial (Newhouse) Limited (property investment).⁴⁸ The OFT does not have any evidence that any of these subsidiaries were directly involved in the Infringement.

Turnover and profit/loss of Northside Truck & Van Limited

- II.33 Northside Truck & Van Limited's turnover and profits for the financial years 2008 to 2011 were as follows:

Year ending	31/12/11⁴⁹	31/12/10⁵⁰	31/12/09⁵¹	31/12/08⁵²
Turnover	£97,595,660	£76,213,500	£62,812,361	£95,048,421
Gross profit (loss)	£11,278,048	£10,292,955	£9,094,375	£12,136,542
Operating profit (loss)	£794,929	£210,754	(£747,599)	£836,782
Profit (loss) on ordinary activities before taxation	£159,165	(£280,531)	(£1,230,898)	£32,543
Profit (loss) for the financial year ⁵³	£12,006	(£309,009)	(£1,053,804)	(£37,889)

⁴⁸ S.A.H. Limited Report 2011, OFT Document Reference 4609, page 28.

⁴⁹ Northside Truck & Van Limited Report 2011, OFT Document Reference 4607, page 7. Page 9 states that '[t]urnover comprises revenue recognised by the company in respect of goods and services supplied, exclusive of Value Added Tax and trade discounts. Turnover derives from the principal activity of the company'.

⁵⁰ Northside Truck & Van Limited Directors' Report and Financial Statements for the year ended 31 December 2010 ('Northside Truck & Van Limited Report 2010'), OFT Document Reference 3996, page 7.

⁵¹ Northside Truck & Van Limited Directors' Report and Financial Statements for the year ended 31 December 2009 ('Northside Truck & Van Limited Report 2009'), OFT Document Reference 3931, page 7.

⁵² Northside Truck & Van Limited Directors' Report and Financial Statements for the year ended 31 December 2008 ('Northside Truck & Van Limited Report 2008'), OFT Document Reference 3932, page 7.

⁵³ Northside Limited's losses in 2008 to 2010 were made after charging £1,104,923 of goodwill amortisation. See Northside Truck & Van Limited Report 2010, OFT Document Reference 3996, page 1; Northside Truck & Van Limited Report 2009, OFT Document Reference 3931, page 1 and Northside Truck & Van Limited Report 2008, OFT Document Reference 3932, page 1. In addition, in 2010 and 2009 the parent company (S.A.H. Limited) forgave part of the intercompany debt, thereby making a capital contribution to the company of £1,000,000 in 2010 and £1,500,000 in 2009. As a result, the profit and loss account reserve increased by £690,991 and £446,196 in 2010 and 2009, respectively. See Northside Truck & Van Limited Report 2010, OFT Document Reference 3996, page 1 and Northside Truck & Van Limited Report 2009, OFT Document Reference 3931, page 1.

Consolidated turnover and profit/loss of S.A.H. Limited

- II.34 S.A.H. Limited's consolidated turnover and profits for the financial years 2008 to 2011 were as follows:

Year ending	31/12/11⁵⁴	31/12/10⁵⁵	31/12/09⁵⁶	31/12/08⁵⁷
Turnover	£109,635,344	£86,758,665	£72,482,171	£107,215,264
Gross profit (loss)	£12,428,376	£11,214,897	£5,915,827	£13,209,643
Operating profit (loss)	£1,429,122	£924,737	(£74,494)	£1,542,530
Profit (loss) on ordinary activities before taxation	£524,925	£115,763	(£917,650)	£603,637
Profit (loss) on ordinary activities after taxation ⁵⁸	£183,051	(£90,667)	(£849,787)	£237,991

- II.35 According to its published reports, S.A.H. Limited's entire turnover during the Relevant Period arose within the UK.⁵⁹

⁵⁴ S.A.H. Limited Report 2011, OFT Document Reference 4609, page 7. Page 12 states that the report comprises the audited financial statements of the company and its subsidiary and associated undertakings. It also states that '[t]urnover comprises the invoiced value of goods and services supplied during the year, net of value added tax and trade discounts'. Page 15 states that turnover from motor vehicle, service and parts sales was £97,595,660.

⁵⁵ S.A.H. Limited Report 2011, OFT Document Reference 4609, page 7 as the figures for 2010 were restated. Page 24 provides the explanation for this adjustment. See also S.A.H. Limited Directors' Report and Financial Statements for the year ended 31 December 2010 ('S.A.H. Limited Report 2010'), OFT Document Reference 3997, page 6.

⁵⁶ S.A.H. Limited Directors' Report and Financial Statements for the year ended 31 December 2009 ('S.A.H. Limited Report 2009'), OFT Document Reference 3934, page 7.

⁵⁷ S.A.H. Limited Directors' Report and Financial Statements for the year ended 31 December 2008 ('S.A.H. Limited Report 2008'), OFT Document Reference 3935, page 7.

⁵⁸ S.A.H. Limited's year-end losses in 2010 and 2009 and profit in 2008 were made after charging goodwill amortisation of £1,104,923. See S.A.H. Limited Report 2010, OFT Document Reference 3997, page 1; S.A.H. Limited Report 2009, OFT Document Reference 3934, page 1 and S.A.H. Limited Report 2008, OFT Document Reference 3935, page 1.

⁵⁹ S.A.H. Limited Report 2010, OFT Document Reference 3997, page 13; S.A.H. Limited Report 2009, OFT Document Reference 3934, page 14 and S.A.H. Limited Report 2008, OFT Document Reference 3935, page 14.

Appointments

- II.36 The directors of Northside Truck & Van Limited during the Relevant Period were as follows:⁶⁰

Name	Appointment	Position in January 2010
Jennifer Anderson	Prior to 2008	In post
Samuel Irvine Anderson	Prior to 2008	In post
Samuel Stewart Anderson	Prior to 2008	In post
Fergus Leitch	Prior to 2008	In post
Timothy Ward	Prior to 2008	In post

- II.37 The directors of S.A.H. Limited during the Relevant Period were as follows:⁶¹

Name	Appointment	Position in January 2010
Jennifer Anderson	Prior to 2008	In post
Samuel Irvine Anderson	Prior to 2008	In post
Samuel Stewart Anderson	Prior to 2008	In post
Fergus Leitch	Prior to 2008	In post

Liability

- II.38 The OFT considers that S.A.H. Limited, as 100 per cent owner of Northside Truck & Van Limited, can be presumed to have exercised decisive influence over Northside Truck & Van Limited's commercial policy during the Relevant Period. The OFT notes that it has not received any representations to the contrary. The OFT relies, as additional evidence of the exercise of decisive influence, on the fact that all the directors of S.A.H. Limited during the Relevant Period were also directors of Northside Truck & Van Limited. Furthermore, of the five directors of Northside Truck & Van Limited, three were also shareholders of S.A.H. Limited.
- II.39 The OFT considers that Northside Truck & Van Limited and S.A.H. Limited form part of the same economic entity. As such, they are jointly

⁶⁰ Northside Limited FAME Report containing financial accounts to year-end 31 December 2011, OFT Document Reference 5037.

⁶¹ S.A.H. Limited FAME Report containing financial accounts to year-end 31 December 2011, OFT Document Reference 5038.

and severally liable for Northside Truck & Van Limited's participation in the Infringement and for payment of the financial penalty being imposed by the OFT for this Infringement.

- II.40 However, Northside applied to the OFT for immunity and was the first to do so where the OFT had already commenced its investigation. Northside was granted full immunity from financial penalties on that basis. Northside is therefore not required by this Decision to pay a penalty under section 36 of the Act.⁶²

⁶² OFT Guidance 803, *Leniency and no-action, OFT's guidance note on the handling of applications* (December 2008).

SECTION III THE OFT'S INVESTIGATION

A. Introduction

III.1 This Decision follows the Statement⁶³ issued on 28 June 2012. The Statement was addressed to H & L and Northside along with:

- Ciceley Commercials Limited and its ultimate parent, Ciceley Limited (together, 'Ciceley')
- Enza Motors Limited, its parent Enza Holdings Limited and its ultimate parent, Enza Group Limited (together, 'Enza')
- Mercedes-Benz UK Limited, its parent Daimler UK Limited and its ultimate parent Daimler AG (together, 'Mercedes') and
- Road Range Limited ('Road Range')

all six undertakings together, the 'Parties to the OFT's Investigation'.

III.2 The Statement set out five separate alleged infringements concerning separate agreements and/or concerted practices, involving varying parties, different products (vans or trucks) over different areas and timeframes. They were:

- An agreement and/or concerted practice between Northside, H & L and Mercedes which had the object of preventing, restricting or distorting competition for the sale of vans between 23 March 2007 and 26 January 2010 ('Infringement 1')⁶⁴
- An agreement and/or concerted practice between Northside and Ciceley which had the object of preventing, restricting or distorting competition for the sale of vans between 15 January 2008 and 26 January 2010 ('Infringement 2')
- An agreement and/or concerted practice between Ciceley and Road Range which had the object of preventing, restricting or distorting competition for the sale of vans between 1 February 2008 and 26 January 2010 ('Infringement 3')
- An agreement and/or concerted practice between Northside and H & L which had the object of preventing, restricting or distorting

⁶³ See paragraph II.13 (Company Profiles).

⁶⁴ Note however that in its decision in relation to Infringement 1 the OFT concluded that the totality of the evidence does not support a finding that Mercedes participated in Infringement 1. The OFT therefore considers that it has no grounds for action against Mercedes in relation to Infringement 1.

competition for the sale of trucks between 13 June 2008 and 26 January 2010 ('Infringement 4') and

- An agreement and/or concerted practice between Ciceley, Enza, Mercedes and Road Range which had the object of preventing, restricting or distorting competition for the sale of trucks between 8 December 2009 and 26 January 2010 ('Infringement 5').

III.3 This Decision solely concerns Infringement 4 ('Decision 4').

III.4 Although the Statement was also addressed to Ciceley, Enza, Mercedes and Road Range, they were not parties to Infringement 4 and this Decision, therefore, is not addressed to them. This Decision, however, refers to evidence obtained from all Parties to the OFT's Investigation in relation to their products and businesses as well as background on the industry. In addition, where appropriate this Decision refers to evidence in relation to the other infringements set out in the Statement.

B. Infringement 1 (vans)

III.5 In addition to this Infringement, both Northside and H & L were also involved in Infringement 1.

III.6 The OFT has concluded that Northside and H & L Garages infringed the Chapter I prohibition by entering into an agreement and/or concerted practice which had the object of preventing, restricting or distorting competition for the sale of vans between 23 March 2007 and 26 January 2010. The OFT's decision concerning that infringement ('Decision 1') is being issued at the same time as this Decision.

III.7 The financial penalty imposed by the OFT for H & L Garages' involvement in Infringement 1 has been taken into consideration in setting the penalty for H & L Garages' involvement in Infringement 4.⁶⁵

C. The types of evidence in this case

Section 28 inspections of premises in January 2010

III.8 The OFT obtained warrants to enter and search the premises of Northside and H & L on 26 and 27 January 2010, using its powers under section 28 of the Act.

⁶⁵ See paragraphs VII.38 to VII.40 (The OFT's Action).

- III.9 During these inspections the OFT also employed forensic IT techniques to seize and subsequently sift images of the electronic devices (desktop and laptop hard drives, server folders, mobile phones, BlackBerrys, CDs and USB sticks) at or accessible from Northside and H & L's premises, using the seize and sift powers conferred by the Criminal Justice and Police Act 2001 (the 'CJPA').⁶⁶
- III.10 Following these inspections, on 29 January 2010 the OFT received an application for Type B immunity/leniency from Northside. Northside was granted full immunity from financial penalties on 11 April 2012.⁶⁷
- III.11 The section 28 inspections and the subsequent leniency application revealed evidence of suspected breaches of the Chapter I prohibition in the distribution of Mercedes-Benz commercial vehicles involving dealers other than Northside and H & L, and also involving the manufacturer, Mercedes. Following the section 28 inspections in January 2010, the OFT also obtained witness evidence from some of the customers whom it considered may have been affected by some of the suspected infringements.

Section 28 inspections of premises in September 2010

- III.12 As a result of this additional evidence, in September 2010 the OFT obtained warrants to enter and search the premises of the following undertakings, using its powers under section 28 of the Act, which were executed on the following dates:
- Mercedes – 14 and 15 September 2010
 - Ciceley – 16 and 17 September 2010
 - Enza – 16 and 17 September 2010 and
 - Road Range – 16 September 2010.
- III.13 These inspections also included the use of forensic IT and the OFT's seize and sift powers referred to in paragraph III.9 above. The

⁶⁶ Section 50 of the CJPA empowers the OFT to seize electronic material from premises and to sift through such material at a later date, in circumstances where it believes that the electronic material contains data relevant to an investigation, and either it is not reasonably practicable to determine on the premises the extent to which that is the case and/or it is not reasonably practicable to separate out the relevant data on the premises without compromising its evidential value.

⁶⁷ Signed Northside immunity agreement, OFT Document Reference 4580.

inspections provided the OFT with further evidence of suspected breaches of competition law.

Interviews conducted

- III.14 Following the inspections and initial analysis of the evidence, in October 2010 the OFT requested to interview certain members of staff of the Parties to the OFT's Investigation.⁶⁸
- III.15 Ciceley⁶⁹ and Road Range⁷⁰ refused the OFT's request to interview its employees during the investigative stage of the case. The OFT interviewed staff from H & L, Enza and Mercedes in November and December 2010. Further interviews were conducted with certain customers and former employees of the Parties to the OFT's Investigation during the course of 2011 and 2012. The OFT notes that the interviewees were all informed at the start of the interview that it would be an offence knowingly or recklessly to provide the OFT with information that is false or misleading in a material particular.
- III.16 Witness statements have been obtained from those employees of both Northside and Enza who were interviewed by the OFT and provided evidence of material relevance to the investigation.
- III.17 Given that Mercedes and H & L did not provide witness statements, for the employees of Mercedes and H & L that were interviewed, the OFT asked for the interview transcripts to be signed by the interviewees, with a declaration that the content of the transcripts is an accurate record of what was said at interview and that the evidence given in the interview and recorded by the transcript is the interviewee's true and faithful recollection of events. H & L complied with this request. Mercedes did not, stating that it wanted to preserve its opportunity to request that the interviewees provide witness statements following

⁶⁸ Email from OFT to Addleshaw Goddard dated 12 October 2010 re Ciceley - interviews, OFT Document Reference 1165; email from OFT to Walker Morris dated 12 October 2010 re H & L Garages, OFT Document Reference 1166; email from OFT to Enza dated 12 October 2010 re OFT investigation - interviews, OFT Document Reference 1167; email from OFT to Road Range dated 12 October 2010 re OFT interviews, OFT Document Reference 1168 and email from OFT to Mercedes dated 12 October 2010 re OFT interviews - Competition Act interviews, OFT Document Reference 1169.

⁶⁹ Email exchange between OFT and Addleshaw Goddard dated 27 September to 22 October 2010 re Ciceley - interviews, OFT Document Reference 1207.

⁷⁰ Letter from Brabners Chaffe Street to OFT dated 22 November 2010 re cooperation by Road Range with OFT investigation, OFT Document Reference 1423.

receipt of the Statement.⁷¹ Mercedes subsequently provided the OFT with witness statements from [Mercedes Sales Manager B]⁷² and from [Mercedes Sales Manager A].⁷³

- III.18 When quoting from interview transcripts, witness statements and documents, the OFT has not corrected any matters such as typographical or grammatical errors, or spelling mistakes.

Section 26 notices and information obtained without use of formal powers

- III.19 During the course of its investigation, the OFT sent the Parties to the OFT's Investigation a number of notices requiring the production of documents and information under section 26 of the Act, as well as letters requesting documents and information without recourse to the OFT's formal powers.

Forensic IT output

- III.20 As discussed above in paragraphs III.9 and III.13 the OFT conducted searches of the electronic material obtained from the Parties to the OFT's Investigation using its seize and sift powers conferred by the CJPA. The analysis of the material produced relevant contemporaneous electronic evidence from each undertaking, which was collated on to one disc and sent to each Party to the OFT's Investigation.

D. Issue of Statement of Objections

- III.21 As outlined in paragraph III.1, on 28 June 2012, the OFT issued the Statement, giving Ciceley, Enza, H & L, Mercedes, Northside and Road Range notice under section 31(1)(a) of the Act and rules 4 and 5 of the OFT's procedural rules (the 'OFT's Rules')⁷⁴ of its proposed infringement decision.
- III.22 As required by the OFT's Rules, the OFT gave all the companies to which the Statement was addressed a reasonable opportunity to inspect the documents on the OFT's file that relate to the matters referred to in

⁷¹ Note of a meeting between the OFT, Nabarro and Mercedes dated 23 November 2011, OFT Document Reference 4583, page 4.

⁷² [C] Witness Statement, OFT Document Reference 5071.

⁷³ [C] Witness Statement, OFT Document Reference 5041.

⁷⁴ The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751).

the Statement.⁷⁵ They were also notified of the period for making written representations and the possibility of making oral representations to the OFT on the matters referred to in the Statement.⁷⁶

Written representations

- III.23 In relation to Infringement 4, the OFT only received written representations from [H & L Director].⁷⁷ These representations are considered further at paragraphs VI.28 to VI.32 (The Conduct of the Parties and Legal Assessment).

Oral representations

- III.24 Neither of the Parties to Infringement 4 requested the opportunity to make oral representations.

⁷⁵ OFT's Rules, Rules 5(3) and 1(1).

⁷⁶ OFT's Rules, Rules 5(2)(c) and 5(4).

⁷⁷ Written Representations of [H & L Director] – Reply to the Statement of Objections on behalf of H & L Garages Ltd (in administration) and its parent Dusted Powder Limited, dated 31 July 2012 ('Written Representations of [H & L Director]'), OFT Document Reference 4815. The representations are expressed to be on behalf of both H & L Garages Limited (in administration) and Dusted Powder Limited. Although at the time of the receipt of the representations [H & L Director] was a director of Dusted Powder Limited (which was still in existence at that time), he was no longer a director of H & L Garages, which had entered into administration. The OFT therefore understands that [H & L Director] was no longer legally entitled to represent H & L Garages. The OFT also notes that [H & L Director] was not legally represented when making his written representations.

SECTION IV INDUSTRY OVERVIEW AND THE RELEVANT MARKET

A. Introduction

IV.1 This section comprises three parts:

- 'Industry Overview' describes the products affected by the Infringement and provides an overview of the commercial vehicle industry
- 'Mercedes and its Dealership Network' describes the key features of Mercedes' selective distribution system and of its relationship with the dealership network
- 'Relevant Market' sets out the market affected by the Infringement for the purposes of penalty calculation.

Industry Overview – Commercial Vehicles

IV.2 During the Relevant Period, the Parties sold commercial vehicles manufactured by Mercedes through its dealership network to end customers.⁷⁸ There are at least three categories of commercial vehicles: i) vans (also known as light commercial vehicles or 'LCVs'), ii) trucks (also known as heavy goods vehicles or 'HGVs') and iii) buses and coaches. The Infringement concerns the sale of trucks and this section therefore focuses on this category.

B. Trucks

IV.3 Trucks make up the second largest sector of the commercial vehicle market. Registrations have declined substantially over the last few years.

Table 1: Truck registrations in the UK (all marques)					
	2010	2009	2008	2007	2006
Total truck registrations	27,015	27,202	47,383	41,396	49,454

Source: SMMT⁷⁹

⁷⁸ This includes the Fuso Canter model manufactured by Mitsubishi and distributed by the Mercedes dealership network. Daimler AG had, at the end of 2010, an 89.29 per cent controlling interest in the Mitsubishi Fuso Truck and Bus Corporation. Daimler AG Statement of Investments as of 31 December 2011, OFT Document Reference 4610, page 12 and Daimler Annual Financial Report 2010, OFT Document Reference 4053, page 251.

⁷⁹ The SMMT collates industry statistics for registrations of all commercial vehicles from the Driver and Vehicle Licensing Authority, broken down by model and certain weight bands. These

Mercedes' truck models

- IV.4 Mercedes has indicated that, historically in the UK, trucks have been categorised according to the following segments: light-duty (6t to 7.5t), medium-duty (7.5t to 16t) and heavy-duty (over 16t).⁸⁰ The OFT notes that other manufacturers may use different classifications,⁸¹ and indeed Mercedes itself classifies light-duty trucks as those below 7t, rather than below 7.5t.⁸² As a result the Atego truck, which the SMMT Databases⁸³ designate as starting at 7.4t, would fall outside the light-duty category based on Mercedes' own classification.

data (the 'SMMT Databases') are used to estimate registrations based on the characteristics of the listed commercial vehicle models which identify them as vans or trucks. Email exchange between OFT and SMMT dated 16 May to 19 September 2011 regarding annual sales data for vans and trucks, OFT Document Reference 3632; SMMT Spreadsheet, OFT Document Reference 3633; email from SMMT to OFT dated 26 September 2011 attaching 3 Axle Rrigids weights data, OFT Document Reference 4358 and SMMT Spreadsheet (rigid 3 axle), OFT Document Reference 4380. See also SMMT Newsletter January 2011, OFT Document Reference 4375; SMMT Newsletter January 2010, OFT Document Reference 4376; SMMT Newsletter January 2009, OFT Document Reference 4377; SMMT Newsletter January 2008, OFT Document Reference 4378 and SMMT Newsletter January 2007, OFT Document References 4379.

⁸⁰ Mercedes Response, OFT Document Reference 1506, question 3, paragraph 3.2 and Mercedes Customer Segmentation Note, OFT Document Reference 2782, paragraph 3.1.

⁸¹ Mercedes Customer Segmentation Note, OFT Document Reference 2782, paragraph 3.4.

⁸² See Table 2.

⁸³ See fn79.

IV.5 Mercedes has a number of different truck models that fall within the medium- and heavy-duty truck segments of the market. Mercedes does not manufacture a truck specifically designed for light-duty work, but it distributes the Fuso Canter model manufactured by Mitsubishi through the Mercedes dealership network. The Fuso Canter is available in two tonnage models (3.5t and 7.5t), and therefore can fall within both the light- and medium-duty ranges.

Table 2: Models of trucks sold by Mercedes in the UK		
Light-duty (below 7t)	Medium-duty (7t-16t)	Heavy-duty (above 16t)
Fuso Canter (Mitsubishi)	Atego Fuso Canter (Mitsubishi)	Axor R Axor C Actros Econic Axtor CR

Source: Mercedes⁸⁴

- IV.6 Mercedes notes that each of its truck models may be sold in a range of weight categories depending on customer specification (engine, number of axles, transmission systems, trailer etc).⁸⁵
- IV.7 In the medium-duty truck segment, Mercedes has one model (the Atego), generally used for local distribution work.

Table 3: Registrations of Mercedes-Benz medium-duty trucks in the UK						
Model	2010	2009	2008	2007	2006	2005
Atego	776	878	1,277	1,731	2,194	2,568

Source: SMMT⁸⁶

⁸⁴ Mercedes Response, OFT Document Reference 1506, question 1, paragraph 1.2.

⁸⁵ Mercedes Response, OFT Document Reference 1506, question 3, paragraph 3.2. Table 2 lists models according to the weight category of the majority of sales, which may vary from year to year. For example, the Atego is not listed as a heavy-duty truck because this is not the most popular weight band for this model, although Table 4 shows that some Atego trucks are sold with heavy-duty specifications.

⁸⁶ SMMT Databases. See email exchange between OFT and SMMT dated 16 May to 19 September 2011 regarding annual sales data for vans and trucks, OFT Document Reference 3632; SMMT Spreadsheet, OFT Document Reference 3633; email from SMMT to OFT dated 26 September 2011 attaching 3 Axle Rigid weights data, OFT Document Reference 4358 and SMMT Spreadsheet (rigid 3 axle), OFT Document Reference 4380.

IV.8 Mercedes has several different truck models in the heavy-duty sector, with the specification of each model being highly specialised according to usage.

Table 4: Registrations of Mercedes-Benz heavy-duty trucks in the UK						
Model	2010	2009	2008	2007	2006	2005
Actros	972	932	1,715	1,456	1,837	2,175
Atego	991	655	1,096	1,274	1,688	1,718
Axor	1,576	940	1,552	800	1,432	1,512
Econic	456	569	627	461	493	399
Total	3,995	3,096	4,990	3,991	5,450	5,804

Source: SMMT⁸⁷

Shares of supply

IV.9 Tables 5, 6 and 7 show shares of supply for trucks in the UK.

Table 5: Share of supply - all trucks in the UK						
	2010	2009	2008	2007	2006	2005
Total registrations	27,015	27,202	47,383	41,396	49,454	51,546
DAF	24%	31%	28%	28%	29%	29%
Mercedes-Benz	18%	15%	13%	14%	15%	16%
Scania	13%	11%	12%	13%	12%	11%
Volvo	12%	11%	13%	11%	11%	12%
MAN	10%	11%	12%	12%	10%	8%
Iveco	8%	9%	9%	10%	10%	12%
Renault	7%	5%	5%	4%	4%	4%
Other⁸⁸	8%	7%	8%	8%	9%	8%

⁸⁷ SMMT Databases. See email exchange between OFT and SMMT dated 16 May to 19 September 2011 regarding annual sales data for vans and trucks, OFT Document Reference 3632; SMMT Spreadsheet, OFT Document Reference 3633; email from SMMT to OFT dated 26 September 2011 attaching 3 Axle Rigid weights data, OFT Document Reference 4358 and SMMT Spreadsheet (rigid 3 axle), OFT Document Reference 4380.

⁸⁸ Including Mitsubishi Fuso Canter trucks distributed by Mercedes.

Table 6: Share of supply - light- and medium-duty trucks in the UK

	2010	2009	2008	2007	2006	2005
Total registrations	6,688	7,867	12,235	12,051	14,835	15,966
DAF	35%	40%	38%	33%	34%	34%
Iveco	17%	18%	20%	21%	21%	25%
Mercedes-Benz	12%	11%	10%	14%	15%	16%
Isuzu	10%	0%	0%	0%	0%	0%
Mitsubishi	8%	4%	5%	4%	4%	3%
MAN	8%	10%	12%	14%	12%	10%
Renault	5%	4%	4%	3%	5%	4%
Other	5%	13%	11%	11%	9%	8%

Table 7: Share of supply – heavy-duty trucks in the UK

	2010	2009	2008	2007	2006	2005
Total registrations	20,327	19,335	35,148	29,345	34,619	35,580
DAF	21%	27%	25%	26%	28%	27%
Mercedes-Benz	20%	16%	14%	14%	16%	16%
Scania	18%	16%	16%	18%	17%	16%
Volvo	15%	15%	17%	15%	15%	17%
MAN	11%	11%	12%	12%	9%	7%
Renault	8%	6%	6%	4%	4%	4%
Iveco	5%	5%	6%	5%	6%	6%
Other	2%	4%	4%	6%	5%	7%

Source: SMMT⁸⁹

C. Types of truck customers

- IV.10 There are a number of different types of commercial vehicle customers. The OFT notes that since some customers require larger volumes of vehicles than others, this can impact on an individual dealer's capacity to supply that particular customer.

⁸⁹ SMMT Databases. These data were used to estimate truck market shares according to the weights which typically correspond to light-, medium- and heavy-duty trucks. The figures in Table 5 include sales for all three segments. See email exchange between OFT and SMMT dated 16 May to 19 September 2011 regarding annual sales data for vans and trucks, OFT Document Reference 3632; SMMT Spreadsheet, OFT Document Reference 3633; email from SMMT to OFT dated 26 September 2011 attaching 3 Axle Rigid weights data, OFT Document Reference 4358 and SMMT Spreadsheet (rigid 3 axle), OFT Document Reference 4380.

- IV.11 According to the SMMT, sales made to customers operating a fleet of 25 or more vehicles should be designated as fleet sales.⁹⁰
- IV.12 Mercedes indicated that nearly all trucks in the UK are operated as part of a fleet due to legal requirements related to running trucks.⁹¹ Truck customers can be categorised as follows:
- Direct account customers:⁹² Mercedes has a separate fleet team which deals with a small number of direct account customers.
 - National fleet customers:⁹³ The vast majority of these customers deal directly with dealers (except direct account customers), with varying levels of involvement by Mercedes. Mercedes stated that major national fleet customers may place business with a number of different dealers in order to service their national requirements.⁹⁴ Mercedes provides contingency support to dealers for these sales. The dealer, however, is free to choose the price.⁹⁵
 - Regional fleet customers: These customers comprise the smaller fleet customers which are not among the top [C]. These are handled by the dealer with the assistance of the local Mercedes Regional Sales Manager ('RSM').⁹⁶
 - Retail: These are truck customers with either a small fleet or a single truck. They are dealt with by the dealer, occasionally with some involvement by the local RSM.⁹⁷

D. Supplementary products

- IV.13 In addition to selling vans and trucks, during the Relevant Period, the Parties were also active in the sale of after-sales services and financing options.

⁹⁰ Motor Industry Facts 2011, OFT Document Reference 4317, page 39.

⁹¹ Mercedes Fleet and Zol Submission, OFT Document Reference 2739, page 1.

⁹² Mercedes Fleet and Zol Submission, OFT Document Reference 2739, pages 1 to 2.

⁹³ Mercedes Fleet and Zol Submission, OFT Document Reference 2739, pages 1 to 2 and Mercedes and Zol Submission, OFT Document Reference 2740, Annex 1.

⁹⁴ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.9.

⁹⁵ The OFT notes H & L's comment that Mercedes caps dealer margins on the vehicle and recommends a margin for all special terms implemented for larger customers served through its franchises, resulting in indirect control of the deal. This is because, in H & L's view, although the dealer is allowed to offer additional reductions, in practice this is very rare due to the fact that ordinarily the margins are already the lowest at which H & L would be willing to transact. See H & L Supplementary Response dated 9 May 2011, OFT Document Reference 2720, page 2.

⁹⁶ Mercedes Fleet and Zol Submission, OFT Document Reference 2739, page 2.

⁹⁷ Mercedes Fleet and Zol Submission, OFT Document Reference 2739, page 2.

After-sales services

- IV.14 Both Mercedes and its dealers have indicated that a significant contribution to dealer profitability is derived from after-sales services. Mercedes stated that on average over [C] per cent of a vehicle's profitability for the dealer is derived from servicing,⁹⁸ and consequently a dealer may choose to make a low margin (or even sell at a loss) if significant ongoing after-sales revenue is likely to be generated by a sale.⁹⁹
- IV.15 The servicing arrangements required for trucks are set out in the Operating Licensing Requirements and are based on mileage and usage.¹⁰⁰ Northside stated that these require servicing to be carried out every four to 12 weeks, but that in practice service intervals tend to be between six and eight weeks.¹⁰¹ In Northside's view, as a result of these requirements, truck customers maintain ongoing relationships with after-sales service providers and the quality of the after-sales service is therefore important to the customer.¹⁰² Physical proximity of the dealer is also important since travel time is costly (both in terms of the fuel cost and of driver costs, given that the distances which drivers are permitted to drive are highly regulated).¹⁰³
- IV.16 All Mercedes-Benz repair and maintenance packages sold by Mercedes dealers for trucks allow customers to use Mercedes-Benz after-sales services nationally, although Northside stated that, in the main, most Northside customers will bring virtually all of their service work to Northside.¹⁰⁴ Dealers reported that service package penetration, the proportion of vehicles sold with an associated services contract with that dealer, ranged from [C] per cent to [C] per cent.¹⁰⁵

⁹⁸ Mercedes Response, OFT Document Reference 1506, question 5.

⁹⁹ Mercedes Response, OFT Document Reference 1506, question 5, paragraph 5.5(a).

¹⁰⁰ These are set out in the Vehicle & Operator Services Agency's Goods Vehicle Operator Licensing - Guide for Operators, OFT Document Reference 4381.

¹⁰¹ Northside conference call, OFT Document Reference 2678, page 5.

¹⁰² Northside conference call, OFT Document Reference 2678, page 5.

¹⁰³ Northside conference call, OFT Document Reference 2678, page 5.

¹⁰⁴ Northside Response, OFT Document Reference 1484, question 17 and Northside conference call, OFT Document Reference 2678, page 5. Note that this is not necessarily true for truck fleet customers. See Northside conference call, OFT Document Reference 2678, page 5.

¹⁰⁵ Northside Response, OFT Document Reference 1484, question 5; H & L Response, OFT Document Reference 1493, question 11(i); Ciceley Response, OFT Document Reference 2260, question 11(i); Road Range Response dated 21 January 2011 ('Road Range Response'), OFT

Financing

- IV.17 Mercedes dealers also provide finance packages. Mercedes stated that a dealer may choose to make a low profit on a vehicle sale, but a good return on financing (either through a commission for the sale of a third party financing arrangement or through finance income from the dealer's own products).¹⁰⁶ Mercedes-Benz Financial Services, the commercial vehicle financial services arm of Daimler AG, provides a range of financing and contract hire options.¹⁰⁷

Mercedes and its Dealership Network

E. Selective distribution system and franchise agreements

- IV.18 At the beginning of 2011, Mercedes' dealership network in the UK comprised 26 dealers for vans and 23 dealers for trucks.¹⁰⁸ In common with the majority of the Mercedes dealership network, during the Relevant Period, both Parties supplied both vans and trucks. All of Mercedes' dealers also provide spare parts and after sales services.¹⁰⁹ Each dealer is a separate undertaking and does not form a single economic entity with Mercedes.
- IV.19 Mercedes, in common with many manufacturers of commercial vehicles, operates a selective distribution system involving franchise agreements with its dealers. According to Mercedes,¹¹⁰ its selective distribution network meets the requirements of the Motor Vehicle Block Exemption Regulation.¹¹¹ Article 1(1)(i) of the Motor Vehicle Block Exemption Regulation defines a selective distribution system as 'a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to

Document Reference 1502, question 11(i) and Enza Response, OFT Document Reference 1499, question 11(i).

¹⁰⁶ Mercedes Response, OFT Document Reference 1506, question 5, paragraph 5.5(b).

¹⁰⁷ Mercedes Response, OFT Document Reference 1506, question 13, paragraphs 13.1 and 13.6.

¹⁰⁸ Since then H & L Garages has gone into liquidation.

¹⁰⁹ MB Margin Model paper submitted with Mercedes Letter dated 13 January 2011 ('Mercedes Margin Model Paper'), OFT Document Reference 1406, paragraph 2.2.

¹¹⁰ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.1.

¹¹¹ 461/2010/EU Commission Regulation of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ 2010 L129/52, 28.05.2010 (the '*Motor Vehicle Block Exemption Regulation*').

sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system'.

- IV.20 Mercedes employs both quantitative and qualitative criteria in its selective distribution system. In determining and keeping under review the number of dealers in its network, the quantitative criteria employed by Mercedes include location and travel habits of existing and potential customers, required investment level of dealers,¹¹² return on investment for dealers and synergies of scale. According to Mercedes, there is no restriction on the minimum or maximum number of vehicles sold,¹¹³ and the qualitative criteria include site and location, management structure and selection, business management and controls, marketing and planning and corporate identity.¹¹⁴
- IV.21 According to the Commission's *Guidelines on Vertical Restraints*, the possible competition risks associated with selective distribution systems are a reduction in intra-brand competition and, especially in the case of cumulative effect, the foreclosure of certain types of distributors, softening of competition and facilitation of collusion between suppliers or buyers.¹¹⁵
- IV.22 The benefit of the exemption under the *Motor Vehicle Block Exemption Regulation*¹¹⁶ does not extend to selective distribution systems where the manufacturer restricts its distributors from making either active or passive sales.¹¹⁷ According to Mercedes, its franchise agreements do not incorporate any restrictions either on active or passive sales.¹¹⁸ The OFT does not make any findings in this Decision in relation to the

¹¹² Mercedes uses the term 'partners' and 'franchise partners', see Mercedes Supplementary Response dated 29 September 2011 ('Mercedes Supplementary Response'), OFT Document Reference 3717.

¹¹³ Mercedes Response dated 7 October 2011 outlining its selective distribution system criteria, OFT Document Reference 3726.

¹¹⁴ Mercedes Supplementary Response, OFT Document Reference 3717.

¹¹⁵ Commission Notice *Guidelines on Vertical Restraints* C(2010) 2365 ('*Guidelines on Vertical Restraints*'), paragraph 175.

¹¹⁶ The conditions for exemption under the *Motor Vehicle Block Exemption Regulation* (with some additions) are those set out in 330/2010/EU Commission Regulation of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 (the '*Vertical Agreements Block Exemption Regulation*').

¹¹⁷ *Vertical Agreements Block Exemption Regulation*, Article 4(c). 'Active' sales mean actively approaching individual customers, whilst 'passive' sales mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers.

¹¹⁸ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.4.

compatibility of Mercedes' selective distribution system with the *Motor Vehicle Block Exemption Regulation*.

F. Zones of Influence

- IV.23 Each of Mercedes' dealers is allocated a 'Zone of Influence' ('Zol') by Mercedes. The Zol is an area surrounding the dealer's premises. At the time of the Infringement, the Zols did not overlap with one another – a customer's premises would always have fallen within the van or truck Zol of only one Mercedes dealer. This position, however, has now changed and currently a customer's premises could fall within one or more Mercedes dealer's Zol.¹¹⁹
- IV.24 Mercedes stated that, when determining a dealer's Zol, Mercedes works on the principle that a customer is most likely to go to the nearest dealership and therefore postcodes are generally allocated to the nearest dealership (although the Zols may not strictly conform to postcode areas).¹²⁰
- IV.25 According to Mercedes, the allocation of the Zols to dealers is 'merely a tool which assists MB [Mercedes] to benchmark the potential market opportunities available to its dealers and measure the dealer's performance'.¹²¹
- IV.26 Mercedes stated that dealers can sell anywhere in the UK (or indeed the European Union), and that there is nothing in its system of rewards and incentives that favours sales within the Zol over those outside the Zol (or vice versa).¹²² However, active marketing within the Zol is encouraged by Mercedes, on the basis that sales opportunities both in respect of vehicles and repair and maintenance contracts are likely to be greater in the dealer's own Zol.¹²³ Mercedes explained that it will 'normally expect the dealers to demonstrate that they have an effective sales and marketing plan to target opportunities (referred to as 'conquest customers' in the dealer development standards) within the Zol. However, MB does not take any steps to prevent or discourage dealers from making sales outside the Zol. On the contrary, it is MB's policy to

¹¹⁹ Mercedes Fleet and Zol Submission, OFT Document Reference 2739, page 5.

¹²⁰ Mercedes Fleet and Zol Submission, OFT Document Reference 2739, page 5.

¹²¹ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.6.

¹²² Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 7.2.

¹²³ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 7.3.

quote the **same** price ... to dealers which are known to be quoting to the same customer ...' (emphasis in the original).¹²⁴

- IV.27 Nevertheless, Mercedes stated that '[d]ealers are commercially driven to maximise sales opportunities in and around their selling locations'.¹²⁵ The OFT was also told that dealers generally tend to add lower margins to sales of vehicles inside their area in comparison with out-of-area sales¹²⁶ because local sales are more likely to generate the more profitable after-sales business.¹²⁷ This seems to be particularly true for trucks.¹²⁸ Costs involved in visiting a potential customer and delivering the vehicles are also a consideration when dealers are quoting to customers.
- IV.28 The OFT was told that customers also take into account the physical proximity to the dealer when choosing where to buy a commercial vehicle.¹²⁹ Customers very often prefer to buy trucks and vans locally in view of the convenience of returning to a local dealer for repair and maintenance.¹³⁰ This is particularly the case for trucks, which are legally required to be serviced every four to 12 weeks.¹³¹

¹²⁴ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraphs 7.3 and 7.4.

¹²⁵ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.5.

¹²⁶ See for example [C] Witness Statement, OFT Document Reference 3868, paragraph 5; [C] Witness Statement, OFT Document Reference 3824, paragraphs 6 to 7; [C] Witness Statement, OFT Document Reference 3870, paragraphs 8 and 9; [C] Witness Statement, OFT Document Reference 3867, paragraph 7; [C] Interview Transcript, OFT Document Reference 4370, page 14 and [C] First Witness Statement, OFT Document Reference 1403, paragraphs 8 and 9. See also Northside presentation slides – Sales Managers Meeting dated 4 and 5 January 2006, OFT Document Reference 0577, page 131.

¹²⁷ See for example [C] Interview Transcript, OFT Document Reference 4372, pages 11 and 32 to 33; [C] Interview Transcript, OFT Document Reference 4374, pages 9 to 10; [C] Interview Transcript, OFT Document Reference 4371, pages 13 to 15 and 17; [C] Interview Transcript, OFT Document Reference 2536, page 5 and [C] Witness Statement, OFT Document Reference 3777, paragraph 5. Mercedes stated that, on average, more than [C] per cent of a vehicle's profitability is derived from servicing (Mercedes Response, OFT Document Reference 1506, paragraph 5.5).

¹²⁸ See for example [C] Witness Statement, OFT Document Reference 3869, paragraphs 7 to 8. See also [C] Witness Statement, OFT Document Reference 3868, paragraphs 20 to 22; [C] Witness Statement, OFT Document Reference 3870, paragraphs 8 to 11; [C] Witness Statement, OFT Document Reference 3867, paragraphs 3 and 5 to 7; [C] Witness Statement, OFT Document Reference 3865, paragraph 10 and [C] Interview Transcript, OFT Document Reference 4371, page 10.

¹²⁹ See for example [C] Witness Statement, OFT Document Reference 3869, paragraph 6.

¹³⁰ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.5.

¹³¹ See paragraph IV.15.

- IV.29 However, customers do also buy commercial vehicles from dealers in a different Zol. Mercedes stated that reasons for this include:
- a. 'Customers may have historic relationships which are maintained even after they change location.'
 - b. 'The customer may award the vehicle contract to one dealer and the aftersales contract to another (or MB itself).'
 - c. 'There are also major national fleet customers which may place business with a number of different dealers in order to service their national requirements.'
 - d. 'MB also negotiates directly with some major fleet customers to provide new vehicles and aftersales services'.¹³²

IV.30 Indeed, a sizeable proportion of each Mercedes dealer's sales are made outside its Zol. Mercedes stated: 'across the UK as a whole on average approximately [C]% of MB dealer truck sales and [C]% of van sales are to customers situated outside the dealer's Zol ...'.¹³³

G. Mercedes' truck pricing, commission and bonus structure

- IV.31 Mercedes has a list price for its truck products which is used as a starting point to calculate prices to dealers but is not regarded as a recommended retail price. There is substantial variance in price for the same truck model due to the high level of customisation of each vehicle (for example variants based on the type of cab, engine, chassis, axle, transmission systems and body options). In addition, the list price is now based on the European List Price ('ELP') introduced in 2008 but it does not take account of discounts given by Mercedes to its dealers that have a major impact on market prices.¹³⁴
- IV.32 For each vehicle an ELP is created based on the specification of the vehicle. This is then adjusted by providing 'declared support' (a discount) which varies by model but is standardised for all dealers. Dealers are then provided with a further discount of [C] per cent for each vehicle, and [C] in the form of a bonus paid on every vehicle sale. The dealer will then include a certain level of profit margin in order to derive the price to be offered to the customer. Dealers can also apply for 'contingency

¹³² Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.9.

¹³³ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.9 and Annex 6.

¹³⁴ Mercedes Response, OFT Document Reference 1506, paragraphs 6.2 to 6.6.

'discounts', which are used to [C].¹³⁵ By these various means, the prices to final customers are negotiated individually at the dealership level.

- IV.33 The dealer bonus scheme for truck and van sales (referred to by Mercedes as the 'margin model') rewards volume of sales and the achievement of certain qualitative targets (such as customer satisfaction, facilities, training, customer information and data management). [C].¹³⁶ In addition to the margin model, Mercedes offers reward and incentive schemes for sales executives based on the volume of vehicles and complementary products such as repair and maintenance packages sold.¹³⁷
- IV.34 Mercedes' pricing for its truck products is described at paragraphs IV.31 to IV.32. Given the number of components which comprise the price to the customer, the average prices shown in the table below are purely illustrative of the relative prices of the different truck models.¹³⁸

Table 8: Average retail prices (£) – Mercedes-Benz trucks in the UK						
Range	2010	2009	2008	2007	2006	2005
Actros	[C]	[C]	[C]	[C]	56,597	54,427
Atego	[C]	[C]	[C]	[C]	35,877	36,201
Axor	[C]	[C]	[C]	[C]	45,568	44,801
Econic	[C]	[C]	[C]	[C]	66,856	73,227

Source: Mercedes¹³⁹

H. Key roles and individuals

- IV.35 Within Mercedes-Benz dealers, the general manager is known as the Dealer Principal. Generally sales managers and financial and/or other managers report to the Dealer Principal. Dealers generally have distinct teams of people dealing with truck sales and van sales, and these are typically headed by a Truck Sales Manager and a Van Sales Manager respectively. Each Sales Manager has a team of sales executives reporting to them.

¹³⁵ Mercedes Response, OFT Document Reference 1506, paragraph 6.7.

¹³⁶ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraphs 3.1 to 3.7.

¹³⁷ Mercedes Response dated 7 October 2011 outlining its selective distribution system criteria, OFT Document Reference 3726.

¹³⁸ Mercedes Response, OFT Document Reference 1506, question 5, paragraphs 5.4 to 5.5.

¹³⁹ Adapted from data provided by Mercedes based on sales figures (total number of sales and total value of sales) submitted by its dealers on a monthly basis. See Mercedes Response, OFT Document Reference 1506, paragraph 5.2 and Annex 2, page 13.

IV.36 This division between van sales and truck sales teams is also reflected in the roles of Mercedes' RSMs, who have day-to-day responsibility for liaising with dealers. This means that the dealers communicate with two RSMs, one on vans and one on trucks. The RSMs provide the primary route of communication between Mercedes and its dealers. Each RSM is responsible for a group of dealers.

Relevant Market

I. Introduction

- IV.37 The objective of this section is to identify the relevant market affected by the Infringement in order to assess the appropriate level of the financial penalty.¹⁴⁰ The 'Relevant Turnover' for penalties purposes is the turnover of the undertaking in the relevant market in the financial year preceding the date when the infringement ended.¹⁴¹
- IV.38 When applying the Chapter I prohibition, the OFT is only obliged to define the relevant market where it is not possible, without such a definition, to determine whether the agreement and/or concerted practice is liable to affect trade in the UK and/or between Member States, and whether it has as its object or effect the prevention, restriction or distortion of competition.¹⁴² No such obligation arises in this case because the Infringement involves an agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition and was by its very nature liable to affect trade and competition in the UK.¹⁴³
- IV.39 The Competition Appeal Tribunal ('CAT') and the Court of Appeal have accepted that it is not necessary for the OFT to set out the precise relevant market definition in order to assess the appropriate level of the

¹⁴⁰ 2004 Penalty Guidance (fn2).

¹⁴¹ 2004 Penalty Guidance (fn2), paragraph 2.7 and 2012 Penalty Guidance (fn2), paragraph 2.7.

¹⁴² Case T-62/98 *Volkswagen AG v European Commission* [2000] ECR II-2707 ('Volkswagen'), paragraph 230 and Case T-29/92 *SPO and Others v Commission* [1995] ECR II-289 ('SPO'), paragraph 74.

¹⁴³ Based on its assessment that the restrictive arrangements did not have any appreciable effect on inter-State trade (see Section VI (The Conduct of the Parties and Legal Assessment)), the OFT considers that it has no grounds for action under Article 101. See paragraphs V.88 to V.91 (Legal Background).

penalty.¹⁴⁴ Rather, the OFT must be 'satisfied on a reasonable, and properly reasoned basis, of what is the relevant product market affected by the Infringement'.¹⁴⁵ To this end, it is also relevant to consider the 'commercial reality', insofar as it 'can reasonably be shown that the products so grouped were "affected" by the Infringement'.¹⁴⁶ The OFT considers that this principle also applies when assessing the relevant geographic market.

- IV.40 The OFT is not bound by market definitions adopted in previous cases, although earlier definitions can on occasion be informative when considering the appropriate market definition. Equally, although previous cases can provide useful information, the relevant market must be identified according to the particular facts of the case in hand.
- IV.41 In the present case, the OFT has adopted a conservative (narrow) approach to market definition. The OFT considers that this approach is appropriate in this case because, bearing in mind that the OFT is identifying the relevant market solely for the purposes of determining the level of financial penalties, it considers that the financial penalties based on this narrow definition will be sufficient in this case to meet the twin objectives of the OFT's policy on financial penalties. These objectives are: (i) to impose penalties which reflect the seriousness of the infringement; and (ii) to ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices.

J. Product market

- IV.42 The OFT considers that the key products affected by the Infringement are new Mercedes-Benz trucks and Mitsubishi Fuso Canter trucks. The Parties do not supply other marques of trucks and, although the Parties sold both vans and trucks during the Relevant Period, this Infringement does not concern vans. It was not necessary in this case to consider whether trucks and vans were in the same relevant market (see paragraph IV.41).

¹⁴⁴ *Argos and Littlewoods v OFT* and *JJB Sports v OFT* [2006] ECWA Civ 1318 ('*Argos, Littlewoods and JJB*'), at paragraphs 169 to 173 and 189 and CAT judgment on penalty, *Argos and Littlewoods v OFT* [2005] CAT 13 ('*Argos/Littlewoods penalty*'), at [178].

¹⁴⁵ *Argos, Littlewoods and JJB* (fn144), at paragraph 70.

¹⁴⁶ *Argos, Littlewoods and JJB* (fn144), at paragraphs 170 to 173 and 228.

Segmentation by weight

- IV.43 During the Relevant Period, the Parties sold light-, medium- and heavy-duty trucks distributed by Mercedes. It would appear from the evidence in the OFT's possession, addressed in Section VI (The Conduct of the Parties and Legal Assessment), that the Infringement applied to trucks of all weights. Given that the Parties had turnover in light-, medium- and heavy-duty trucks, the Relevant Turnover is not affected by whether the relevant market for trucks is combined or comprises three separate segments. The OFT therefore has not concluded on whether light-, medium-, and heavy-duty trucks form part of the same relevant market or whether there are three separate relevant markets.

K. Geographic market

- IV.44 The Infringement refers to an arrangement to restrict competition in the areas (Zols) of the Parties.¹⁴⁷
- IV.45 The OFT considers that the relevant geographic market is at least as wide as the Zols of the Parties, although it may be wider depending on the intensity of sales cross-Zols. It was not necessary in this case to consider whether the geographic market is wider than the Zols of the Parties (see paragraph IV.41).

L. Conclusion

- IV.46 In summary, for the purposes of calculating financial penalties in this case, the OFT considers that the Relevant Turnover¹⁴⁸ is that achieved with the sale of new Mercedes-Benz trucks and Mitsubishi Fuso Canter trucks within the combined Zols of the Parties.¹⁴⁹
- IV.47 The OFT is identifying the relevant product and geographic markets in this case for the sole purpose of determining the level of the applicable financial penalty. It does so without prejudice to the OFT's discretion to adopt a different market definition in any subsequent case in light of the relevant facts and circumstances in that case, including the purpose for which the market is defined.

¹⁴⁷ See Section VI (The Conduct of the Parties and Legal Assessment). In this Decision the terms 'area' and 'Zol' have been used refer to the area allocated to each dealer by Mercedes (see paragraph IV.23).

¹⁴⁸ See paragraph IV.37.

¹⁴⁹ For the avoidance of doubt, Relevant Turnover does not include sales to direct account customers (which are generally dealt with by Mercedes directly, see paragraph IV.12).

SECTION V LEGAL BACKGROUND

A. Introduction

- V.1 This Section sets out the legal framework against which the OFT has considered the evidence in this case.
- V.2 The legal provisions prohibiting agreements, concerted practices and decisions by associations of undertakings which prevent, restrict or distort competition are contained in the Chapter I prohibition and Article 101 of the Treaty on the Functioning of the European Union ('Article 101'). The relevant parts of both provisions are set out below, followed by an explanation of the key concepts contained within each, as is the law on the burden and standard of proof.
- V.3 As discussed in paragraphs V.88 to V.91, the OFT considers that it has no grounds for action under Article 101. However, Article 101 is still relevant in view of section 60 of the Act,¹⁵⁰ and references to it will therefore be made where appropriate.¹⁵¹

B. The Chapter I prohibition

- V.4 The Chapter I prohibition provides that agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the UK¹⁵² and which have as their object or effect the prevention, restriction or distortion of competition within the UK, are prohibited unless they are excluded by or as a result of, or exempt in accordance with, the Act.¹⁵³ The Chapter I prohibition applies in particular to agreements, decisions or practices which directly or indirectly fix selling prices or any other trading conditions and/or share markets.¹⁵⁴

¹⁵⁰ See paragraphs V.5 to V.7.

¹⁵¹ Throughout this document, whenever appropriate in light of section 60 of the Act, when referring to the case law of the Court of Justice (formerly the European Court of Justice) and General Court (formerly the Court of First Instance), we interpret statements as to the rights and obligations of the Commission as statements as to the rights and obligations of the OFT.

¹⁵² Under section 2(3) of the Act, subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the UK, and under section 2(7), 'United Kingdom' means, in relation to an agreement which operates or is intended to operate only in a part of the UK, that part.

¹⁵³ Competition Act 1998 (Commencement No 5) Order 2000 SI 2000/344, Article 2 and Schedule 1.

¹⁵⁴ Sections 2(2)(a) and 2(2)(c) of the Act.

Application of section 60 of the Act - consistency with EU law

- V.5 Section 60 of the Act provides that, so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising in relation to competition within the UK should be dealt with in a manner which is consistent with the treatment of corresponding questions under EU competition law.
- V.6 Section 60 of the Act also provides, that when determining a question arising under Part 1 of the Act, the OFT must act (so far as is compatible with the provisions of Part 1 of the Act) with a view to securing consistency with the principles laid down by the Treaty on the Functioning of the European Union ('TFEU') and the Court of Justice and the General Court (collectively the 'European Courts'), and any relevant decision of the European Courts, as applicable at that time, in determining any corresponding questions arising in Union Law. Under sections 60(3) and (4) of the Act, the OFT must, in addition, have regard to any relevant decision or statement of the Commission.
- V.7 The provision of EU competition law equivalent to the Chapter I prohibition is Article 101, on which the Chapter I prohibition is modelled.

C. Undertakings

- V.8 The Chapter I prohibition applies to agreements and concerted practices between 'undertakings', as well as to decisions by associations of undertakings.
- V.9 The term 'undertaking' is not defined in the Act or in the TFEU. It is a broad term which the European Courts have held to cover 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'.¹⁵⁵

¹⁵⁵ Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron* [1991] ECR I-1979, paragraph 21. The OFT's approach to assessing liability is set out in paragraphs II.3 to II.11 (Company Profiles).

D. Agreements and concerted practices between undertakings

Agreements and/or concerted practices

- V.10 The Chapter I prohibition applies to 'agreements' as well as to 'concerted practices'.¹⁵⁶
- V.11 The European Courts have confirmed that it is not necessary, for the purposes of finding an infringement, to characterise the arrangement exclusively as an agreement or as a concerted practice.¹⁵⁷ Both the European Courts and the CAT have stated that the concepts of agreement and concerted practice are not mutually exclusive and there is no rigid dividing line between the two. On the contrary, they are intended 'to catch forms of collusion having the same nature and only distinguishable from each other by their intensity and the forms in which they manifest themselves'.¹⁵⁸
- V.12 This reasoning has been expressly cited by the European Courts and the CAT in several recent cases.¹⁵⁹ The Court of Justice in *T-Mobile Netherlands*, referring to the opinion of Advocate-General Kokott,¹⁶⁰ held that:
- 'the criteria laid down in the Court's case law for the purpose of determining whether conduct has as its object or effect the prevention, restriction or distortion of competition are applicable irrespective of whether the case entails an agreement, a decision or a concerted practice'.¹⁶¹

¹⁵⁶ Section 2(1) of the Act and Article 101(1) of the TFEU.

¹⁵⁷ *HFB Holding* (fn14), paragraph 189; Case T-7/89 *SA Hercules Chemicals v Commission* [1991] ECR II-1711 ('*Hercules Chemicals*'), paragraph 264. See also Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij and Others v Commission* [1999] ECR II-931 ('*Limburgse Vinyl*'), paragraphs 695 to 698 and Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125 ('*Anic*'), paragraph 132.

¹⁵⁸ *Anic* (fn157), paragraph 131; followed in *HFB Holding* (fn14), paragraph 190. See also *Argos, Littlewoods and JJB* (fn144), at paragraph 21(iii) and *Apex Asphalt and Paving v OFT* [2005] CAT 4 ('*Apex Asphalt*'), at [206(ii)] (followed in *Makers UK v OFT* [2007] CAT 11 ('*Makers*'), at [103(ii)]).

¹⁵⁹ Case C-8/08 *T-Mobile Netherlands and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529 ('*T-Mobile Netherlands*'), paragraph 23; *JJB Sports v OFT and Allsports v OFT* [2004] CAT 17 ('*JJB/Allsports*'), at [153] to [154] and *Argos and Littlewoods v OFT* [2004] CAT 24 ('*Argos/Littlewoods*'), at [148] to [149], both citing *Anic* (fn157), paragraphs 108 and 130 to 131. See also *Apex Asphalt* (fn158), at [201] and [206(ii)] (followed in *Makers* (fn158), at [103(ii)]).

¹⁶⁰ Opinion of Advocate-General Kokott in *T-Mobile Netherlands* (fn159), paragraph 38.

¹⁶¹ *T-Mobile Netherlands* (fn159), paragraph 24.

V.13 While there is a particular overlap between the concepts of agreements and concerted practices in the case of single complex infringements of long duration,¹⁶² the same principle applies to discrete infringements of short duration. The CAT has confirmed in its judgments in the *JJB Sports/AllSports* and *Argos/Littlewoods* cases, both of which involved discrete infringements of comparatively short duration that:

'It is trite law that it is not necessary for the OFT to characterise an infringement as either an agreement or a concerted practice: it is sufficient that the conduct in question amounts to one or the other'.¹⁶³

V.14 This position was upheld by the Court of Appeal.¹⁶⁴

V.15 The OFT therefore considers that it is not required to come to a conclusion as to whether the conduct of the Parties should be specifically characterised as an agreement or as a concerted practice, provided that it finds that the conduct amounts to one or the other, in order to demonstrate an infringement of the Chapter I prohibition.

Agreements

V.16 An agreement does not have to be a formal written agreement to be caught by the Chapter I prohibition. Nor does an agreement have to be legally binding or contain any enforcement mechanisms.¹⁶⁵ The Chapter I prohibition is intended to catch a wide range of agreements, including oral agreements¹⁶⁶ and 'gentlemen's agreements',¹⁶⁷ since anti-competitive agreements are, by their nature, rarely in written form.¹⁶⁸ An agreement may be express or it may be implied from the conduct of the

¹⁶² Commission Decision 2002/742/EC of 5 December 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/E-1/36 604 – *Citric acid*) (OJ 2002 L 239/18), paragraph 143 (not challenged on appeal: see Case T-59/02 *Archer Daniels Midland v Commission* [2006] 5 CMLR 28 ('*Archer Daniels Midland*') and Case T-43/02 *Jungbunzlauer v Commission*, judgment of the Court of First Instance of 27 September 2006).

¹⁶³ *JJB/Allsports* (fn159), at [644] and *Argos/Littlewoods* (fn159), at [665].

¹⁶⁴ *Argos, Littlewoods and JJB* (fn144), at paragraph 21.

¹⁶⁵ Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.865 – *PVC*) (OJ 1994 L 239/14), paragraph 30.

¹⁶⁶ Case 28/77 *Tepea v Commission* [1978] ECR 1391 ('*Tepea*'), paragraph 41.

¹⁶⁷ Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, paragraphs 106 to 114.

¹⁶⁸ See also OFT Guidance 401, *Agreements and concerted practices* (December 2004) (the '*Agreements and Concerted Practices Guidance*'), paragraph 2.7.

parties.¹⁶⁹ It may also consist of an isolated act, a series of acts or a course of conduct.¹⁷⁰

- V.17 The key question is whether there has been 'a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention'.¹⁷¹
- V.18 The intention of the parties must be to conduct themselves on the market in a specific way,¹⁷² for example by adhering to a common plan that limits or is likely to limit their individual commercial freedom by determining lines of mutual action or abstention from action on the market.¹⁷³

Concerted practices

- V.19 An infringement through concerted practice does not require an actual agreement (whether express or implied) to have been reached. As the Court of Justice held in *Dyestuffs*, a concerted practice is:
- 'a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition'.¹⁷⁴
- V.20 The concept of a concerted practice must be understood in light of the principle whereby each economic operator must determine its policy on

¹⁶⁹ See for example *Tepea* (fn166).

¹⁷⁰ *Anic* (fn157), paragraph 81.

¹⁷¹ Case T-41/96 *Bayer v Commission* [2000] ECR II-3383 ('*Bayer*'), paragraph 69 (upheld on appeal in Joined Cases C-2/01 P and C-3/01 P *BAI and Commission v Bayer* [2004] ECR I-23). See also *JJB/Allsports* (fn159), at [156] and [637]; *Argos/Littlewoods* (fn159), at [151] and [658] and *Argos, Littlewoods and JJB* (fn144), at paragraph 21(iv).

¹⁷² Joined Cases 209/78 to 215/78 and 218/78 *Heintz Van Landewyck and Others v Commission* [1980] ECR 3125, paragraph 86; *Hercules Chemicals* (fn157), paragraph 256; *Limburgse Vinyl* (fn157), paragraph 715 and *Bayer* (fn171), paragraph 67. See also *JJB/Allsports* (fn159), at [156] and [637] and *Argos/Littlewoods* (fn159), at [151] and [658].

¹⁷³ See for example Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 – *Polypropylene*) (OJ 1986 L 230/1), paragraph 81.

¹⁷⁴ *Dyestuffs* (fn12), paragraph 64 (followed in *Suiker Unie* (fn17), paragraph 26; Joined Cases 89/85 etc. *Alhström Osakeyhtiö v Commission* [1993] ECR I-1307, paragraph 63; *Anic* (fn157), paragraph 115 and Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287 ('*Hüls*'), paragraph 158). See also *JJB/Allsports* (fn159), at [151]; *Argos/Littlewoods* (fn159), at [146]; *Argos, Littlewoods and JJB* (fn144), at paragraph 21(i) and *Apex Asphalt* (fn158), at [196] and [206(iii)] (followed in *Makers* (fn158), at [101] and [103(iii)]).

the market independently. The Court of Justice explained this in its judgment in *Suiker Unie* in the following terms:

'[t]he criteria of coordination and cooperation laid down by the case-law of the Court, which in no way require the working out of an actual plan, must be understood in light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells'.¹⁷⁵

- V.21 In its judgment in *Anic*, the Court of Justice re-affirmed its earlier interpretation of the requirement of independence in *Suiker Unie*,¹⁷⁶ and further expanded on it as follows:

'[a]ccording to [the Court's] case-law, although [the] requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such 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 a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market'.¹⁷⁷

- V.22 In order to prove a concerted practice, it is therefore not necessary to show that the competitor in question has formally undertaken, in respect of one or several others, to adopt a particular course of conduct or that the competitors have expressly agreed a particular course of conduct on the market. It is sufficient that the exchange of information should have

¹⁷⁵ *Suiker Unie* (fn17), paragraph 173; *Anic* (fn157), paragraph 116 and *Hüls* (fn174), paragraph 159. See also *Apex Asphalt* (fn158), at [198] and [206(iv)] (followed in *Makers* (fn158), at [102] and [103(iv)]).

¹⁷⁶ *Suiker Unie* (fn17), paragraph 174.

¹⁷⁷ *Anic* (fn157), paragraph 117 (followed in *Hüls* (fn174), paragraphs 159 to 160 and *HFB Holding* (fn14), paragraph 212). See also *Apex Asphalt* (fn158), at [198] and [206(v)] (followed in *Makers* (fn158), at [102] and [103(v)]).

removed or substantially reduced uncertainty as to the conduct on the market to be expected on each participant's part.¹⁷⁸

- V.23 Moreover, in *Cimenteries* the General Court held that reciprocal contacts are established 'where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it [...] [i]t is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct to expect of the other on the market'.¹⁷⁹
- V.24 Thus, the mere receipt of information concerning competitors may be sufficient to give rise to a concerted practice, as is reflected in the following statement by the CAT in *JJB/Allsports*:
- 'Cimenteries (at paragraphs 1849 and 1852) and Tate & Lyle (at paragraphs 54 to 60) [...] show that even the unilateral disclosure of future pricing intentions can constitute a concerted practice if the effect of disclosure is in fact to reduce uncertainty in the marketplace'.¹⁸⁰
- V.25 Where it is established that an undertaking participates in a meeting of a manifestly anti-competitive nature, it is for the undertaking to adduce evidence to establish that it indicated its opposition to the anti-competitive arrangement to its competitors.¹⁸¹
- V.26 According to the case law of the European Courts, the concept of a concerted practice requires, in addition to undertakings acting in concert with one another, conduct on the market pursuant to such collective practices and a relationship of cause and effect between the two.¹⁸²
- V.27 However, where an undertaking participating in a concerted arrangement remains active on the market, there is a presumption that it will take

¹⁷⁸ Joined Cases T-25/95 etc. *Cimenteries and Others v Commission* [2000] ECR II-491 ('*Cimenteries*'), paragraph 1852.

¹⁷⁹ *Cimenteries* (fn178), paragraphs 1849 and 1852. See also *Apex Asphalt* (fn158), at [206(vii)] and [206(viii)] (followed in *Makers* (fn158), at [103(vii)] and [103(viii)]).

¹⁸⁰ *JJB/Allsports* (fn159), at [658]. See Joined Cases T-202/98 etc. *Tate & Lyle and Others v Commission* [2001] ECR II-2035 ('*Tate & Lyle*'), paragraph 58 (citing Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR II-867 ('*Rhône-Poulenc*'), paragraphs 122 to 123). See also *Apex Asphalt* (fn158), at [200]; *JJB/Allsports* (fn159), at [159] and *Argos/Littlewoods* (fn159), at [155].

¹⁸¹ *Hüls* (fn174), paragraph 155 and *Anic* (fn157), paragraph 96.

¹⁸² *Anic* (fn157), paragraph 118 and *Hüls* (fn174), paragraph 161. See also *Apex Asphalt* (fn158), at [206(ix)] (followed in *Makers* (fn158), at [103(ix)]).

account of information exchanged with its competitors. In *Anic*, the Court of Justice held that:

'subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period, as was the case here'.¹⁸³

- V.28 In *T-Mobile Netherlands*, the Court of Justice held that this presumption of a causal connection applies even where the concerted action was the result of a meeting held by the participating undertakings on a single occasion.¹⁸⁴
- V.29 Furthermore, although the concept of a concerted practice presupposes conduct of the participating undertakings on the market, it does not necessarily require that such conduct produce the concrete effect of restricting, preventing or distorting competition.¹⁸⁵ As the Court of Justice observed in *Hüls*, a concerted practice which has as its object the prevention, restriction or distortion of competition will infringe competition law even where there is no effect on the market.¹⁸⁶

Participation and commitment to an agreement or concerted practice

- V.30 The fact that a party may have played only a limited part in establishing the agreement or concerted practice, or may have participated only under pressure from other parties, does not mean that it is not party to the agreement or concerted practice.¹⁸⁷
- V.31 The CAT has stated that 'acts of any employee may be attributed to his or her corporate employer with whom they comprise the same

¹⁸³ *Anic* (fn157), paragraph 121; *Hüls* (fn174), paragraph 162 and *Cimenteries* (fn178), paragraphs 1865 and 1910. See also *Apex Asphalt* (fn158), at [206(x)] (followed in *Makers* (fn158), at [103(x)]).

¹⁸⁴ *T-Mobile Netherlands* (fn159), paragraphs 58 to 59.

¹⁸⁵ *Anic* (fn157), paragraph 124. See also *Apex Asphalt* (fn158), at [206(xi)] (followed in *Makers* (fn158), at [103(xi)]).

¹⁸⁶ *Hüls* (fn174), paragraphs 163 to 164 and *Anic* (fn157), paragraph 123. See also *Apex Asphalt* (fn158), at [206(xii)] (followed in *Makers* (fn158), at [103(xii)]).

¹⁸⁷ *Agreements and Concerted Practices Guidance* (fn168), paragraph 2.8. See for example also *Anic* (fn157), paragraph 80; *Cimenteries* (fn178), paragraphs 1389 and 2557 and Case T-28/99 *Sigma Tecnologie di Rivestimento v Commission* [2002] ECR II-1845, paragraph 40.

undertaking'.¹⁸⁸ An agreement or concerted practice may be made on an undertaking's behalf by its employees acting in the ordinary course of their employment, despite the ignorance of more senior management.¹⁸⁹ Even if the employees were acting contrary to instructions, this does not affect the liability of the undertaking.¹⁹⁰

V.32 The parties may show varying degrees of commitment to the common plan and there may well be internal conflict. The mere fact that a party does not fully abide by an agreement or concerted practice which is anti-competitive does not relieve that party of responsibility for it.¹⁹¹ Equally, the fact that a party may come to recognise that in practice it can 'cheat' on the agreement or concerted practice at certain times does not preclude a finding that there was an infringement.¹⁹²

V.33 Where an undertaking does not publicly distance itself from an agreement or concerted practice (for example, where it attended meetings with an anti-competitive purpose or received information by participating in meetings), thus giving the impression to the other participants that it subscribes to and will act in accordance with it, it may be concluded that it has participated in the agreement or concerted practice.¹⁹³ The rationale for this principle of law is that:

'a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive

¹⁸⁸ *Tesco Stores Ltd, Tesco Holdings Ltd and Tesco plc v OFT* [2012] CAT 31 ('*Tesco Stores*'), at [74(a)].

¹⁸⁹ Joined Cases 100/80 to 103/80 *Musique Diffusion française v Commission* [1983] ECR 1825 ('*Musique Diffusion française*'), paragraph 97.

¹⁹⁰ Case T-53/03 *BPB v Commission* [2008] ECR II-1333, [2008] 5 CMLR 1201, paragraphs 360 and 431.

¹⁹¹ Case T-141/89 *Tréfileurope Sales v Commission* [1995] ECR II-791 ('*Tréfileurope Sales*'), paragraphs 53 to 60 and 72.

¹⁹² Case 246/86 *SC Belasco and Others v Commission* [1989] ECR 2117, paragraphs 12 to 16; Commission Decision of 15 October 2008 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/39188 – *Bananas*) C(2008) 5955 ('*Bananas*'), paragraph 324 (citing Case T-308/94 *Cascades v Commission* [1998] ECR II-925, paragraph 230) and *Archer Daniels Midland* (fn162), paragraph 189.

¹⁹³ *Tréfileurope Sales* (fn191), paragraph 85 (citing *Hercules Chemicals* (fn157), paragraph 232); *HFB Holding* (fn14), paragraph 223 and Joined Cases C-204/00 P etc. *Aalborg Portland v Commission* [2004] ECR I-123 ('*Aalborg Portland*'), paragraph 85 (citing Case C-291/98 P *Sarrió v Commission* [2000] ECR I-9991, paragraph 50).

mode of participation in the infringement which is therefore capable of rendering the undertaking liable in the context of a single agreement'.¹⁹⁴

- V.34 The General Court has held that 'the notion of public distancing as a means of excluding liability must be interpreted narrowly'.¹⁹⁵ In considering how a party could publicly distance itself from the agreement or concerted practice, the General Court in *Westfalen Gassen* noted that the applicant could have written to competitors and to the secretary of the professional association to indicate that it did not in any way want to be considered to be a member of the cartel or to participate in meetings of a professional association which served as a cover for unlawful concerted actions.¹⁹⁶
- V.35 The CAT in *Replica Kit* also considered the concept of public distancing and the requirement that a party publicly distance itself or report the matter to the relevant competition authority. The CAT considered that, in order to meet the requirement of publicly distancing itself from the agreement or concerted practice, a party should take the following steps:

'[a]t the very least, in order for A to distance itself from the continuing arrangement between B and C, what in our view is required is that A should genuinely and explicitly state to B and C that as far as A is concerned they are entirely free to disregard any previous arrangements there may be restricting competition, and that A wishes to play no part, tacitly or otherwise, in any such arrangements'.¹⁹⁷

- V.36 The CAT also noted that '[r]eporting what transpired to the OFT puts the matter beyond doubt'.¹⁹⁸

Liability

- V.37 In *Anic*, the Court of Justice commented that:

'the agreements and concerted practices referred to in [Article 101] necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take

¹⁹⁴ *Aalborg Portland* (fn193), paragraph 84.

¹⁹⁵ Case T-303/02 *Westfalen Gassen Nederland v Commission* [2006] ECR II-4567 ('*Westfalen Gassen*'), paragraph 103.

¹⁹⁶ *Westfalen Gassen* (fn195), paragraph 103.

¹⁹⁷ *JJB/Allsports* (fn159), at [1046].

¹⁹⁸ *JJB/Allsports* (fn159), at [1046].

different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged'.¹⁹⁹

- V.38 The Court of Justice went on to state that 'the mere fact that each undertaking takes part in the infringement in ways particular to it does not suffice to exclude its responsibility for the entire infringement, including conduct put into effect by other participating undertakings but sharing the same anti-competitive object or effect'.²⁰⁰
- V.39 This approach was followed in *AC Treuhand*, where the General Court, citing *Anic*, held that 'the fact that an undertaking did not take part in all aspects of an anti-competitive scheme, or that it played only a minor role in the aspects in which it did participate, is not material to the establishment of an infringement on its part'.²⁰¹ It went on to state that: '[...] the case law recognises the joint liability of the undertakings which are co perpetrators of an infringement under Article 81(1) EC and/or which have played an accessory role in such an infringement, in so far as it has been held that the objective condition for the attribution of various anti competitive acts constituting the cartel as a whole to the undertaking concerned is satisfied where that undertaking has contributed to its implementation, even in a subsidiary, accessory or passive role [...]'.²⁰²
- V.40 In addition, the General Court held that:
- 'the attribution of the infringement as a whole to the participating undertaking depends on the manifestation of its own intention, which shows that it is in agreement, albeit only tacitly, with the objectives of the cartel. That subjective condition is inherent in the criteria relating to the tacit approval of the cartel and to the undertaking having publicly distanced itself from the content of the cartel [...], in that those criteria imply a presumption that the undertaking concerned continues to

¹⁹⁹ *Anic* (fn157), paragraph 79.

²⁰⁰ *Anic* (fn157), paragraph 80.

²⁰¹ Case T-99/04 *AC Treuhand v Commission* [2008] ECR II-1501 ('*AC Treuhand*'), paragraph 132.

²⁰² *AC Treuhand* (fn201), paragraph 133.

endorse the objectives of the cartel and to support its implementation'.²⁰³

E. Prevention, restriction or distortion of competition²⁰⁴

The law on anti-competitive object

- V.41 The Court of Justice has identified 'infringements by object' by reference to the fact that certain agreements or concerted practices can be regarded 'by their very nature' as being injurious to the proper functioning of normal competition.²⁰⁵
- V.42 The Court of Justice has also noted that the object of an agreement or concerted practice is not assessed by reference to the parties' subjective intentions when they entered into it, but rather is determined by an objective analysis of its aims.²⁰⁶ The fact that legitimate objectives or aims are pursued in tandem with objectives or aims which infringe the Chapter I prohibition cannot justify or supersede the infringing objectives or aims.²⁰⁷
- V.43 Nonetheless, although proof of subjective intention is not a necessary pre-condition to the finding of an infringement, there is nothing to prevent the OFT from taking such intention into account when determining whether an agreement or concerted practice had as its object the prevention, restriction or distortion of competition.²⁰⁸
- V.44 However, no agreement or concerted practice is automatically restrictive by object. Instead, the objective analysis of whether an agreement or

²⁰³ *AC Treuhand* (fn201), paragraph 134.

²⁰⁴ As set out in Section VI (The Conduct of the Parties and Legal Assessment), the OFT considers that the agreement and/or concerted practice which constitutes the Infringement had the object of preventing, restricting or distorting competition. The agreement and/or concerted practice had the purpose of dampening competition and contained to varying degrees at least some element of market sharing, price coordination and/or the exchange of commercially sensitive information. In its assessment, the OFT has therefore taken into account the existing case law regarding these types of anti-competitive agreements and concerted practices, to the extent appropriate in view of the facts and evidence pertaining to the Infringement.

²⁰⁵ Case C-209/07 *Competition Authority v Beef Industry Development Society and Barry Brothers (Carrigmore) Meats* [2008] ECR I-8637 ('BIDS and Barry Brothers'), paragraph 17 and *T-Mobile Netherlands* (fn159), paragraph 29.

²⁰⁶ Joined Cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines and Rheinzinc v Commission* [1984] ECR 1679 ('CRAM'), paragraphs 25 to 26.

²⁰⁷ Case C-551/03P *General Motors v Commission* [2006] ECR I-3173 ('General Motors'), paragraph 64.

²⁰⁸ *Cityhook v OFT* [2007] CAT 18, at [270]; *General Motors* (fn207), paragraphs 77 to 78 and *T-Mobile Netherlands* (fn159), paragraph 27.

concerted practice is contrary to the Chapter I prohibition 'by its very nature' must take account of the actual framework and, therefore, the legal and economic context in which the arrangement (to which the restriction is imputed) was deployed.²⁰⁹

Examples of market sharing, price coordination and the exchange of commercially sensitive information

- V.45 Section 2(2) of the Act contains a non-exhaustive, illustrative list of the types of agreement and concerted practice which may infringe the Chapter I prohibition.²¹⁰
- V.46 Section 2(2)(c) of the Act provides that the Chapter I prohibition applies to agreements and concerted practices which 'share markets or sources of supply'.²¹¹ Firms may agree to share markets in a number of different ways. For example, market sharing may take the form of an agreement to divide markets on a territorial basis, with each participant agreeing not to compete within the others' agreed territory.²¹² In a number of cases the Commission and the European Courts have found market sharing occurring through the allocation of customers on the basis of existing commercial relationships to be a restriction of competition by object.²¹³
- V.47 In the *Pre-Insulated Pipe* case, the Commission stated that market sharing by its very nature restricts competition. In that case, suppliers agreed to respect each others' 'existing' customer relationships. For each supply contract, the existing supplier would inform other participants in the arrangement what price they intended to quote, and

²⁰⁹ See for example also Joined Cases 96/82 etc. *NV IAZ International Belgium v Commission* [1983] ECR 3369, paragraphs 22 to 25; *CRAM* (fn206), paragraphs 25 to 26 and Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969, paragraph 110.

²¹⁰ *Agreements and Concerted Practices Guidance* (fn168), paragraphs 2.2 to 2.3.

²¹¹ *Agreements and Concerted Practices Guidance* (fn168), paragraph 3.10.

²¹² *Suiker Unie* (fn17); Case T-30/91 *Solvay v Commission* (OJ 1991 L 152/1), [1994] 5 CMLR 57 and Case T-36/91 *ICI v Commission* [1995] ECR II-1847.

²¹³ Commission Decision 83/546/EEC of 17 October 1983 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.064 – *Cast iron and steel rolls*) [1984] 11 CMLR 694 ('*Cast Iron and Steel Rolls*'); Commission Decision 86/399/EEC of 10 July 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.371 – *Roofing Felt*) (OJ 1991 L 232/15) and Commission Decision 2002/759/EC of 5 December 2001 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/37.800/F3 – *Luxembourg Brewers*) (OJ 2002 L 253/21) (appeals dismissed in Joined Cases T-49/02 to T-51/02 *Brasserie Nationale v Commission* [2005] ECR II-3033, [2006] 4 CMLR 266).

the other suppliers would quote higher prices to ensure the maintenance of the existing customer relationship.²¹⁴

- V.48 All of the arrangements within the *Choline Chloride* case, including the arrangement whereby participants quote elevated prices so as to avoid drawing customers away from agreed supply relationships were said to be a method of market sharing by customer allocation which had the object of restricting competition.²¹⁵
- V.49 The illustrative list contained in section 2(2) of the Act also refers to those agreements which 'directly or indirectly fix purchase or selling prices or any other trading conditions'.²¹⁶ The case law is clear that the Chapter I prohibition applies to any form of agreement which might restrict or dampen price competition, either directly or indirectly. This will include, for example, an agreement to adhere to published price lists, not to quote a price without consulting potential competitors,²¹⁷ or an agreement not to charge less than any other price in the market, which the Court of Justice found had the objective of restricting competition.²¹⁸ An agreement may restrict price competition even if it does not eliminate it entirely.²¹⁹
- V.50 In certain circumstances, exchanges of pricing information among competitors may also amount to a restriction of competition by object. In *Tate & Lyle*, the General Court held that an exchange of information regarding future pricing allowed the parties to 'create a climate of mutual certainty as to their future pricing policies' and amounted to a restriction of Article 101 by object.²²⁰

²¹⁴ Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691/E-4 – *Pre-Insulated Pipe Cartel*) (OJ 1999 L 24/1).

²¹⁵ Commission Decision 2005/566/EC of 9 December 2004 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No C.37.533 – *Choline Chloride*) (OJ 2005 L 190/22).

²¹⁶ *Agreements and Concerted Practices Guidance* (fn168), paragraph 3.4. See for example Case 123/83 *Bureau national interprofessionnel du cognac v Guy Clair* [1985] ECR 391, paragraph 22 and Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne* [1988] ECR 1919, paragraph 15. See also Case T-14/89 *Montedipe v Commission* [1992] ECR II-1155, paragraphs 246 and 265 and Case T-148/89 *Tréfilunion v Commission* [1995] ECR II-1063, paragraphs 101 and 109.

²¹⁷ *Cast Iron and Steel Rolls* (fn213).

²¹⁸ See for example Case 8/72 *Vereeniging van Cementhandelaren v Commission* [1972] ECR 877.

²¹⁹ *Agreements and Concerted Practices Guidance* (fn168), paragraph 3.6.

²²⁰ *Tate & Lyle* (fn180), paragraphs 58 and 60. See also *Rhône-Poulenc* (fn180), paragraphs 122 to 123.

- V.51 In its *Bananas* decision,²²¹ the Commission referred to *Tate & Lyle*, noting that 'according to case-law conduct whereby an undertaking discloses to its competitors the conduct which it intends or contemplates to adopt in the market concerning its pricing policy is considered as conduct concerning price fixing'.²²² In that case, the collusion involved communications, which took place between parties before they set their weekly quotation prices, covering price setting factors, price trends and/or indications of quotation prices. According to the Commission '[b]y these practices the parties coordinated the setting of their quotation prices instead of deciding on them independently. These arrangements have as their object the restriction of competition within the meaning of Article [101]'.²²³
- V.52 The sharing of pricing information reduces uncertainties inherent in the competitive process and facilitates the co-ordination of the parties' conduct on the market.²²⁴ The Commission has explicitly stated that '[i]t is contrary to the provisions of Article [101] [...] for a producer to communicate to his competitors the essential elements of his price policy'.²²⁵
- V.53 Where competitors share information other than pricing information, which they would otherwise keep secret as confidential business information, this can also amount to an infringement of competition law by object, as it is likely to increase transparency on the market regarding the undertakings' competitive behaviour, thereby substituting practical cooperation for the risks of competition.²²⁶

²²¹ *Bananas* (fn192).

²²² *Bananas* (fn192), paragraph 292.

²²³ *Bananas* (fn192), paragraph 263. The Commission's position was upheld by the General Court, which stated: '[t]he Commission was therefore right to conclude that the pre-pricing communications which took place between Dole and Weichert concerned the fixing of prices and that they gave rise to a concerted practice having as its object the restriction of competition within the meaning of Article 81 [...]. Case T-587/08 *Fresh Del Monte Produce v Commission* Judgment of the General Court of 14 March 2013 (not yet published), paragraph 585.

²²⁴ OFT Guidance 408, *Trade associations, professions and self-regulating bodies* (December 2004), paragraph 3.10. See generally Case C-194/99 P *Thyssen Stahl v Commission* [2003] ECR I-10821, paragraph 81.

²²⁵ Commission Decision 74/292/EEC of 15 May 1974 relating to proceedings under Article 85 of the EEC Treaty (IV/400 – *Agreements between manufacturers of glass containers*) (OJ 1974 L 160/1), paragraph 43. In paragraph 45 of that decision, the Commission states '[...] the agreement to exchange information on prices has the object of restricting or distorting competition between the parties within the common market'.

²²⁶ For example *Hercules Chemicals* (fn157), paragraphs 259 to 260 (in addition to pricing information, the information exchanged included sales volume restrictions, profitability

V.54 Finally, regardless of whether the subject matter of the information exchange would, in any event, change as a result of market conditions, the Court of Justice has held that an exchange of information which has the potential of removing uncertainty as regards 'the timing, extent and details of the modifications to be adopted [...] must be regarded as pursuing an anti-competitive object'.²²⁷

No need to prove anti-competitive effect where anti-competitive object is established

- V.55 In the context of Article 101, the European Courts have held that 'there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition'.²²⁸ The European Courts have also held that this is equally the case where the conduct in question concerns a concerted practice.²²⁹
- V.56 The European Courts have held that, although the concept of a concerted practice presupposes conduct of the participating undertakings on the market, it does not necessarily require that the conduct produce the concrete effect of preventing, restricting or distorting competition.²³⁰ Under Article 101, concerted practices are therefore prohibited regardless of their effect, when they have an anti-competitive object.²³¹

thresholds, customer identities). See also *SPO* (fn142), paragraphs 121 and 123 (information exchanged included product costs, product characteristics and tender breakdowns) and République française Conseil de la concurrence, Décision n° 05-D-64 du 25 novembre 2005 *relative à des pratiques mises en œuvre sur le marché des palaces parisiens* (the '*Parisian Luxury Hotels case*'), paragraphs 200 to 264 (upheld on appeal in République française Cour d'appel de Paris, 1ère Chambre - Section H, Arrêt n° RG 2005/24285 du 26 septembre 2006, pages 8 to 9 (information exchanged included occupancy rates, average room prices and marketing strategies).

²²⁷ *T-Mobile Netherlands* (fn159), paragraphs 40 to 41.

²²⁸ Joined Cases 56-64 and 58-64 *Établissements Consten and Grundig-Verkaufs v Commission* [1966] ECR 299, page 342 (applied in Case 277/87 *Sandoz Prodotti Farmaceutici v Commission* [1990] ECR I-45, summary paragraph 3; *Anic* (fn157), paragraph 99; *Cimenteries* (fn178), paragraphs 837, 1531 and 2589; *BIDS and Barry Brothers* (fn205), paragraph 16 and *T-Mobile Netherlands* (fn159), paragraph 29).

²²⁹ *Anic* (fn157), paragraph 123 and *T-Mobile Netherlands* (fn159), paragraphs 28 to 30.

²³⁰ *Anic* (fn157), paragraph 124; *Hüls* (fn174), paragraphs 163 to 165 and Commission Decision 1999/210/EC of 14 October 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (Case IV/F-3/33.708 – *British Sugar etc.*) (OJ 1999 L 76/1), paragraph 95 (substantially upheld on appeal in *Tate & Lyle* (fn180)). See also *Apex Asphalt* (fn158), at [206(xi)] (followed in *Makers* (fn158), at [103(xi)]).

²³¹ *Anic* (fn157), paragraphs 122 to 123. See also *Apex Asphalt* (fn158), at [206(xii)] (followed in *Makers* (fn158), at [103(xii)]).

- V.57 It follows that, when applying the Chapter I prohibition, the OFT is not obliged to establish that an agreement or concerted practice had an anti-competitive effect where it is found to have had as its object the prevention, restriction or distortion of competition.²³²
- V.58 The Court of Justice has made clear that, in order to find an 'object' infringement, it is sufficient, having regard to the legal and economic context, that it has the potential to have a negative impact on competition.²³³ The OFT is therefore not required to conduct a competitive analysis to demonstrate an **actual** prevention, restriction or distortion of competition in any particular case.²³⁴

F. **Appreciable prevention, restriction or distortion of competition**

- V.59 An agreement or concerted practice will infringe the Chapter I prohibition only where it has as its object or effect the appreciable prevention, restriction or distortion of competition. An agreement will fall outside the Chapter I prohibition if its impact on competition is insignificant. As the Court of Justice held in *Völk*:
- 'an agreement falls outside the prohibition in Article [101(1)] when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question'.²³⁵
- V.60 In determining whether an agreement is capable of having an appreciable effect on competition, the OFT will have regard to the Commission's approach as set out in the *Notice on Agreements of Minor Importance*.²³⁶ This sets out that an agreement or concerted practice will generally have no appreciable effect on competition if the aggregate market share of the parties to the agreement does not exceed 10 per cent on any of the relevant markets affected by the agreement where it is made between competing undertakings²³⁷ or exceed 15 per cent on any of the relevant

²³² *Argos/Littlewoods* (fn159), at [357].

²³³ *T-Mobile Netherlands* (fn159), paragraph 31.

²³⁴ *T-Mobile Netherlands* (fn159), paragraph 43.

²³⁵ Case 5-69 *Franz Völk v S.P.R.L. Ets J. Vervaecke* [1969] ECR 295 ('Völk'), paragraph 5/7.

²³⁶ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty of the European Community (2001/C 368/07) (the '*Notice on Agreement of Minor Importance*'), paragraphs 7a and 7b.

²³⁷ Competing undertakings are undertakings which are actual or potential competitors on any of the markets concerned.

markets affected by the agreement where the agreement is made between non-competing undertakings.²³⁸

V.61 However, that approach does not apply to an agreement or concerted practice containing certain hardcore restrictions set out in the *Notice on Agreements of Minor Importance*. These include any agreement or concerted practice which has as its object the direct or indirect fixing of prices or the allocation of markets or customers.²³⁹

V.62 In *North Midland Construction*, the CAT said the following in relation to the appreciability test in object cases:

'[i]t is clear that an agreement having as its object a restriction of competition could nevertheless be so trifling as to fail the appreciability test. On the other hand, it may also be the case that the nature of specific collusive conduct is such that, given the individual circumstances, the potential effects on competition of the conduct in question are inherently likely to be significant. In the latter case the burden of establishing appreciability may be more easily discharged'.²⁴⁰

V.63 The OFT also notes the recent decision by the Court of Justice in *Expedia*:

'It must therefore be held that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition'.²⁴¹

V.64 In *North Midland Construction*, the CAT confirmed that, in object cases, the appreciability requirement may be satisfied by potential as well as actual effects on competition.²⁴²

²³⁸ Non-competing undertakings are undertakings which are neither actual nor potential competitors on any of the markets concerned.

²³⁹ *Notice on Agreements of Minor Importance* (fn236), paragraph 11.

²⁴⁰ *North Midland Construction v OFT* [2011] CAT 14 ('*North Midland Construction*'), at [53].

²⁴¹ C-266/11 *Expedia Inc. v Autorité de la concurrence and Others*, judgment of 13 December 2012 (not yet published), paragraph 37.

²⁴² *North Midland Construction* (fn240), at [56] to [61]. See also *Apex Asphalt* (fn158), at [251].

G. Effect on trade within the UK

- V.65 By virtue of section 2(1)(a) of the Act, the Chapter I prohibition applies only to agreements and concerted practices which 'may affect trade within the United Kingdom'.
- V.66 For the purposes of the Chapter I prohibition, the UK includes any part of the UK where an agreement or concerted practice operates or is intended to operate.²⁴³
- V.67 By their very nature, agreements and concerted practices which are capable of appreciably restricting competition within the UK are inherently capable of affecting trade.²⁴⁴
- V.68 It should be noted that, in order to infringe the Chapter I prohibition, an agreement or concerted practice is not in fact required to affect trade provided it is capable of doing so. Moreover, the test is not read as importing a requirement that the effect on trade should be appreciable.²⁴⁵

H. Burden and standard of proof

Burden of proof

- V.69 The burden of proving an infringement of the Chapter I prohibition lies with the OFT.²⁴⁶ However, this burden does not preclude the OFT from relying, where appropriate, on evidential presumptions. In *Napp* the CAT stated that:

'[t]hat approach does not in our view preclude the Director,²⁴⁷ in discharging the burden of proof, from relying, in certain circumstances, from inferences or presumptions that would, in the absence of any countervailing indications, normally flow from a given set of facts, for example [...] that an undertaking's presence at a meeting with a

²⁴³ Section 2(7) of the Act provides that 'the United Kingdom' means, in relation to an agreement which operates or is intended to operate only in a part of the United Kingdom, that part.

²⁴⁴ *Agreements and Concerted Practices Guidance* (fn168), paragraph 2.25.

²⁴⁵ *Aberdeen Journals v OFT* [2003] CAT 11 ('*Aberdeen Journals*'), at [459] to [460].

²⁴⁶ *Napp Pharmaceutical Holdings v Director General of Fair Trading*, [2002] CAT 1 ('*Napp*'), at [95] and [100]. The CAT has confirmed this approach in *JJB/Allsports* (fn159), at [164].

²⁴⁷ References to the 'Director' are to the Director General of Fair Trading. From 1 April 2003, Section 2(1) of the EA02 transferred the functions of the Director General of Fair Trading to the OFT.

manifestly anti-competitive purpose implies, in the absence of explanation, participation in the cartel alleged'.²⁴⁸

Standard of proof

V.70 The applicable standard of proof is the civil standard. The OFT is therefore required to demonstrate that an infringement has occurred on the balance of probabilities.

V.71 This was recently confirmed by the CAT in *Tesco Stores*, as follows:

'[...] the standard of proof is the civil standard of balance of probabilities [...]. We have also, of course, taken account of the principle of the presumption of innocence, enshrined in Article 6(2) of the European Convention on Human Rights and Fundamental Freedoms (Treaty Series No. 73 (1953) Cmd 8969), in the context of alleged infringements of the 1998 Act, which may result in the imposition of financial penalties. Any doubt in the mind of the Tribunal as to whether a point is established on the balance of probabilities must operate to the advantage of the undertaking alleged to have infringed the competition rules [...]'.²⁴⁹

Evidential weight

V.72 In considering whether the evidence obtained demonstrates an infringement of the Chapter I prohibition, the OFT will assess the extent and weight of that evidence.

V.73 It is well established that, in cases involving infringements of the Chapter I prohibition, the evidence available may be limited. As the Court of Justice stated in *Aalborg Portland*:

'55. Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum.'

'56. Even if the Commission discovers evidence explicitly showing

²⁴⁸ *Napp* (fn246), at [110].

²⁴⁹ *Tesco Stores* (fn188), at [88]. See also *Quarmby Construction Company and St James Securities Holdings v OFT* [2011] CAT 11 ('*Quarmby*'), at [81].

unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction.

'57. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules'.²⁵⁰

- V.74 In a number of more recent judgments, the European Courts have reiterated the principles set out in *Aalborg Portland* and confirmed that while 'the Commission has to provide sufficiently precise and consistent evidence' to support a finding that an infringement took place, 'it is important to emphasise that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement; it is sufficient if the body of evidence relied on by the institution, viewed as whole, meets that requirement'.²⁵¹
- V.75 The General Court has also confirmed that there is no principle precluding reliance on a single item of documentary evidence, provided that there are no doubts as to its probative value and that it definitely attests to the existence of the infringement in question.²⁵²
- V.76 The CAT in *JJB/Allsports*, referring to the principles outlined in *Aalborg Portland*, noted that:

'cartels are by their nature hidden and secret; little or nothing may be committed to writing. In our view even a single item of evidence, or wholly circumstantial evidence, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard: see Claymore Dairies at [3] to [10]'.²⁵³

²⁵⁰ *Aalborg Portland* (fn193), paragraphs 55 to 57. See also Joined Cases T-44/02 OP etc. *Dresdner Bank and Others v Commission* [2006] ECR II-3567, paragraphs 64 to 65.

²⁵¹ Joined Cases T-109/02 etc. *Bolloré and Others v Commission* [2007] ECR II-947 ('*Bolloré*'), paragraphs 257 to 258, citing *Volkswagen* (fn142), paragraph 43 and *Limburgse Vinyl* (fn157), paragraphs 513 to 520. See also Case T-191/06 *FMC Foret v Commission*, judgment of 6 June 2011 ('*FMC Foret*'), paragraphs 105 to 108.

²⁵² *FMC Foret* (fn251), paragraph 122, citing *Cimenteries* (fn178), paragraph 1838.

²⁵³ *JJB/Allsports* (fn159), at [206].

V.77 Most recently, in *Quarmby*,²⁵⁴ the CAT (drawing on *JJB/Allsports*) noted that circumstantial evidence may be taken into account and held that:

'we consider that the prevalence of this conduct was a factor which the OFT was entitled to take into account in coming to a view on the likelihood of an individual company participating in a specific infringement. This Tribunal may take into account circumstantial evidence, particularly in connection with secret cartel behaviour where little or nothing may be committed to writing (*JJB Sports PLC v Office of Fair Trading* [2004] CAT 17 at paragraph 206). This is also true of evidence described by the Appellants as fragmentary. Ultimately, the totality of evidence, viewed as a whole, must be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking concerned is entitled (*JJB* at paragraph 204)'.²⁵⁵

V.78 The question of evidence obtained from an undertaking which has made an application for leniency has been specifically considered by the European Courts and the following principles emerge from the case law:

- Admissions by a leniency applicant do not, by their nature, lack evidential value; 'the mere fact that the information was submitted by an undertaking which made an application for leniency does not call in question its probative value'²⁵⁶
- Reliance may be placed, as against an undertaking, on statements made by other incriminated undertakings, including leniency applicants.²⁵⁷ However, where the accuracy of a statement by a leniency applicant is contested by several other undertakings who are similarly accused, it cannot be regarded as constituting

²⁵⁴ *Quarmby* (fn249).

²⁵⁵ *Quarmby* (fn249), at [86]. See also *Durkan* (fn10), at [95] to [96].

²⁵⁶ *FMC Foret* (fn251), paragraph 115. In particular, although statements of admission may need to be treated with caution (in case they downplay the contribution of the undertaking making the admission), the leniency process '*does not necessarily create an incentive to submit distorted evidence as to the other participants in a cartel*' since this would put the applicant's cooperation in question and risk the loss of its leniency discount (*FMC Foret* (fn251), paragraph 117 (citing Case T-120/04 *Peróxidos Orgánicos v Commission* [2006] ECR II-4441, paragraph 70 and Case T-54/03 *Lafarge v Commission* [2008] ECR II-120 (published in French) ('*Lafarge*'), paragraph 58)). See also Case T-133/07 *Mitsubishi Electric v Commission*, judgment of 12 July 2011 (not yet published) ('*Mitsubishi*'), paragraph 107 as regards statements made by employees of a leniency applicant.

²⁵⁷ *FMC Foret* (fn251), paragraph 116 (citing *Limburgse Vinyl* (fn157), paragraph 512).

adequate proof as against those other undertakings unless it is supported by other evidence²⁵⁸

- In accordance with the principle outlined above, a statement by a leniency applicant in itself may be sufficient proof if it is particularly reliable. In particular, if a body of consistent evidence corroborates the existence and certain specific aspects of the collusion referred to in a statement by a leniency applicant, that statement may **in itself** be sufficient to evidence **other** aspects of the collusion.²⁵⁹

V.79 While the above principles are of particular relevance in assessing the weight to be attached to statements made by or on behalf of a leniency applicant,²⁶⁰ as with any evidence obtained in an investigation, 'the sole criterion relevant in evaluating the evidence adduced is its reliability', which must be understood in light of the 'prevailing principle of Community law [of] the unfettered evaluation of evidence'.²⁶¹

V.80 As regards the Chapter I prohibition, the CAT has taken a similar approach. In *Claymore Dairies*, it stated that:

'[i]n our view, there is no rule of law that, in order to establish a Chapter I infringement, the OFT has to rely on written or documentary evidence. The oral evidence of a credible witness, if believed, may in itself be sufficient to prove an infringement, depending on the circumstances of a particular case. Of course, if the OFT is relying primarily on a witness rather than on documents, it will no doubt look for support in the

²⁵⁸ *FMC Foret* (fn251), paragraph 120 (citing Joined Cases T-67/00 etc. *JFE Engineering* [2004] ECR II-2501 ('*JFE Engineering*'), paragraph 219; Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407, paragraph 285; *Bolloré* (fn251), paragraph 167; *Lafarge* (fn256), paragraph 293 and Case T-337/94 *Enso-Gutzeit v Commission* [1998] ECR II-1571, paragraph 91). Other evidence can take many forms, including contemporaneous documentary evidence (whether originating from the same undertaking or another), statements of other undertakings alleged to have participated in the cartel and the evidence of employees of the alleged participants (see *FMC Foret* (fn251), paragraphs 183 to 186 and 232 and *Bolloré* (fn251), paragraphs 168 to 184).

²⁵⁹ *FMC Foret* (fn251), paragraph 120 (referring to *JFE Engineering* (fn258), paragraph 219). The OFT notes the view of the CAT panel in the Construction appeals as to the evidential weight it considered should be given to material which a leniency applicant creates after the event and which is based on evidence relied on by the OFT (see *AH Willis v OFT* [2011] CAT 13 ('*AH Willis*'), at [49]).

²⁶⁰ See, for example, *JFE Engineering* (fn258), paragraph 205, and on appeal Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel v Commission* [2007] ECR I-00729, paragraphs 50 to 51, 70 to 74 and 103 for a discussion of evidence given on behalf of a leniency applicant. See also *Mitsubishi* (fn256), paragraphs 87 to 89.

²⁶¹ *Mitsubishi* (fn256), paragraphs 81 and 85 (citing Case T-50/00 *Dalmine v Commission* [2004] ECR II-2395, paragraph 72).

surrounding circumstances, for example, the dates and timing of price increases. It will no doubt ask itself whether there is reason to believe that the witness may be untruthful or mistaken but, as at present advised, we do not think there is any technical rule that precludes the OFT from accepting an oral statement of a witness at face value if it thinks it right to do so'.²⁶²

- V.81 In terms of the value of evidence from witnesses which is contrary to the interests of their employers, in *JFE Engineering Corp*, the General Court noted that 'statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence'.²⁶³
- V.82 As regards evidence obtained in the context of a leniency application, in *Quarmby*, a claim that evidence provided by a witness 'was "tainted" because it was given in the context of [a] leniency application' was dismissed by the CAT as 'unsubstantiated'. In particular, the CAT noted that the undertaking providing the underlying evidence to the OFT and the witness commenting on that evidence were under a duty of continuous and complete cooperation (as a condition of leniency) and were aware of the criminal sanctions which they faced if they provided false or misleading information to the OFT.²⁶⁴

I. Exclusion and exemptions

Exclusion

- V.83 Section 3 of the Act provides that certain cases are excluded from the Chapter I prohibition. None of the exclusions from the Chapter I prohibition provided for by section 3 of the Act applies to the Infringement.

Exemption pursuant to section 9 of the Act

- V.84 Agreements and concerted practices which satisfy the criteria set out in section 9 of the Act benefit from exemption from the Chapter I

²⁶² *Claymore Dairies and Express Dairies v OFT* [2003] CAT 18, at [8].

²⁶³ See *JFE Engineering* (fn258), paragraph 211.

²⁶⁴ *Quarmby* (fn249), at [114]. However, as referred to in fn259, the OFT notes the view of the CAT panel in the Construction appeals as to the evidential weight it considered should be given to material which a leniency applicant creates after the event and which is based on evidence relied on by the OFT (see *AH Willis* (fn259), at [49]).

prohibition. It is for the parties to demonstrate that the four conditions for exemption under section 9 of the Act are satisfied.

- V.85 The Parties have not submitted any representations to the effect that the criteria as set out in section 9 of the Act are met. The OFT considers it most unlikely that the arrangement covered by the Infringement is exempted from the Chapter I prohibition by virtue of section 9 of the Act. In particular, it is difficult to envisage how the Infringement could be said to have contributed to improving the production or distribution of goods, promoting technical or economic progress or how consumers could be said to have benefitted. In the circumstances, it is not necessary for the OFT to consider whether any of the remaining requirements for exemption under the relevant provisions would have been met.

Parallel exemption

- V.86 Section 10 of the Act provides that an agreement is exempt from the Chapter I prohibition if it is covered by a finding of inapplicability by the Commission²⁶⁵ or an EU block exemption regulation, or would be covered by an EU block exemption regulation if the agreement had an effect on trade between EU Member States.
- V.87 The Infringement is not covered by a finding of inapplicability by the Commission or by an EU block exemption regulation and would not be covered by such a regulation if it had an effect on trade between EU Member States.

J. Article 101

- V.88 Where the OFT applies national competition law to agreements or concerted practices which may affect trade between EU Member States, the OFT must also apply Article 101.²⁶⁶

Effect on trade between Member States

- V.89 For Article 101 to be engaged, the agreement or concerted practice must affect trade between EU Member States to an appreciable

²⁶⁵ The Commission may find that Article 101 is inapplicable to an agreement either because the conditions of Article 101(1) are not fulfilled or because the conditions of Article 101(3) are satisfied.

²⁶⁶ 1/2003/EC Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ 2003 L1/1, Article 3.

extent.²⁶⁷ This is a jurisdictional requirement demarcating the boundary between EU competition law and national competition law.²⁶⁸

Appreciability may be assessed by reference to the market position and importance of the undertakings concerned, and it will be absent where the effect on the market is insignificant because of the undertakings' weak position on the market.²⁶⁹

- V.90 For the purposes of assessing whether an agreement or concerted practice may affect trade between EU Member States the OFT has regard to the approach set out in the Commission's published guidance.²⁷⁰ Agreements which cover only part of an EU Member State are not likely to affect trade between EU Member States appreciably, unless they have the effect of hindering competitors from other EU Member States from gaining access to part of the EU Member State, which constitutes a substantial part of the internal market.²⁷¹ The guidance also provides that agreements that are local in nature are in themselves not capable of appreciably affecting trade between Member States.²⁷²
- V.91 The Infringement was not cross-border in nature, but rather took place in a limited area within the UK. During the Relevant Period, the Parties made no sales to customers in other Member States²⁷³ and the evidence in the OFT's possession does not suggest that the Infringement had the effect of hindering competitors from other Member States from gaining access to part of the UK. The operation of the agreement and/or concerted practice was local in scope.²⁷⁴ On the basis of the foregoing, the OFT considers that it has no grounds for action under Article 101.²⁷⁵

²⁶⁷ *Völk* (fn235), paragraph 5/7 and Case 22-71 *Béguelin Import v SAGL Import Export* [1971] ECR 949, paragraph 16.

²⁶⁸ Case 22/78 *Hugin Kassaregister and Hugin Cash Registers v Commission* [1979] ECR 1869, paragraph 17. See also *Aberdeen Journals* (fn245), at [459].

²⁶⁹ *Völk* (fn235), paragraph 5/7 and Case T-77/92 *Parker Pen v Commission* [1944] ECR II-549, paragraph 40.

²⁷⁰ Commission Notice Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C101/07) (the '*Notice on the Effect on Trade*').

²⁷¹ *Notice on the Effect on Trade* (fn270), paragraphs 89 and 92.

²⁷² *Notice on the Effect on Trade* (fn270), paragraph 91.

²⁷³ See paragraphs II.22 and II.35 (Company Profiles).

²⁷⁴ See paragraph IV.46 (Industry Overview and the Relevant Market).

²⁷⁵ In finding no grounds for action under Article 101 against the Parties, the OFT has not made a non-infringement decision. In Case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele 2 Polska, now Netia SA w Warszawie*, the Court of Justice clarified that, given the risk of undermining the uniform application of Articles 101 and 102, only the Commission is empowered to make a finding that there has been no breach of these provisions

SECTION VI THE CONDUCT OF THE PARTIES AND LEGAL ASSESSMENT

Conduct of the Parties

A. The OFT's analysis of the evidence and findings

- VI.1 The OFT has concluded, on the basis of the evidence viewed as a whole, that the Parties infringed the Chapter I prohibition. The main sources of evidence are summarised in this sub-section A by reference to the corresponding paragraph numbers in this Conduct Section,²⁷⁶ but the OFT's conclusions are reached in light of the totality of the evidence.
- VI.2 On 13 June 2008, [Northside Director], [Northside Manager B], and [Northside Manager A] had a meeting with [H & L Director] and [H & L Manager C] at Northside's Doncaster depot. At that meeting, Northside and H & L entered into an anti-competitive agreement and/or concerted practice. The agreement and/or concerted practice consisted of two elements. The Parties agreed that a H & L Truck Sales Executive ([H & L Sales Executive C]) should cease targeting customers based in Northside's area.²⁷⁷ The Parties also agreed that they would not 'prospect within each other's areas'²⁷⁸ and that they would each pass to the other Party enquiries from customers based in the latter's area.²⁷⁹ The OFT has concluded that this constituted an agreement and/or concerted practice which had the object of preventing, restricting or distorting competition for the sale of trucks to customers based in the Parties' areas.
- VI.3 There is also evidence that the Parties subsequently contacted each other on a number of occasions in relation to specific customers under the terms of the agreement and/or concerted practice.²⁸⁰ In relation to [H & L Sales Executive C], H & L attempted to prevent him from contacting customers in Northside's area and eventually dismissed him.²⁸¹

and that national competition agencies can only decide that there are no grounds for action on their part.

²⁷⁶ References to the 'Conduct Section' are to paragraphs VI.1 to VI.82.

²⁷⁷ See paragraphs VI.14 to VI.19.

²⁷⁸ See paragraph VI.23. The OFT considers that to 'prospect within each other's areas' means to actively pursue sales to customers within each other's areas.

²⁷⁹ See paragraphs VI.21 to VI.28.

²⁸⁰ See paragraphs VI.33 to VI.78.

²⁸¹ See paragraphs VI.14 to VI.19.

B. Evidence of the infringement

Background to the meeting of 13 June 2008

- VI.4 On 13 June 2008, [Northside Director], [Northside Manager B] and [Northside Manager A]²⁸² had a meeting with [H & L Director] and [H & L Manager C] at Northside's Doncaster depot.²⁸³
- VI.5 Evidence from both Parties suggests that the 13 June 2008 meeting was precipitated by increased friction between Northside and H & L, caused at least in part by the departure of [H & L Sales Executive C], from Northside and his subsequent employment by H & L in January 2008.²⁸⁴ After joining H & L, [H & L Sales Executive C] continued to have contact with some of his former Northside customers and competed against Northside for their business.
- VI.6 There is evidence that [H & L Director] was concerned about [H & L Sales Executive C]'s attempt to win Northside's share of the account of a customer (Polypipe) which had previously ordered from both Northside and H & L.²⁸⁵

²⁸² [Northside Manager A] only attended part of the meeting but his presence is noteworthy given the agreement that he had already achieved with H & L on vans - see Decision 1.

²⁸³ [Northside Director], [Northside Manager B], [Northside Manager A] and [H & L Director] each confirmed the meeting's occurrence and their attendance. See [C] Witness Statement, OFT Document Reference 3869, paragraph 29; [C] Witness Statement, OFT Document Reference 3870, paragraphs 21 and 25; [C] Witness Statement, OFT Document Reference 3868, paragraph 66 and [C] Interview Transcript, OFT Document Reference 4372, page 89. [H & L Manager C] stated that he remembered having been given a guided tour of Northside's Doncaster premises, but that he did not recall what had been discussed nor any other details about the meeting ([C] Interview Transcript, OFT Document Reference 4371, pages 35 to 36). The OFT notes that [H & L Sales Executive C]'s subsequent email to [H & L Manager C] refers to '*your recent meeting with Northside*' and the '*issues*' raised at that meeting – which implies that the meeting went beyond a guided tour of the premises. See email from [H & L Sales Executive C] to [H & L Manager C] dated 2 July 2008 re Milton Keynes Council, OFT Document Reference 1302.

²⁸⁴ [C] Witness Statement, OFT Document Reference 3870, paragraphs 22 to 25; [C] Interview Transcript, OFT Document Reference 0855, pages 39 to 41 and [C] Interview Transcript, OFT Document Reference 4372, page 90.

²⁸⁵ [C] Interview Transcript, OFT Document Reference 4372, pages 88 to 89. See also instructions from [H & L Director] to [H & L Sales Executive C] not to quote for out-of-area business (email from [H & L Director] to [H & L Sales Executive C] cc: [H & L Manager C] dated 22 May 2008 re Polypipe Group, OFT Document Reference 1310). See also email from [H & L Sales Executive C] to [H & L Manager C] dated 6 June 2008 re Polypipe, OFT Document Reference 1661. Note however that [H & L Manager C] stated in interview that he was happy for [H & L Sales Executive C] to quote for the business (See [C] Interview Transcript, OFT Document Reference 4371, pages 84 to 87).

- VI.7 Senior management of H & L and Northside ultimately determined that a face-to-face meeting was necessary to prevent further conflict in relation to [H & L Sales Executive C]'s activities. The evidence available to the OFT indicates that, once the Parties were at the discussion table, they took the opportunity to reach a broader anti-competitive agreement and/or concerted practice to restrict competition in their respective areas.
- VI.8 The tension created by [H & L Sales Executive C]'s activities is illustrated by the events surrounding the quotation he provided to a customer based in Northside's area, Ron Hull in April 2008.²⁸⁶ Ron Hull informed Northside that it had decided to place its order with H & L because they were cheaper than Northside.²⁸⁷
- VI.9 In response to this, [Northside Manager B] contacted [H & L Manager C] to ask why H & L had provided a quotation to Ron Hull and to ascertain the details of their quotation. [Northside Manager B] stated: 'I telephoned H & L and asked [H & L Manager C] why [H & L Sales Executive C] was quoting Ron Hull and how was he able to beat Northside on price'.²⁸⁸
- VI.10 At the instigation of [Northside Manager B], the conflict caused by the quotation to Ron Hull was then escalated to [Northside Director], Northside's Dealer Principal.²⁸⁹ [Northside Director] stated: 'I recall that I telephoned [H & L Director] about the customer Ron Hull who was one

²⁸⁶ See also [Northside Director]'s comment regarding customer Econ Engineering. [C] Witness Statement, OFT Document Reference 3869, paragraph 38.

²⁸⁷ See [C] Witness Statement, OFT Document Reference 3870, paragraph 23 and facsimile from [Northside Sales Executive E] to [a contact at Ron Hull] dated 24 April 2008 re Atego Chassis Cab Price, OFT Document Reference 0474. See also extract from diary of [Northside Sales Executive E] dated 23 to 24 April 2008, OFT Document Reference 0473. The notebook of [Northside Sales Executive G] contains a reference to Ron Hull and the following handwritten note: '*ORDER PLACED* [H & L Sales Executive C] £[C] INC CAMERA REV + WINDOW' (handwritten note of [Northside Sales Executive G], OFT Document Reference 0475). See also Northside Lost Sales Report for period 8 August 2008 to 25 February 2010 ('Northside Lost Sales Report'), OFT Document Reference 0584, page 23, which is an entry on Northside's lost sales report for [Northside Sales Executive G] including a quotation dated May 2008 in respect of customer Ron Hull. The known competitor is recorded as 'Other MB', the quotation is for £[C] and the status is noted as '*Lost*' for the reason 'Vehicle Price'. The additional notes column contains the entry 'UNDERCUT BY [H & L Sales Executive C] @ H & L'. This information appears to have come from the customer. [C] Witness Statement, OFT Document Reference 3870, paragraph 23.

²⁸⁸ [C] Witness Statement, OFT Document Reference 3870, paragraph 23. This contact is confirmed by [H & L Manager C] ([C] Interview Transcript, OFT Document Reference 4371, pages 47 to 50).

²⁸⁹ [C] Witness Statement, OFT Document Reference 3870, paragraphs 23 to 24.

of the customers targeted by [H & L Sales Executive C] [...] I wanted to find out why they were quoting in our area and to try to understand the pricing of the deal'.²⁹⁰

- VI.11 In response, [H & L Director] investigated the matter internally and asked [H & L Manager C] to review the deal sheet. In his email to [H & L Manager C], [H & L Director] stated: 'I think we should refuse to accept this order but this needs handling carefully so as not to fall foul of competition law'.²⁹¹
- VI.12 [H & L Director] told the OFT that he thought this could be in breach of competition law because 'I was suggesting that we withdraw from the, from the business and [...] I was a little bit nervous that Ron Hull may, may consider this to be a, our withdrawal was as a result of something Northside had done which it wasn't. All Northside did was make me aware that we were quote - I didn't, as the managing director, I didn't even know we were quoting Ron Hull when this email came through [...]'.²⁹² He also said that, on that occasion, '[H & L Manager C] decided that it had gone past the point of no return and rather than upset the customer, he decided to supply the vehicle'.²⁹³
- VI.13 [H & L Director] told the OFT that he was not overly concerned about [H & L Sales Executive C] quoting 'out of patch' to Ron Hull, but that his primary concern was that [H & L Sales Executive C] was providing quotations to customers without conferring with his manager: 'it was just another example of the guy operating to his own agenda without any, without any control and the, the, the, the opportunity for disaster was massive'.²⁹⁴

Agreement and/or concerted practice regarding [H & L Sales Executive C]'s activities

- VI.14 At the meeting of 13 June 2008, [Northside Director] specifically asked [H & L Director] to 'keep [H & L Sales Executive C] out of Northside's area of influence'.²⁹⁵ [Northside Manager B] stated:

²⁹⁰ [C] Witness Statement, OFT Document Reference 3869, paragraph 32.

²⁹¹ Email from [H & L Director] to [H & L Manager C] dated 14 May 2008 re Ron Hull, OFT Document Reference 1313.

²⁹² [C] Interview Transcript, OFT Document Reference 4372, page 135.

²⁹³ [C] Interview Transcript, OFT Document Reference 4372, page 136.

²⁹⁴ [C] Interview Transcript, OFT Document Reference 4372, page 131.

²⁹⁵ [C] Witness Statement, OFT Document Reference 3869, paragraph 34.

'The outcome of the meeting was that they agreed that they would speak to [H & L Sales Executive C] and tell him that he was employed to look after H & L's depot in York and to generate work in York and not to visit his old customers based in Northside's patch. [...]

'It was further agreed that if there was any further interference from [H & L Sales Executive C], I would contact [H & L Manager C] about it [...].'²⁹⁶

VI.15 [Northside Manager A] stated:

'I recall that the conversation was mainly about [H & L Sales Executive C] and his targeting of Northside customers and that [Northside Director] was asking H & L to get a grip on him. I recall [H & L Director] agreeing that [H & L Sales Executive C] should not be targeting Northside's customers'.²⁹⁷

VI.16 [H & L Director] denied that the meeting resulted in 'agreed outcomes' in relation to [H & L Sales Executive C].²⁹⁸ However, he stated:

'It was just, you know, they [Northside] were very nervous about what he [H & L Sales Executive C] was saying to people and I had to, I had to give them some assurances that I would stop him [...] and I can't remember what happened after that but I will have, undoubtedly, I will have sat [H & L Sales Executive C] down and said, 'Look, you've got to stop this'.²⁹⁹

VI.17 There is contemporaneous documentary evidence to support Northside's version of events. [H & L Sales Executive C] sent the following email to customer Eurotrail on 17 June 2008, four days after the meeting of Friday 13 June 2008:

'[Northside Director] kicked off on Friday to [H & L Director] regarding me having contact and dealing with people I used to deal with before my move to H & L and he stated that Eurotrail was a Northside customer and he dealt with the account personally and I should have no contact with you. I have responded by stating that it is the customers decision and could infringe block exemption and other legal issues.

²⁹⁶ [C] Witness Statement, OFT Document Reference 3870, paragraphs 27 to 28.

²⁹⁷ [C] Witness Statement, OFT Document Reference 3868, paragraph 67.

²⁹⁸ [C] Interview Transcript, OFT Document Reference 4372, page 106.

²⁹⁹ [C] Interview Transcript, OFT Document Reference 4372, page 106.

'I have no intention of doing anything illegal no matter how much pressure is put on me'.³⁰⁰

- VI.18 Two months after the meeting with Northside, [H & L Director] wrote a letter to [H & L Sales Executive C] instructing him to refrain from devoting efforts to prospecting within Northside's territory. He said: 'I must re-emphasis that any activity must be focussed within the H&L territory and not in Northside's territory. Over the past few months you have continued to devote effort to business within Northside's territory and this must cease'. This was justified on the basis that '[a]s a company we do not make money unless the vehicles that we sell are serviced and maintained by ourselves. This is obviously not the case when vehicles are running out of patch'. In the letter [H & L Director] also stated: '[...] unless we witness and concerted effort to focus on business within our geographical area, coupled with an adherence to the reporting process that [H & L Manager B] has put in place, we will have to seriously reconsider our decision to employ you'.³⁰¹
- VI.19 On the balance of the evidence, the OFT does not accept that this letter captures the real reasons (or at least the entirety of the reasons) for [H & L Director]'s instructions to [H & L Sales Executive C] to focus his efforts within H & L's Zol. The OFT considers that, having reached an agreement and/or concerted practice with Northside just two months earlier, [H & L Director]'s instructions cannot be dissociated from the anti-competitive arrangement between the Parties.
- VI.20 Both [H & L Director] and [H & L Sales Executive C] were at the time aware of competition law.³⁰² The OFT considers that [H & L Director]'s understanding of the legal implications of his arrangement with Northside would have influenced his drafting of the letter to [H & L Sales Executive C] and led him to refrain from referring to the arrangement with

³⁰⁰ Email exchange between various inc. [H & L Sales Executive C] and [H & L Manager C] dated 15 May to 29 July 2008 re Available Actros, Actros, Eurotrail, Eurotrail UK, Pricing and Meeting, OFT Document Reference 4391, page 20.

³⁰¹ Letter from [H & L Director] to [H & L Sales Executive C] dated 14 August 2008 re development of sales and after-sales, OFT Document Reference 2605. [H & L Director] said in interview that, although he could not recall what he said to [H & L Sales Executive C] after the meeting, he considered that it was likely that he would have reminded [H & L Sales Executive C] of the letter (referred to in paragraph VI.18), of who he worked for and that there was 'no future' if he 'refused to work within the confines of our business'. ([C] Interview Transcript, OFT Document Reference 4372, pages 119 to 120). [H & L Sales Executive C]'s employment was subsequently terminated in the autumn of 2008 ([C] Interview Transcript, OFT Document Reference 4372, page 237).

³⁰² See paragraphs VI.11 and VI.17.

Northside in his letter. The OFT therefore considers that [H & L Director]'s instructions to [H & L Sales Executive C] are a manifestation of the agreement and/or concerted practice between the Parties.

General agreement and/or concerted practice

- VI.21 [H & L Sales Executive C]'s activities may have triggered the meeting on 13 June 2008 between Northside and H & L but, having gathered around the discussion table at the Northside depot, the Parties took the opportunity to conclude a broader agreement and/or concerted practice to restrict competition for customers in each other's areas.
- VI.22 [Northside Manager B] stated:

'Northside has developed a good relationship with H & L and I would consider that I had a good relationship with [H & L Manager C], my counterpart at H & L. This good relationship arose out of a meeting that [Northside Director] and I had with [H & L Director] and [H & L Manager C] regarding the conduct of [H & L Sales Executive C] [...]

'[At the meeting] [t]here was also an understanding reached that we would stick to our own dealer's areas and that if any issues arose regarding one of the dealers entering another dealer's area, [H & L Manager C] and I would discuss this to resolve the issues.

'[...] We also had an understanding with H & L that if we had an enquiry from someone in H & L's area we would pass that enquiry to H & L. H & L would similarly pass to us details of enquiries they had received from customers in Northside's area. I conveyed this to my sales team at a team meeting [...]'.³⁰³

- VI.23 [Northside Director] stated:

'It was agreed at the meeting that Northside and H & L would contact one another if we got a request to quote for a customer based in the other dealer's area of influence. The agreement was that should any customers from H & L's area approach us or a customer from our area approach H & L then [Northside Manager B] and [H & L Manager C] would speak to each other. The aim was to ensure that we didn't prospect in each other's area and to ensure that we weren't

³⁰³ [C] Witness Statement, OFT Document Reference 3870, paragraphs 21 and 28 to 29.

undercutting their pricing and they weren't undercutting ours in our respective areas'.³⁰⁴

- VI.24 [H & L Director] denied that there was a general agreement between H & L and Northside that each dealer would not sell into the other's area.³⁰⁵ He also denied that there was any agreement that [H & L Manager C] and [Northside Manager B] would contact each other following the meeting.³⁰⁶ However, in relation to Polypipe, [H & L Director] stated:³⁰⁷

'So, we popped over there to have a chat with, with [Northside Director] to discuss the implications and basically to, to try and settle the situation down and understand what the implications were [...] So, he, we met and we talked about the Polypipe account and whether we should, whether there was anything we needed to do in terms of change to the arrangements and it's a difficult one. I don't think, I don't think it was minuted or anything but I just, I think we just agreed that the status quo should continue and that Northside would supply anything that went into the operations that, that ran out of West Yorkshire and we would continue to supply vehicles down in the south of Lincolnshire'.³⁰⁸

- VI.25 [H & L Director] also stated:

'I worked very hard for the first two or three years to get that level of support from fellow dealers and largely, I've got that now and if you've got a salesman running around making a nuisance of himself, that's

³⁰⁴ [C] Witness Statement, OFT Document Reference 3869, paragraph 37.

³⁰⁵ [C] Interview Transcript, OFT Document Reference 4372, pages 139 to 140 and 194.

³⁰⁶ [C] Interview Transcript, OFT Document Reference 4372, pages 278 to 279.

³⁰⁷ [Northside Director]'s evidence is that during the meeting H & L had speculated that Polypipe itself would split the order between Northside and H & L ([C] Witness Statement, OFT Document Reference 3869, paragraph 35). On the same day as the meeting with H & L, Northside was informed that Polypipe had decided to place its entire order with Northside and [Northside Director] was aware of this at the time of the meeting with H & L ([C] Witness Statement, OFT Document Reference 3869, paragraphs 35 to 36; [C] Witness Statement, OFT Document Reference 3870, paragraph 30 and [C] Witness Statement, OFT Document Reference 3867, paragraph 25). The fact that Northside did not communicate this to H & L does not detract from the fact that the Parties discussed Polypipe's business, and that H & L left the meeting with the belief that an agreement had been reached in relation to Polypipe. Nonetheless, the OFT considers that [H & L Director]'s perception that he had reached a common understanding with Northside as to how the two dealers would deal with customer Polypipe is evidence of the purpose and nature of the discussions that took place at the meeting of 13 June 2008.

³⁰⁸ [C] Interview Transcript, OFT Document Reference 4372, page 89. Witness evidence from representatives of customer Polypipe is that they had the impression that there had been competition and rivalry between H & L and Northside. See [C] Witness Statement, OFT Document Reference 0978, paragraph 18 and [C] Witness Statement, OFT Document Reference 0979, paragraph 12.

neither in the interests of me as a business owner nor in the interests of the franchise, nor in the interests of the customer, to be perfectly honest and damaging your relationship with your fellow dealers is, you know, it's got to stop really and that's, that was, that was the purpose of the meeting really, just to re-set the ground rules and say, 'This is, this is how we will handle this Polypipe, Polypipe account going forward'.³⁰⁹

- VI.26 [H & L Director]'s denial that the Parties reached an agreement and/or concerted practice at the meeting of 13 June 2008 is contradicted by his perception that there existed an agreement in relation to customer Polypipe. It is also contradicted by the witness evidence from Northside³¹⁰ and by the actions taken by both H & L and Northside after that meeting (see for example [H & L Director]'s email referred to in paragraph VI.35). The OFT also notes that the witness evidence from Northside regarding the terms of the anti-competitive arrangement reached at the 13 June 2008 meeting is consistent with the evidence concerning the subsequent actions of both Parties discussed in paragraphs VI.33 to VI.81.
- VI.27 In view of the foregoing, on balance the OFT considers that [Northside Director]'s and [Northside Manager B]'s version of events is more plausible and that the agreement and/or concerted practice was not limited to [H & L Sales Executive C]'s activities nor to customer Polypipe but, rather, extended to approaches from customers in the Parties' Zols.³¹¹

[H & L Director]'s written representations

- VI.28 [H & L Director] provided written representations in response to the Statement on 31 July 2012.³¹² He states that he accepts the findings outlined in the Statement that relate to H & L Garages.³¹³ However, he denies being present 'when an agreement was made' between H & L and Northside. He also denies discussing with Northside 'about contacting each other when quoting in one another's territories'. He states that the purpose of the meeting of 13 June 2008 was to discuss the 'unacceptable behaviour' of [H & L Sales Executive C].³¹⁴ The OFT

³⁰⁹ [C] Interview Transcript, OFT Document Reference 4372, page 97.

³¹⁰ See paragraphs VI.22 and VI.23.

³¹¹ The OFT also notes that H & L Garages is a Party to this Infringement and does not benefit from leniency (and, at the time of [H & L Director]'s interview, was still in business). As such, the incentive of H & L Garages to cooperate at the time of interview with the OFT's investigation was limited.

notes that [H & L Director] does not resile in his representations from his earlier statement about his belief that there was an agreement in relation to the Polypipe account.³¹⁵

- VI.29 In his written representations, [H & L Director] states that, although he finds it difficult to recall specific details about the meeting, he is confident he would have remembered 'something as significant' as the agreement [Northside Director] refers to in his witness statement (see paragraph VI.23).³¹⁶ [H & L Director] makes further representations around the factual context of the meeting of 13 June 2008 and asserts that it is conceivable an arrangement was entered into when he was not present. For example, he says that at one point he was taken on a guided tour of the Doncaster facility by [Northside Director], and that he left the Doncaster depot separately from [H & L Manager C] and questions whether a discussion may have happened between [H & L Manager C] and [Northside Manager B] when he was not there.³¹⁷ [H & L Director]'s denial in his written representations that he was present when an agreement was made is not corroborated by any further evidence.
- VI.30 All those at the meeting have independently confirmed [H & L Director]'s presence at the meeting of 13 June 2008.³¹⁸ None of the meeting participants, including [H & L Director] himself, noted [H & L Director] leaving the meeting early or only attending part of the meeting.³¹⁹ In [H

³¹² Written Representations of [H & L Director], OFT Document Reference 4815.

³¹³ See fn77. The OFT notes that, in his written representations on the Statement, [H & L Director] states that he accepts the findings in relation to H & L Garages, but that he denies his own personal involvement in the Infringement. Although this Decision is being addressed to H & L Garages, H & L Garages is now in liquidation. It seems unlikely that [H & L Director] will suffer financial consequences as a result of this Decision in addition to any losses he may suffer due to H & L Garages' liquidation. Obviously however, under the Company Directors Disqualification Act 1986, an individual may be disqualified from acting as a director for up to 15 years if a company of which they are a director is involved in a breach of competition law and the Court considers that as a result they are unfit to be involved in the management of a company.

³¹⁴ Written Representations of [H & L Director], OFT Document Reference 4815.

³¹⁵ See paragraph VI.24.

³¹⁶ Written Representations of [H & L Director], OFT Document Reference 4815.

³¹⁷ Written Representations of [H & L Director], OFT Document Reference 4815. [H & L Manager C] also mentioned a guided tour of the Doncaster facility (see fn283).

³¹⁸ See [C] Witness Statement, OFT Document Reference 3869, paragraph 29; [C] Witness Statement, OFT Document Reference 3870, paragraph 25; [C] Witness Statement, OFT Document Reference 3868, paragraph 66 and [C] Interview Transcript, OFT Document Reference 4372, page 89.

³¹⁹ Whereas [Northside Manager A]'s attendance for only part of the meeting was noted by [Northside Director], [Northside Manager B] and [Northside Manager A] ([C] Witness Statement,

& L Director]'s interview in November 2010, he did not mention that he left the meeting early or missed part of the meeting. When asked about the general agreement, he said that he could not remember this being discussed.³²⁰ In relation to the tour of the facility, [H & L Manager C] also mentions that he was taken on a tour of the Doncaster facility, however it is not clear whether this was the same tour.³²¹ In his interview, [Northside Director] mentioned an 'understanding that we look after our customers, and you look after your customers'. When asked by the OFT whether [H & L Director] had agreed with that understanding at the meeting, [Northside Director] replied 'yes'.³²²

- VI.31 In light of the totality of the evidence and of H & L's limited incentives to cooperate with the OFT's investigation, the OFT does not consider [H & L Director]'s contention that he was absent from the meeting when Northside and H & L entered into the anti-competitive arrangement to be plausible.
- VI.32 The OFT notes however that, even if it was true that [H & L Director] was not in fact present at the meeting when the agreement was entered into (which the OFT does not concede is the most plausible version of events), this does not affect the OFT's finding that there was an agreement concluded and/or concerted practice initiated at the meeting of 13 June 2008 between Northside and H & L that they would not prospect within each other's areas and that they would each pass to the other Party enquiries from customers based in the latter's area.

C. Manifestations of agreement and/or concerted practice

- VI.33 The following paragraphs describe manifestations of the agreement and/or concerted practice between the Parties during the Relevant Period. In relation to contacts between the Parties, [Northside Manager B] stated:

'[a]s a result of the June 2008 meeting, I contacted [H & L Manager C] on a number of occasions. On the occasions I did contact him, it was to

OFT Document Reference 3869, paragraph 29; [C] Witness Statement, OFT Document Reference 3870, paragraph 25 and [C] Witness Statement 3868, paragraph 66).

³²⁰ [C] Interview Transcript, OFT Document Reference 4372, page 102.

³²¹ See [C] Interview Transcript, OFT Document Reference 4371, pages 35 to 36. See also fn283.

³²² [C] Interview Transcript, OFT Document Reference 0855, page 94.

find out if they had quoted for a particular customer, and if so why they had done so. I would also have asked how much H & L had quoted'.³²³

Alan Lodge – June 2008

- VI.34 Only a few days after the meeting on 13 June 2008, H & L became aware of possible interest from a customer based in Northside's area. H & L decided not to follow up the lead; rather, it passed the lead on to Northside.
- VI.35 One of the drivers from customer Alan Lodge had indicated that there was dissatisfaction with Northside's service and that Alan Lodge might be in the market for some new vehicles.³²⁴ During the course of an internal discussion about whether [H & L Sales Executive C] should approach Alan Lodge, [H & L Director] emailed [H & L Manager C], stating: '[c]an you guide [H & L Sales Executive C] on this one – suggest we back off but inform [Northside Director] he has an issue? What's your view?'.³²⁵ In response, [H & L Manager C] stated: '[a]fter a conversation with [H & L Sales Executive C], I have decided to pass this lead on to [Northside Manager B] @ Northside'. [H & L Director] replied: '[g]ood call!!!!'.³²⁶
- VI.36 In interview, [H & L Director] said that he could not recall the discussion, but that it was likely that H & L decided not to approach Alan Lodge because there was little margin to be had on the deal for H & L as a result of the customer's geographic location.³²⁷ [H & L Manager C] stated that he decided to inform Northside about the lead and the alleged servicing issues with this customer (rather than attempting to approach Alan Lodge himself) because there was a risk that H & L would not be able to provide a better service to the customer because it was in Northside's area of influence, and that the customer might therefore go to a different manufacturer.³²⁸

³²³ [C] Witness Statement, OFT Document Reference 3870, paragraph 31.

³²⁴ Email exchange between [a H & L employee], [H & L Sales Executive C] and [H & L Manager C] dated 16 June 2008 re Driffield Show – Alan Lodge, OFT Document Reference 1651.

³²⁵ Email exchange between [H & L Sales Executive C], [H & L Director] and [H & L Manager C] dated 16 June 2008 re Driffield Show – Alan Lodge, OFT Document Reference 1298.

³²⁶ Email exchange between [H & L Sales Executive C], [H & L Director] and [H & L Manager C] dated 16 June 2008 re Driffield Show – Alan Lodge, OFT Document Reference 1307.

³²⁷ [C] Interview Transcript, OFT Document Reference 4372, pages 164 to 168.

³²⁸ [C] Interview Transcript, OFT Document Reference 4371, pages 55 to 56.

- VI.37 In light of the totality of the evidence and of H & L's limited incentives to cooperate with the OFT's investigation,³²⁹ the OFT does not consider the explanations provided by [H & L Director] and [H & L Manager C] to be plausible. The OFT considers that this incident is consistent with and constitutes a manifestation of the agreement and/or concerted practice between the Parties, and the OFT considers that the agreement and/or concerted practice would have at least influenced H & L's decision to contact Northside and pass the customer to them.

Econ Engineering Ltd ('Econ Engineering') – May to August 2008

- VI.38 Following the meeting of 13 June 2008, Northside contacted H & L to influence their handling of a request for a quotation by customer Econ Engineering in order to retain the business at Northside. The customer told the OFT that they believed that H & L would not supply them due to an agreement with Northside.³³⁰
- VI.39 Prior to the 13 June 2008 meeting, customer Econ Engineering had sought quotations from H & L, Northside and another dealer, John R Weir.³³¹
- VI.40 [H & L Sales Executive C] asked [H & L Manager C] for authority to provide a quotation to this customer on 15 August 2008 (that is, after the 13 June 2008 meeting).³³² It does not appear that authority was granted. On 27 August 2008, [H & L Sales Executive C] sent an email to [H & L Director], stating:

'I have just had a angry [Contact A at Econ Engineering] on the phone requesting an explanation why H & L will not supply vehicles to them. I have said nothing out of turn to decline their request but I think it is

³²⁹ See fn311.

³³⁰ [Contact A at Econ Engineering], stated: '[i]t is my understanding based on what I was told by [H & L Sales Executive C] that the MDs of H & L and Northside had agreed that Econ was a Northside customer and that H & L should not quote for Econ's business' ([C] Witness Statement, OFT Document Reference 0519). See paragraph VI.41.

³³¹ Email exchange between [Contact B at Econ Engineering] and [a Mercedes employee] dated 8 to 15 May 2008 re Bank Stock Update and Various Mercedes Items, OFT Document Reference 1086. See also [C] Witness Statement, OFT Document Reference 3869, paragraphs 38 to 39; [C] Witness Statement, OFT Document Reference 3870, paragraphs 32 to 33. The OFT notes that [H & L Director] and [H & L Manager C] told the OFT that they did not recall contact with Northside in relation to this customer (see [C] Interview Transcript, OFT Document Reference 4372, page 176 and [C] Interview Transcript, OFT Document Reference 4371, page 98).

³³² Email from [H & L Sales Executive C] to [H & L Manager C] dated 15 August 2008 re Econ, OFT Document Reference 1292.

important that someone in a senior position speaks to them as a priority before the situation gets out of hand. Please advise'.³³³

- VI.41 Econ Engineering informed the OFT that they were told by H & L that they had to deal with Northside and could not order from H & L.³³⁴ This was confirmed by [Northside Sales Executive F] (the contact person for this account). He was told by Econ Engineering that they had been informed that they could not order from H & L.³³⁵
- VI.42 Therefore, in light of the totality of the evidence, the OFT considers that this incident is consistent with and constitutes a manifestation of the agreement and/or concerted practice between the Parties.
- VI.43 The OFT notes that, on 3 September 2008, [H & L Director] sent an email to [H & L Sales Executive C], stating: '[...] I have no problems with you quoting however any truck quote will need to be based on a gross of no less than £[C] [...] As you will appreciate, these vehicles generally do not run in our territory and as such our only profit opportunity is in the metal. The account is also a very demanding one and takes a lot of managing hence we need to be making a reasonable return'.³³⁶ However, the OFT considers that [H & L Director]'s understanding of the legal implications of his arrangement with Northside³³⁷ would have likely influenced his drafting of this email to [H & L Sales Executive C] and led him to refrain from referring to the arrangement with Northside in his

³³³ Email from [H & L Sales Executive C] to [H & L Director] dated 27 August 2008 re Econ Engineering, OFT Document Reference 1294.

³³⁴ [C] Witness Statement, OFT Document Reference 0519. See also email from [H & L Sales Executive C] to [H & L Director] dated 4 September 2008 re Econ, OFT Document Reference 1308. [Contact A at Econ Engineering] stated that he complained to [a Mercedes Sales Manager] about having to purchase from Northside (see [C] Witness Statement, OFT Document Reference 0517). See also an undated entry (located nine pages after an entry dated 30 July 2008 and two pages before an entry dated 4 September 2008) in the notebook of [a Mercedes Sales Manager] recording the following: 'ECON [...] 2) Sort out politics b/w Northside / H + L', (extract from notebook of [a Mercedes Sales Manager], OFT Document Reference 1056, page 9). Email from [Northside Sales Executive F] to [Northside Manager B] dated 10 October 2008 re Econ, OFT Document Reference 0637.

³³⁵ [C] Interview Transcript, OFT Document Reference 0931 pages 12 to 15. See also [C] Witness Statement, OFT Document Reference 0519, stating that '[H & L Sales Executive C] told me that he did could not give Econ a price and that Econ had to go to Northside', and that 'I also recall that after this incident [H & L Sales Executive C] said to me that he was not allowed to deal with Econ and that he had been given this instruction by senior staff at H + L'. See also [C] Witness Statement, OFT Document Reference 0518, stating: '[H & L Sales Executive C] told me that he thought the bosses at H + L and Northside were speaking to each other and they had come to an agreement'.

³³⁶ Email from [H & L Director] to [H & L Sales Executive C] cc: [H & L Manager C] and [H & L Manager B] dated 3 September 2008 re Econ, OFT Document Reference 1622.

³³⁷ See paragraphs VI.11 to VI.12.

email. The OFT therefore considers that [H & L Director]'s communication to [H & L Sales Executive C] is a manifestation of and was in accordance with the agreement and/or concerted practice between the Parties.

Pexl – December 2008/January 2009

- VI.44 Following a request in December 2008, in January 2009 Northside decided not to provide a quotation to a customer based in H & L's area and instead passed the contact to H & L.
- VI.45 On 19 December 2008, [Northside Sales Executive E] received an emailed request for a quotation from customer Pexl (Power Equipment eXports Ltd). On 5 January 2009, [Northside Sales Executive E] forwarded the email to [H & L Manager C], stating: '[t]his is your area. Please contact Customer below'.³³⁸
- VI.46 [Northside Sales Executive E] stated:

'[u]pon reviewing the request for a quote I researched the company and discovered that they were located in Goole, which was in H & L's area of influence. I believed that it was unlikely that they would use our workshops because of the nature of their business. The deal also looked a little complicated so I took the decision to forward the request onto [H & L Manager C] as it was in their area of influence'.³³⁹

³³⁸ Email exchange between various inc. [Northside Sales Executive E] and [H & L Manager C] dated 19 December 2008 to 5 January 2009 re Enquiry, OFT Document Reference 1577.

³³⁹ [C] Witness Statement, OFT Document Reference 3867, paragraph 18. [Northside Sales Executive E] stated that he was not aware of a general agreement between H & L and Northside, and that he was not given any specific instructions regarding how to handle quotations to customers in H & L's area ([C] Witness Statement, OFT Document Reference 3867, paragraphs 28 to 29). However, he also stated that, in his discussions with [Northside Manager B] before taking up the position at Northside, 'it was made pretty crystal clear that, you know, I was not coming to Northside to go and poach H&L customers'. He said that his bosses were 'drumming it [into] me that, you know, 'You don't approach H&L's customers''. As a result, he stated that 'when selling, I mostly stick to [Northside's] area of influence and do not actively approach customers outside my area of influence' ([C] First Interview Transcript, OFT Document Reference 0854, page 47 and [C] Witness Statement, OFT Document Reference 3867, paragraph 5). The representatives of the Parties present at the meeting of 13 June 2008 (who were sales managers and dealer principals, not sales executives) may not have explicitly informed all of their sales staff that there was an anti-competitive arrangement in place between Northside and H & L. Indeed, they may have deliberately avoided doing so given their awareness that the arrangement must have been in breach of competition law. However, in this case the OFT considers that [Northside Sales Executive E] must have been instructed to act in a manner consistent with the arrangement, even if he may not have been told of the agreement and/or concerted practice itself.

VI.47 The OFT considers that this incident is consistent with and was a manifestation of the agreement and/or concerted practice between the Parties. The OFT considers that the agreement and/or concerted practice would have at least influenced Northside's decision to pass the customer to H & L.

Balcan Engineering – April 2009

- VI.48 Northside was in contact with H & L regarding a quotation to customer Balcan Engineering. Following this contact, in April 2009 Northside provided a quotation with a higher margin to the customer because it was based in H & L's area.
- VI.49 In relation to Balcan Engineering, [Northside Sales Executive E] stated: 'I recall that the customer was in H & L's area of influence and as such I quoted with a higher margin. I recall discussing the quote with [a H & L Sales Executive], but I cannot recall the exact nature of the discussion'.³⁴⁰
- VI.50 The OFT considers that this incident is consistent with and was a manifestation of the agreement and/or concerted practice between the Parties. The OFT considers that the agreement and/or concerted practice would have at least influenced Northside's decision to discuss the customer with H & L and to provide a quotation with a higher margin because the customer was based in H & L's area.

Tanks and Vessels – May 2009

VI.51 In May 2009, H & L provided Northside with details about the prices and margins quoted to Tanks and Vessels, a customer in Northside's area.

VI.52 [H & L Sales Executive D] sent an email to [Northside Sales Executive E] at Northside with the title 'Tanks & Vessels'. The email states:

'[Northside Sales Executive E],
'Atego 816 Day cab £[C]
'Canter 7C18 £[C]
'Left £[C] across each of them
'Regards

³⁴⁰ [C] Witness Statement, OFT Document Reference 3867, paragraph 19 and Northside Lost Sales Report, OFT Document Reference 0584, page 34.

'[H & L Sales Executive D]'.³⁴¹

- VI.53 [Northside Sales Executive E] stated: 'I recall that [H & L Sales Executive D] telephoned me in relation to this customer but I cannot recall what was discussed. [H & L Sales Executive D] then sent me this email off his own back. I was surprised to receive the email as it contained such detailed information about H & L's customer quote and forwarded it on to [Northside Director]'.³⁴²
- VI.54 [H & L Sales Executive D] recalled providing a quotation to this customer but denied contacting [Northside Sales Executive E] about this or any other customer.³⁴³ However, the OFT notes that [H & L Sales Executive D]'s statement is contradicted by contemporaneous documentary evidence that he did send an email to [Northside Sales Executive E] containing prices and margins for this customer.
- VI.55 The OFT considers that this incident is consistent with and a manifestation of the agreement and/or concerted practice between the Parties. The OFT considers that the agreement and/or concerted practice would have at least influenced H & L's decision to disclose pricing information about its quotation to Northside. The OFT also considers that, through [H & L Sales Executive D]'s email, H & L signalled to Northside that it was observing the agreement and/or concerted practice when quoting to customers in Northside's area and that the email would have enabled Northside to set its price accordingly.

Prospect Transport – June 2009

- VI.56 In June 2009, Northside was in contact with H & L regarding a quotation to customer Prospect Transport. Following this contact, Northside provided a quotation with a higher margin to the customer because it was based in H & L's area.
- VI.57 An entry on Northside's lost sales report for [Northside Sales Executive E] lists a quotation date of 22 June 2009 in respect of customer

³⁴¹ Email from [H & L Sales Executive D] to [Northside Sales Executive E] dated 14 May 2009 re Tanks & Vessels, OFT Document Reference 0756.

³⁴² [C] Witness Statement, OFT Document Reference 3867, paragraph 24.

³⁴³ [H & L Sales Executive D] was not shown the email dated 14 May 2009 at the time of the interview. See [C] Interview Transcript, OFT Document Reference 4373, pages 29 to 31.

Prospect Transport. The additional notes column contains the entry 'H & L Patch, Quoted expensive'.³⁴⁴

- VI.58 [Northside Sales Executive E] stated: 'I recall having a discussion with [H & L Manager C] regarding the quote. I did not tell him the amount I quoted but I may have said something along the lines that I had quoted expensive because I would not expect to see the truck again'.³⁴⁵
- VI.59 [H & L Manager C] denied having any contact with Northside in respect of this customer.³⁴⁶ However, in view of [Northside Sales Executive E]'s recollection, coupled with the contemporaneous documentary evidence described in paragraph VI.57 to the effect that [Northside Sales Executive E] provided an expensive quotation because the customer was in H & L's area, the OFT considers it more likely that contact did in fact take place.
- VI.60 The OFT considers that at the very least [Northside Sales Executive E]'s decision, even in the absence of contact with H & L about this particular customer, was influenced by the agreement and/or concerted practice between the Parties. The OFT notes that, although [Northside Sales Executive E] said that he had 'quoted expensive' because he did not expect the customer to return to Northside for repair and maintenance services, if this decision was independent of the arrangement between the Parties he would not have needed to contact [H & L Manager C] to discuss the quote.
- VI.61 The OFT also notes that, even if [Northside Sales Executive E] did not disclose to H & L the precise quotation provided, the information that it had 'quoted expensive' was sufficient to signal to H & L that Northside was acting in accordance with the terms of the agreement and/or concerted practice. In addition, it had the potential to influence the price set by H & L.

[C.M. Roach & Co.] – August 2009

- VI.62 In August 2009, Northside contacted H & L to inform them that Northside had quoted to customer [C.M. Roach & Co.]. Northside provided a quotation with a higher margin to the customer because it was based in H & L's area.

³⁴⁴ Northside Lost Sales Report, OFT Document Reference 0584, page 38.

³⁴⁵ [C] Witness Statement, OFT Document Reference 3867, paragraph 17.

³⁴⁶ [C] Interview Transcript, OFT Document Reference 4371, pages 129 to 130.

- VI.63 An entry on Northside's lost sales report for [Northside Sales Executive E] lists a quotation date of 21 August 2009 in respect of customer [C.M. Roach & Co.]. The quotation is recorded as being for £[C], the status is listed as 'Still open' and the additional notes column contains the entry 'Quoted expensive as this is in H & L area (Told H & L)'.³⁴⁷
- VI.64 [Northside Sales Executive E] stated:
- 'I recall that I telephoned [H & L Sales Executive E] about the deal. I recall that I did not tell him the figure that we quoted, but I did tell him that I had quoted the customer. It is possible that I told him that I had left a good margin in the deal'.³⁴⁸
- VI.65 [H & L Sales Executive E] recalled that another Mercedes dealer, Ciceley, provided quotations to the customer but stated that he was not aware that Northside had even quoted to [a contact at C.M. Roach & Co.].³⁴⁹ He denied contact with [Northside Sales Executive E] 'or anyone else from Northside regarding out of area quotes, either in terms of a general agreement or in respect of specific customers'.³⁵⁰ Ultimately, Ciceley secured the business.³⁵¹ The OFT notes that, after the deal was completed, [H & L Sales Executive E] complained to [Mercedes Sales Manager D] that the customer was in his area and should have gone to him.³⁵²
- VI.66 However, in view of [Northside Sales Executive E]'s recollection that he had contacted H & L, supported by the contemporaneous documentary evidence referred to in paragraph VI.63, the OFT, on balance, considers it more plausible that contact did in fact take place. The OFT considers that at the very least [Northside Sales Executive E]'s decision to provide a quotation including a good margin because the customer was based in H & L's area, even in the absence of contact with H & L about this particular customer, was influenced by the agreement and/or concerted practice between the Parties.

³⁴⁷ Northside Lost Sales Report, OFT Document Reference 0584, page 39. See email from [Northside Sales Executive E] to [a contact at C.M. Roach & Co.] dated 21 August 2009 re Quotation, OFT Document Reference 0631, containing a quotation for an Axor 1824 for £[C].

³⁴⁸ [C] Witness Statement, OFT Document Reference 3867, paragraph 14.

³⁴⁹ [C] Witness Statement, OFT Document Reference 2406, paragraph 5.

³⁵⁰ [C] Witness Statement, OFT Document Reference 2406, paragraph 4.

³⁵¹ [C] Interview Transcript, OFT Document Reference 2443, page 55.

³⁵² [C] Interview Transcript, OFT Document Reference 2443, pages 55 to 56.

VI.67 The OFT notes that, even if [Northside Sales Executive E] did not disclose to H & L the precise quotation provided, the information that he had 'left a good margin' was sufficient to signal to H & L that Northside was acting in accordance with the terms of the agreement and/or concerted practice. In addition, it had the potential to influence the price set by H & L.

Sandtoft Services ('Sandtoft') – November 2009

- VI.68 In November 2009, Northside contacted H & L and provided a quotation including a high margin to customer Sandtoft because it was based in H & L's area.
- VI.69 [Northside Sales Executive E] explained that Sandtoft was a customer of H & L with whom he was familiar because he had previously worked for H & L.³⁵³ In 2007, when Sandtoft approached Northside for a quotation, [Northside Sales Executive E] declined to provide one because 'it felt unethical having quoted at one company and moved to another. So H & L got that business'.³⁵⁴
- VI.70 Subsequently in 2009, Sandtoft approached Northside for another quotation.³⁵⁵ In the intervening period Sandtoft had moved two of its trucks to Northside for servicing, due to problems with the service at H & L.³⁵⁶ [Northside Sales Executive E] had wanted to quote competitively for this business but 'was instructed by [Northside Manager B] to quote with a good margin in the deal because the customer was out of area'.³⁵⁷
- VI.71 An entry on Northside's lost sales report for [Northside Sales Executive E] lists a quotation dated 24 November 2009 for customer Sandtoft. The

³⁵³ [C] Witness Statement, OFT Document Reference 3867, paragraph 20.

³⁵⁴ [C] Witness Statement, OFT Document Reference 3867, paragraph 20. See also document entitled '*Lost Sales Report*', containing the comment '*Given to H & L*' next to an entry for Sandtoft dated 11 April 2007 (Northside Lost Sales Report, OFT Document Reference 0584, page 10).

³⁵⁵ [C] Witness Statement, OFT Document Reference 3867, paragraph 21.

³⁵⁶ Email from [H & L Sales Executive E] to [a H & L Manager] cc: [H & L Manager C] dated 22 June 2007 re How many more time can we say Sorry!!!!!!!, OFT Document Reference 1301, in which [H & L Sales Executive E] wrote to [a H & L Manager], copying in [H & L Manager C], stating: '*Sandtoft Services [...] I have just been advised by this customer that he is leaving us & going to Northside due to the lack of communication, response (on credit notes) & attitude of the service dept*'. See also email from H & L sales administrator to [H & L Sales Executive E] cc: [H & L Manager C] dated 26 September 2007 re Sandtoft, OFT Document Reference 1764 and [C] Witness Statement, OFT Document Reference 3867, paragraph 21.

³⁵⁷ [C] Witness Statement, OFT Document Reference 3867, paragraph 22.

additional notes column contains the entry 'Given to H & L customer uses us for service, not them'.³⁵⁸

- VI.72 [Northside Sales Executive E] recalled speaking to [H & L Sales Executive D] about the deal, but he stated that he did not remember what had been discussed.³⁵⁹ [H & L Sales Executive D] denied having had any contact with [Northside Sales Executive E] in respect of this customer.³⁶⁰ The OFT notes that [H & L Sales Executive D] also denied having been in touch with [Northside Sales Executive E] in relation to customer Tanks and Vessels where there is contemporaneous evidence that contact was made (see paragraph VI.54), which calls into question the reliability of his evidence on this issue.
- VI.73 [Northside Manager B] stated that, had he realised at the time that Sandtoft used Northside for servicing, he would have been 'aggressive in chasing the business'.³⁶¹ However, the OFT does not consider that [Northside Manager B]'s assertion diminishes the fact that, on that occasion, based on his understanding of the arrangement between the Parties, he instructed [Northside Sales Executive E] to act in accordance with the anti-competitive arrangement with Northside.
- VI.74 In view of [Northside Sales Executive E]'s recollection that he had contacted H & L and of the questions over the reliability of [H & L Sales Executive D]'s evidence, the OFT, on balance, considers it more plausible that contact between them did in fact take place. The OFT considers that at the very least [Northside Manager B]'s instructions to [Northside Sales Executive E], even in the absence of contact with H & L about this particular customer, were influenced by the agreement and/or concerted practice between the Parties. The OFT considers that this incident is consistent with and was a manifestation of the agreement and/or concerted practice between the Parties.

House of James – November 2009

- VI.75 In November 2009, both H & L and Northside provided quotations to customer House of James.³⁶² [Northside Sales Executive E] and [H & L

³⁵⁸ Northside Lost Sales Report, OFT Document Reference 0584, page 42.

³⁵⁹ [C] Witness Statement, OFT Document Reference 3867, paragraph 23.

³⁶⁰ [C] Interview Transcript, OFT Document Reference 4373, pages 23 to 26.

³⁶¹ [C] Witness Statement, OFT Document Reference 3870, paragraphs 34 to 35.

³⁶² Email exchange between various inc. [Northside Director] and [Northside Sales Executive E] dated 4 to 11 November 2009 re quote, OFT Document Reference 0403; Northside quotation to

Manager C] exchanged quotation specifications, which allowed [Northside Sales Executive E] to establish that they were each quoting for different models of truck.³⁶³

VI.76 [Northside Sales Executive E] stated:

'Following the submission of the quote, I was contacted by [a contact at House of James] who informed me that the quote was too expensive and 'we needed to do better'. As a result of this, I telephoned [H & L Manager C], on my own initiative, to find out why there was a difference between our quote and H & L's because the customer had told me that our quote was 'way out'. I asked [H & L Manager C] what he was quoting from a specification position, not a monetary position [...] My discussion with [H & L Manager C] only related to the specification of the quote. We did not discuss prices or margins at all. I did not come to any agreement with [H & L Manager C]'.³⁶⁴

VI.77 [Northside Director] stated:

'I was not surprised that [H & L Manager C] shared the level of detail that he did with [Northside Sales Executive E], because Northside and H & L were having periodic conversations about quotes that they had provided to specific customers. This contact emanated from the agreement reached at the meeting on 13 June 2008'.³⁶⁵

VI.78 The OFT considers that this incident is another manifestation of the agreement and/or concerted practice between the Parties. The OFT also considers that this contact between Northside and H & L is illustrative of the relationship between them.

D. Evidence of continuing agreement and/or concerted practice in 2010

VI.79 On 19 January 2010, [Northside Manager B] wrote an email to [Northside Sales Executive F], copying [Northside Director], regarding a conversation he had had with another Mercedes dealership, Enza, about a potential deal. In the email, [Northside Manager B] stated: 'I have

House of James Transport dated 11 November 2009 for Actros tractor, OFT Document Reference 0639 and Northside quotation to House of James Transport dated 11 November 2009 for Axor tractor, OFT Document Reference 0640.

³⁶³ Email from [Northside Sales Executive E] to [Northside Director] dated 13 November 2009 re quote, OFT Document Reference 0641.

³⁶⁴ [C] Witness Statement, OFT Document Reference 3867, paragraph 10.

³⁶⁵ [C] Witness Statement, OFT Document Reference 3869, paragraph 40.

spoke to [Enza Director A] this morning [...] I don't think Enza are working with us on this like some of our other dealers ie H & L. Im getting the distinct impression that they want this business'.³⁶⁶

- VI.80 In relation to this email, [Northside Manager B] stated:

'[m]y comment about Enza not 'working with us on this like some of our other dealers' is a reference to the understanding we had from our meeting with H & L in June 2008 and subsequent relationship. I believe that if I had had a similar conversation with H & L to the one that I had with Enza, they would have responded differently and quoted with a higher margin [...]'.³⁶⁷

- VI.81 The OFT considers that this contemporaneous documentary and witness evidence shows that Northside understood the agreement and/or concerted practice still to be in place in January 2010.

E. Evidence relating to the termination of the Infringement

- VI.82 The OFT has no evidence of the termination of this Infringement. The OFT similarly has no evidence of either of the Parties distancing themselves from it at any time before 26 January 2010, when the OFT used its powers under section 28 of the Act to inspect the premises of Northside and H & L. On 29 January 2010, Northside made an application for Type B immunity/leniency and was granted a marker by the OFT. One condition for the grant of immunity is that Northside ceased its participation in the reported activity. In light of this, the OFT considers that the Infringement ended with the inspections at Northside and H & L on 26 January 2010.

Legal Assessment

F. Introduction

- VI.83 From the evidence presented in the Conduct Section, the OFT draws the following conclusions concerning its legal assessment of the conduct of the Parties. References to specific paragraph numbers are included in this section for ease of reference to the primary sources of evidence, but the conclusions are reached in light of the totality of the evidence.

³⁶⁶ Email from [Northside Manager B] to [Northside Sales Executive F] cc: [Northside Director] dated 19 January 2010, OFT Document Reference 0434.

³⁶⁷ [C] Witness Statement, OFT Document Reference 3870, paragraph 51.

VI.84 In assessing the evidence in this case, the OFT has applied the requisite standard of proof as described in paragraphs V.70 to V.82 (Legal Background) of this Decision. The OFT is satisfied that the evidence set out and referred to in this Decision meets the requisite standard and is sufficient to discharge the burden of proof.

G. Agreement and/or concerted practice

VI.85 The OFT has concluded that the Parties infringed the Chapter I prohibition by entering into an agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition.

Classification of the Infringement as an agreement and/or concerted practice

- VI.86 The OFT has concluded, on the basis of the evidence set out and referred to in the Conduct Section, that the Parties engaged in an agreement and/or a concerted practice within the meaning of the Chapter I prohibition. In summary, the evidence shows that:
- On 13 June 2008, [Northside Director], [Northside Manager B] and [Northside Manager A] and [H & L Director] and [H & L Manager C] met at Northside's depot. [Northside Director] and [Northside Manager B] stated that at that meeting it was agreed that H & L would ensure that [H & L Sales Executive C] did not target Northside's customers.³⁶⁸ The fact that an agreement in relation to [H & L Sales Executive C]'s activities was reached at that meeting is corroborated by [H & L Director]'s actions following the meeting³⁶⁹ and by contemporaneous documentary evidence in the form of an email from [H & L Sales Executive C] to a former customer.³⁷⁰
 - Witnesses from Northside confirm the meeting also resulted in a broader agreement to restrict competition for customers in the Parties' areas.³⁷¹

³⁶⁸ See paragraphs VI.14 to VI.15.

³⁶⁹ See paragraphs VI.16 and VI.18 to VI.19.

³⁷⁰ See paragraph VI.17.

³⁷¹ See paragraphs VI.22 to VI.23 and VI.80.

- [H & L Director]'s perception was that a common understanding had been reached between Northside and H & L as to how the two dealers would deal with customer Polypipe.³⁷² Although in interview he denied that there was a more general agreement to restrict competition for customers in each other's areas, his denial is contradicted by the actions taken by both H & L and Northside after that meeting (including for example [H & L Director]'s email referred to in paragraph VI.35). In addition, in his written representations [H & L Director] states that he accepts the findings outlined in the Statement that relate to H & L.³⁷³
- VI.87 The OFT notes that the concept of an agreement under the Chapter I prohibition is sufficiently wide to catch a broad range of arrangements, going beyond legally binding agreements.³⁷⁴ Indeed, for there to be an agreement under the Chapter I prohibition, it is sufficient that the parties have expressed their intention to conduct themselves on the market in a specific way.³⁷⁵ In this case, both Northside and H & L expressed their intention not to prospect within each other's areas and that each should pass to the other enquiries from customers based in the other Party's area. They also agreed to prevent [H & L Sales Executive C] from actively prospecting for business in Northside's area.
- VI.88 An agreement may also be implied from the conduct of the parties.³⁷⁶ The actions taken following the meeting are evidence of the existence of an agreement, while also forming part of a series of acts or course of conduct which constitute the agreement itself.³⁷⁷ In this case, the conclusion that there was a concurrence of wills between H & L and Northside is corroborated by communications which took place between the Parties following the meeting, as well as the Parties' internal communications, internal documents and the Parties' actions subsequent to the meeting.³⁷⁸ The finding that there was an agreement in relation to [H & L Sales Executive C]'s activities is also supported by [H & L Director]'s actions following the meeting.³⁷⁹

³⁷² See paragraph VI.24.

³⁷³ See paragraph VI.28.

³⁷⁴ See paragraph V.16 (Legal Background).

³⁷⁵ See paragraph V.18 (Legal Background).

³⁷⁶ See paragraph V.16 (Legal Background).

³⁷⁷ See paragraph V.16 (Legal Background).

³⁷⁸ See paragraphs VI.33 to VI.78.

³⁷⁹ See paragraph VI.16 and VI.18 to VI.19.

- VI.89 The OFT has also concluded that the shared understanding between the Parties constituted at the very least a concerted practice. The OFT notes that reciprocal contacts amounting to an agreement and/or concerted practice may be established where one competitor discloses its intentions or future conduct in the market and the other requests or at least accepts the information.³⁸⁰ By indicating to each other that they would not prospect within each other's areas and that they would each pass to the other Party enquiries from customers based in the other Party's area, Northside and H & L gave each other assurance that they would be competing less vigorously for customers in each other's areas. The mutual disclosure between Northside and H & L of their commercial strategy removed uncertainty as to their future conduct on the market, with the result that competition between them was restricted (or had the potential to be restricted).
- VI.90 The evidence described in paragraphs VI.33 to VI.81 further supports the conclusion that there existed an agreement and/or a concerted practice between the Parties. The OFT notes that, following that mutual disclosure of future commercial strategy, each of the Parties would have been able to behave on the market in accordance with the objective of the arrangement without necessarily contacting the other Party about specific customers. In any event, it is not necessary for the OFT to arrive at a definite conclusion as to the characterisation of the Parties' conduct as either an agreement or a concerted practice in order to demonstrate an infringement of the Chapter I prohibition.³⁸¹
- VI.91 Where an undertaking participates in a meeting of a manifestly anti-competitive nature, it will be taken to have participated in an agreement and/or concerted practice unless it adduces evidence to establish that it had indicated its opposition to the anti-competitive arrangement to the other participants.³⁸² The OFT has not received any evidence that either of the Parties made clear to the other Party that it did not wish to take part in the agreement and/or concerted practice, nor has the OFT received any evidence that, following the meeting of 13 June 2008, the Parties took active steps to clearly distance themselves from the anti-competitive arrangement. On the contrary, the evidence is that the Parties were in contact on a number of occasions throughout the

³⁸⁰ See paragraph V.23 (Legal Background).

³⁸¹ See paragraphs V.10 to V.15 (Legal Background).

³⁸² See paragraph V.25 (Legal Background).

Relevant Period as a result of the agreement and/or concerted practice³⁸³ and that H & L took steps to control [H & L Sales Executive C]'s activities in accordance with the agreement and/or concerted practice.³⁸⁴

- VI.92 Throughout the Relevant Period, Northside and H & L were actively involved in the sale of trucks distributed by Mercedes. If the Infringement is to be classified only as a concerted practice, the OFT is entitled to presume that, since the Parties remained active on the market, there was a causal connection between the concerted practice and their conduct on that market.³⁸⁵

H. Anti-competitive object

- VI.93 The Parties agreed that one of H & L's employees ([H & L Sales Executive C]) should cease targeting customers based in Northside's area. They also agreed that they would not prospect for business within each other's areas and that they would each pass to the other Party enquiries from customers based in the other Party's area. The OFT considers that this amounts to conduct which can be regarded by its very nature as being injurious to the proper functioning of normal competition.³⁸⁶
- VI.94 In addition, the Parties disclosed to each other their intended conduct in relation to customers based in each other's areas.³⁸⁷ Furthermore, on a number of occasions the Parties disclosed to each other the particular course of conduct they were adopting in relation to specific customers.³⁸⁸ By doing so, the Parties reduced uncertainty between them regarding the approach they would take in relation to customers based in each other's areas generally.
- VI.95 The OFT also notes that the subjective intention of the arrangement was stated by [Northside Director] as being 'to ensure that we didn't prospect in each other's area and to ensure that we weren't undercutting their pricing and they weren't undercutting ours in our respective areas'.³⁸⁹

³⁸³ See paragraphs VI.33 to VI.78.

³⁸⁴ See paragraphs VI.16 to VI.19.

³⁸⁵ See paragraph V.27 (Legal Background).

³⁸⁶ See paragraphs V.41 to V.44 (Legal Background).

³⁸⁷ See paragraph V.52 (Legal Background).

³⁸⁸ See paragraphs VI.33 to VI.78.

³⁸⁹ See paragraph VI.23 and paragraph V.43 (Legal Background).

VI.96 In view of the foregoing, the OFT has concluded that the agreement and/or concerted practice between the Parties had as its object the prevention, restriction or distortion of competition for customers based in the Parties' areas. Having found that the agreement and/or concerted practice constitutes a restriction or distortion by object under the Chapter I prohibition, the OFT is not required to demonstrate an actual prevention, restriction or distortion of competition.³⁹⁰

I. Appreciability

VI.97 The OFT considers that the agreement and/or concerted practice, which amounts to a restriction or distortion of competition by object, had (or had the potential to have) an appreciable impact on competition.

VI.98 An agreement and/or concerted practice will not meet the appreciability criterion if it has only an insignificant impact on the market.³⁹¹

VI.99 In determining whether the agreement and/or concerted practice meets the appreciability requirement, the OFT has had regard to the Commission's *Notice on Agreements of Minor Importance*.³⁹² The OFT considers that the Infringement contained to varying degrees at least some element of market sharing, price coordination and/or the exchange of commercially sensitive information, which are 'hardcore' restrictions of competition. Therefore, even if the market shares of the Parties are below the threshold set out in the *Notice on Agreements of Minor Importance*, the approach set out in the *Notice on Agreements of Minor Importance* would not apply to the Infringement.

VI.100 The OFT has had regard to the approach to the appreciability test in object cases set out by the CAT in *North Midland Construction*.³⁹³ The OFT considers that the nature of the agreement and/or concerted practice is such that, given the circumstances of this case, its potential impact on competition is inherently likely to be appreciable.

VI.101 The agreement and/or concerted practice concerned the sale of trucks distributed by a major manufacturer, Mercedes, which holds a sizeable share of the total sale of trucks in the UK.³⁹⁴ Moreover, to the extent (if

³⁹⁰ See paragraph V.58 (Legal Background).

³⁹¹ See paragraphs V.59 and V.62 (Legal Background).

³⁹² See paragraphs V.60 to V.61 (Legal Background).

³⁹³ See paragraphs V.62 and V.64 (Legal Background).

³⁹⁴ See paragraph IV.9 (Industry Overview and the Relevant Market).

at all) that competition between Mercedes dealers is limited by the selective distribution system, the OFT considers that firms should not engage in conduct which will further limit the residual scope for competition.³⁹⁵

VI.102 The agreement and/or concerted practice potentially deprived customers of the benefits of obtaining competitive quotations from the Parties and of playing them off against each other. As such, the arrangement had at least the potential for enabling the Parties to secure deals within their own areas at a higher price, and to enjoy further profits from any after-sales business associated with the sale.³⁹⁶

VI.103 The anti-competitive arrangement between the Parties also had the potential for opening, reinforcing or maintaining the channels of communication between them, which could facilitate collusive conduct on other markets where both Parties are active (such as vans).

VI.104 Finally, the OFT notes that there could potentially be an impact on the wider trucks market to the extent that the Infringement enabled Mercedes dealers to raise prices, thereby reducing the competitive constraint on dealers of other brands.

VI.105 The OFT therefore considers that the nature and the circumstances of the Infringement mean that the agreement and/or concerted practice is appreciable and not so insignificant as to fall outside the scope of the Chapter I prohibition.

J. Effect on trade within the UK

VI.106 As set out in paragraphs V.65 to V.68 (Legal Background), the OFT considers that it is likely that an agreement and/or concerted practice which appreciably restricts competition within the UK also affects trade within the UK.

VI.107 The agreement and/or concerted practice appreciably restricted competition,³⁹⁷ or at least had the potential to do so, and operated in a part of the UK. The Parties' conduct is therefore considered by the OFT

³⁹⁵ Commission Decision 82/506/EEC of 15 July 1982 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.525 and IV/30.000 – SS/1) (OJ 1982 L 232/1) ('*Stichting Sigarettenindustrie Agreements*'), paragraph 100(d).

³⁹⁶ See paragraph IV.14 (Industry Overview and the Relevant Market).

³⁹⁷ See paragraphs VI.97 to VI.105.

to have affected trade within the UK or a part of it or to have been capable of doing so.

VI.108 The requirement of an effect on trade within the UK is therefore satisfied in respect of the Infringement.

K. Conclusion on the application of the Chapter I prohibition

VI.109 In view of the foregoing, the OFT has decided that the Parties infringed the Chapter I prohibition by participating between 13 June 2008 and 26 January 2010 in an agreement and/or concerted practice with the object of preventing, restricting or distorting competition for the sale of trucks to customers based in the Parties' areas.

SECTION VII THE OFT'S ACTION

A. Introduction

VII.1 This Section sets out the enforcement action which the OFT is taking and its reasons for taking that action.

B. The OFT's decision

VII.2 The OFT finds, for the reasons set out in Section VI (The Conduct of the Parties and Legal Assessment) and on the basis of the evidence set out and referred to in that section, that Northside and H & L infringed the Chapter I prohibition by participating between 13 June 2008 and 26 January 2010 in an agreement and/or concerted practice which had the object of preventing, restricting or distorting competition for the sale of trucks to customers based in the Parties' areas.

C. Directions

VII.3 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. As the OFT considers that the Infringement has already come to an end it is not issuing directions in this case.

D. Financial penalties

General points

VII.4 Section 36(1) of the Act provides that on making a decision that an agreement or concerted practice has infringed the Chapter I prohibition, the OFT may require an undertaking concerned to pay the OFT a penalty in respect of the infringement.

VII.5 In accordance with section 38(8) of the Act, the OFT must have regard to the guidance on penalties being in force at the time when setting the amount of penalty. The OFT's revised guidance on penalties, which came into force in September 2012, states that when determining the penalty in a given case, regard will be had to the calculation mechanism contained in the penalty guidance in force at the time the Statement of

Objections in the case was issued.³⁹⁸

- VII.6 As the Statement was issued on 28 June 2012, before this revised guidance came into force, the OFT had regard to the calculation mechanism set out in the *2004 Penalty Guidance*.

Previous OFT decisions

- VII.7 The OFT is not bound by its decisions in relation to the calculation of financial penalties in previous cases.³⁹⁹ Rather, the OFT makes its assessment on a case-by-case basis⁴⁰⁰ having regard to all relevant circumstances and the objectives of its policy on financial penalties.
- VII.8 Provided the penalties it imposes in a particular case are within the range of penalties permitted by section 36(8) of the Act and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (the '2000 Order') as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259) (the '2004 Order'), and having regard to its guidance on penalties under section 38 of the Act, the OFT has a margin of appreciation when determining the appropriate amount of a penalty under the Act.⁴⁰¹
- VII.9 Each case is specific to its own facts and circumstances and it cannot be assumed that the level of penalty appropriate for a particular party in one case (or the manner in which the guidance on penalties has been applied) will necessarily be the same in respect of another party in another case. The OFT considers that, subject to the above, it is free to adapt its policy as appropriate having regard to all relevant circumstances and its overall policy objectives on financial penalties, as set out in its guidance on penalties.⁴⁰²

³⁹⁸ 2012 *Penalty Guidance* (fn2), paragraph 1.11.

³⁹⁹ For example, *Eden Brown and Others v OFT* [2011] CAT 8 ('Eden Brown'), at [78].

⁴⁰⁰ For example, *Kier Group and Others v OFT* [2011] CAT 3 ('Kier'), at [116] where the CAT noted that '*other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent*'. See also *Eden Brown* (fn399), at [97] where the CAT observed that '*[d]ecisions by this Tribunal on penalty appeals are very closely related to the particular facts of the case*'.

⁴⁰¹ *Argos/Littlewoods* (fn159), at [168] and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, at [102].

⁴⁰² *Musique Diffusion française* (fn189), paragraphs 101 to 110 and *Dansk Rørindustri* (fn14), paragraph 169.

Statutory cap on penalties

- VII.10 No penalty which has been fixed by the OFT may exceed 10 per cent of the turnover of the undertaking, calculated in accordance with the provisions of the 2000 Order as amended by the 2004 Order.⁴⁰³ This is considered further at paragraphs VII.48 to VII.50.

Small agreements

- VII.11 Section 39(3) of the Act provides that a party to a 'small agreement'⁴⁰⁴ is immune from the effect of section 36(1) of the Act and as such no penalty can be imposed. The combined applicable turnover of the Parties involved in the Infringement exceeds £20 million. Accordingly, neither of the Parties will benefit from immunity from penalties under section 39(3) of the Act.

Intention/negligence

- VII.12 The OFT may impose a penalty on an undertaking that has infringed the Chapter I prohibition only if it is satisfied that the infringement has been committed intentionally or negligently.⁴⁰⁵ The CAT has stated:

'[...] an infringement is committed intentionally for the purposes of the Act if the undertaking must have been aware that its conduct was of such a nature as to encourage a restriction or distortion of competition [...] an infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition'.⁴⁰⁶

- VII.13 This is consistent with the approach taken by the Court of Justice, which has confirmed:

'that condition [of intentionality] is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty (see Joined Cases 96/82 to 102/82, 104/82,

⁴⁰³ Section 36(8) of the Act.

⁴⁰⁴ 'Small agreement' is defined, pursuant to section 39(1) and the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262), as an agreement between undertakings, the combined applicable turnover of which, for the business year ending in the calendar year preceding the one during which the infringement occurred, does not exceed £20 million.

⁴⁰⁵ Section 36(3) of the Act.

⁴⁰⁶ *Napp* (fn246), at [456] to [457].

105/82, 108/82 and 110/82IAZ International Belgium and Others v Commission [1983] ECR 3369, paragraph 45, and Nederlandsche Banden-Industrie- Michelin v Commission, paragraph 107)⁴⁰⁷.

- VII.14 In the present case, the OFT considers that the very nature of the Infringement means that the Parties could not have been unaware that the agreement and/or concerted practice in which they were involved was, or was likely to be, restrictive of competition. The OFT has therefore decided that each of the Parties committed the Infringement either intentionally or negligently.

E. Northside's application for immunity

- VII.15 As set out in paragraph I.6 (Introduction), Northside benefits from full immunity from the financial penalties being imposed by the OFT.
- VII.16 The OFT has not calculated the penalty that would otherwise be imposed on Northside had it not benefitted from such immunity. The OFT does not consider that it needs to calculate Northside's penalty since Northside benefits from full immunity from the financial penalty under section 36 of the Act.

F. Calculation of H & L Garages' penalty

Turnover

- VII.17 For the purpose of penalty calculation, the OFT considers that the Relevant Turnover⁴⁰⁸ or total turnover applicable is the turnover of the undertaking which comprises the relevant single economic entity, as defined in paragraph II.25 (Company Profiles).
- VII.18 In this case, at the time of the Infringement H & L comprised two legal entities within the same corporate group (H &L Garages Limited and Dusted Powder Limited). However, as explained in paragraph II.18 (Company Profiles), Dusted Powder Limited was struck off the Companies House register and subsequently dissolved on 8 January 2013. It therefore no longer exists as a legal entity. In any event, as a holding company Dusted Powder Limited did not have any turnover other than that derived from H & L Garages' activities and therefore the Relevant Turnover and total turnover for the two companies in

⁴⁰⁷ Case C-280/08 P *Deutsche Telekom v Commission* (OJ 2010 C 346/4), paragraph 124.

⁴⁰⁸ As defined in paragraph IV.46 (Industry Overview and the Relevant Market).

combination will be the same as H & L Garages' own turnover. H & L Garages' turnover has therefore been used for the basis of the penalty calculation.

Step 1 – calculation of the starting point

- VII.19 The starting point for determining the level of penalty for the Infringement is calculated having regard to the seriousness of the Infringement and the Relevant Turnover of the undertaking.⁴⁰⁹
- Relevant Turnover
- VII.20 As set out in paragraph IV.37 (Industry Overview and the Relevant Market), the Relevant Turnover is the turnover of the undertaking in the market affected by the Infringement in the financial year preceding the date when the infringement ended.
- VII.21 In the case of the penalty for H & L Garages, this is the financial year ending 31 December 2009 as the Infringement ended during the financial year ending 31 December 2010.⁴¹⁰
- VII.22 As outlined in paragraph II.16 (Company Profiles), H & L Garages is currently in liquidation. Although requests were made,⁴¹¹ neither its administrators, liquidators nor its parent company, Dusted Powder Limited, were able to assist in the provision of the required Relevant Turnover information.⁴¹²
- VII.23 In the absence of financial information from the party, the OFT is using H & L Garages' wholesale price figure within the Relevant Market during the Relevant Period provided by Mercedes⁴¹³ as a proxy for its relevant turnover.⁴¹⁴ The OFT notes that the wholesale price figures provided by Mercedes do not include any margin that H & L Garages may have made

⁴⁰⁹ 2004 Penalty Guidance (fn2), paragraphs 2.3 to 2.5.

⁴¹⁰ As set out in paragraph VI.82 (The Conduct of the Parties and Legal Assessment), the OFT considers that the end date for Infringement is the OFT's visit to Northside on 26 January 2010.

⁴¹¹ Email from OFT to BDO dated 24 August regarding Case CE/9161-09 - Relevant turnover information, OFT Document Reference 4872 and email from OFT to [H & L Director] dated 24 August re Case CE/9161-09 - Relevant turnover information, OFT Document Reference 4873.

⁴¹² Email from BDO to OFT dated 28 August 2012, OFT Document Reference 4887 and email from [H & L Director] to OFT dated 30 August 2012 regarding Case CE/9161-09 - Relevant turnover information, OFT Document Reference 4873.

⁴¹³ Email from Mercedes to OFT dated 12 October 2012 re MBUK Turnover calculation for H & L, OFT Document Reference 5006.

⁴¹⁴ Note of telephone call between OFT and Mercedes dated 26 September 2012, OFT Document Reference 4959.

or any additional turnover for additional items included in the retail price. However, in the circumstances of this case, the OFT considers that this figure provides an appropriate basis for H & L Garages' penalty calculation.

Seriousness of the infringement

- VII.24 Under the *2004 Penalty Guidance*, the starting point which the OFT applies may not exceed 10 per cent of H & L Garages' Relevant Turnover.⁴¹⁵
- VII.25 The actual percentage which is applied to the Relevant Turnover depends upon the nature of the infringement. The more serious and widespread the infringement, the higher the likely percentage rate.⁴¹⁶ When making this assessment, the OFT will consider a number of factors, including the nature of the product, the structure of the market, the market shares of the undertakings involved in the infringements and the effect on competitors and third parties. The damage caused to consumers, whether directly or indirectly, will also be an important consideration.⁴¹⁷
- VII.26 In assessing the seriousness of the Infringement, as indicated in paragraph IV.42 (Industry Overview and the Relevant Market), the OFT notes that it is a restriction of intra-brand competition and that the Parties are therefore to a certain extent constrained by dealers of other marques.
- VII.27 However, the starting point also reflects the fact that the Infringement is an infringement of the Chapter I prohibition 'by object' and can be regarded, by its very nature, as being injurious to the proper functioning of normal competition and is, therefore, a serious infringement of competition law.⁴¹⁸ In a case where there is an infringement by object, there is no need for the OFT to determine or quantify any actual anti-competitive effects of the conduct in question when assessing the seriousness of an infringement, and the absence of evidence of actual effects in relation to a particular infringement is not a mitigating factor in

⁴¹⁵ *2004 Penalty Guidance* (fn2), paragraph 2.8.

⁴¹⁶ *2004 Penalty Guidance* (fn2), paragraph 2.4.

⁴¹⁷ *2004 Penalty Guidance* (fn2), paragraph 2.5.

⁴¹⁸ *2004 Penalty Guidance* (fn2), paragraphs 2.3 and 2.4, and paragraph VI.96 (The Conduct of the Parties and Legal Assessment).

this respect.⁴¹⁹

- VII.28 Taking these factors in the round, the OFT has decided that a starting point of six per cent is appropriate.

Step 2 – adjustment for duration

- VII.29 At Step 2, the starting point under Step 1 may be adjusted to take into account the duration of the infringement.⁴²⁰ Penalties for infringements which last more than one year may be multiplied by no more than the number of years of the infringements. The 2004 Penalty Guidance states that '[p]art years may be treated as full years for the purpose of calculating the number of years of the infringement'.⁴²¹
- VII.30 The OFT has concluded that the Infringement lasted between 13 June 2008 and 26 January 2010. The OFT's approach in this case, for the purposes of calculating the penalties, is to round up each part year to the nearest quarter of a year. The OFT has therefore applied a multiplier of 1.75 to the penalty at this step of the calculation.

Step 3 – adjustment for other factors

- VII.31 The penalty may be adjusted, after Step 2, to achieve the twin objectives of the OFT's policy on financial penalties: to impose penalties on infringing undertakings which reflect the seriousness of the infringement and to ensure that the threat of penalties will deter both the infringing undertakings and other undertakings generally from engaging in anti-competitive practices. Adjustment to the penalty at Step 3 may result in either an increase or a decrease in the financial penalty.
- VII.32 In considering whether any adjustment to the penalty is required for the purposes of deterrence, the OFT considers the need specifically to deter the infringing undertaking from engaging in such behaviour in future ('specific deterrence') as well as the need more generally to ensure that other undertakings are deterred from engaging in similar behaviour ('general deterrence'). In assessing whether and in what amount a deterrence adjustment is necessary, the OFT may take into account – among other things - the need to send a clear message of deterrence to the industry in question (in this case, the commercial vehicle distribution

⁴¹⁹ *Francis/Barrett and Others v Office of Fair Trading*, [2011] CAT 9, at [88].

⁴²⁰ 2004 Penalty Guidance (fn2), paragraph 2.10.

⁴²¹ 2004 Penalty Guidance (fn2), paragraph 2.10.

industry) and more generally, including in particular to companies involved in the supply of products which are brought to the market through a selective distribution system.

- VII.33 Other considerations at this stage may include the OFT's estimate of any economic or financial benefit made by the infringing undertakings from the infringements, and the special characteristics, including the size and financial position of the undertakings in question.⁴²² These can result in either an increase or a decrease of the financial penalty resulting from the application of Steps 1 and 2.
- VII.34 When assessing whether an adjustment is required, the OFT will consider a number of indicators of the undertaking's size and financial position. For example, the financial penalty calculated at the end of Step 2 of the calculation may represent a relatively low proportion of an undertaking's total turnover because it may have significant activities in other product and/or geographic markets.
- VII.35 In this case the OFT carried out detailed cross-checks by reference to certain relevant indicators of H & L's size and financial position prior to H & L Garages' administration and subsequent liquidation and Dusted Powder Limited's dissolution when considering whether the proposed level of the penalty was appropriate and, in particular, whether it was necessary and proportionate.⁴²³
- VII.36 This cross-check was carried out by considering the financial indicators in the round. The OFT has not applied specific thresholds in relation to the indicators or taken any one indicator in isolation as determinative in setting the appropriate penalty; different indicators may point in different directions and some indicators may be more or less meaningful for a particular party. Instead, the OFT has applied a common set of principles consistently to ensure that the penalty arrived at was proportionate and achieved the objectives of the OFT's policy on financial penalties.⁴²⁴

⁴²² 2004 *Penalty Guidance* (fn2), paragraph 2.11.

⁴²³ Neither H & L Garages nor Dusted Powder Limited submitted accounts to Companies House for 2011 (see fn29 and fn33). The OFT therefore considered in particular H & L's (i) three-year (2008, 2009 and 2010) average total turnover, average gross profits and average profits after tax, (ii) net assets in 2010 and (iii) net assets in 2010 plus two years of dividends (2009 and 2010). The consideration of indicators of size and financial position from the time of Infringement alongside those at the time the financial penalty is being imposed is consistent with the 2012 *Penalty Guidance* (fn2), paragraph 2.16.

⁴²⁴ *Kier* (fn400), at [177].

- VII.37 H & L Garages' penalty, after Steps 1 and 2, resulted in a penalty that constituted multiples of H & L's average profits after tax⁴²⁵ and relatively high proportions of the other financial indicators of H & L's financial position such as net assets and net assets plus dividends.⁴²⁶ The OFT therefore considered that a downwards adjustment was required and applied a 75 per cent reduction.
- VII.38 As stated in paragraph III.6 (The OFT's Investigation), on the same day as this Decision is adopted, the OFT is adopting Decision 1 imposing financial penalties on H & L Garages for its involvement in Infringement 1. The OFT has therefore taken a step back and carried out a cross-check across the two penalties to ensure that, taken together, they do not lead to the imposition of a total penalty across both infringements that is excessive or disproportionate. The OFT notes the findings of the CAT in *Kier* that:
- 'In our view, if more than one discrete infringement is being pursued then whatever deterrent element is appropriate for each infringement should be included in the specific penalty for it. This should not result in an excessive overall penalty provided that the 'totality' principle is respected and any necessary adjustments are made to each separate penalty'.⁴²⁷
- VII.39 The OFT considered that on this basis a further reduction of 30 per cent was required. Without further adjustment, the sum of the two penalties would have amounted to over 150 per cent of H & L's' average profits after tax and around 70 per cent of its net assets.
- VII.40 Following this further discount, the sum of the two penalties constitutes around 110 per cent of H & L's average profits after tax, as well as just under 50 per cent of its net assets and around 35 per cent of its net assets plus dividends for the financial years 2009 and 2010. In view of this, and considering in particular the need to deter future anti-competitive behaviour and to reflect the seriousness of the Infringement 1 and Infringement 4 (one of which had a longer duration which would have had a bigger actual or potential impact), the OFT is satisfied that, in

⁴²⁵ The penalty amounted to around 230 per cent of H & L's average profits after tax.

⁴²⁶ The penalty amounted to around 100 per cent of its net assets and around 75 per cent of its net assets plus dividends.

⁴²⁷ *Kier* (fn400), at [180].

the round, the resulting penalty is necessary and proportionate to achieve the twin policy objectives in all the circumstances of the case.

- VII.41 This further 'totality' adjustment of 30 per cent for overall proportionality is only appropriate in the circumstances as set out in this Decision and in Decision 1. In particular, the OFT considers this discount is only appropriate if the respective penalties at the end of Step 3 for H & L Garages amount to £213,173 for Infringement 1 and £126,333 for Infringement 4 without further 'totality' adjustment. If there are changes to the penalties imposed on H & L Garages for its involvement in either or both of the Infringement 1 and Infringement 4, this further 'totality' adjustment would need to be re-assessed.

Step 4 – adjustment for aggravating and mitigating factors

- VII.42 The OFT may increase the penalty where there are other aggravating factors, or decrease it where there are mitigating factors.⁴²⁸
- VII.43 Aggravating factors can include the involvement of senior management in the infringement, repeated infringements by the same undertaking or other undertakings in the same group, and the intentional, rather than negligent commission of the infringement. These factors are not exhaustive.
- VII.44 Mitigating factors can include adequate steps having been taken to ensure compliance with the Chapter I prohibition, and cooperation by a party which enables the enforcement process to be concluded more effectively and/or speedily, although undertakings benefiting from the leniency programme would not normally receive additional reductions in financial penalties under this head to reflect general cooperation.⁴²⁹ These factors are also not exhaustive.
- VII.45 The OFT considered increasing the penalty at Step 4 for the involvement of [H & L Manager C] in this Infringement but has concluded, in light of [H & L Manager C]'s responsibilities, that an uplift for senior management involvement at Step 4 was not required for his involvement in the particular circumstances of this case.
- VII.46 The OFT considers that an uplift of 10 per cent is appropriate for the direct involvement of a director of the company, [H & L Director], in this

⁴²⁸ 2004 Penalty Guidance (fn2), paragraph 2.14.

⁴²⁹ 2004 Penalty Guidance (fn2), paragraph 2.16 and footnote 19.

Infringement as outlined in paragraph VI.2 (The Conduct of the Parties and Legal Assessment).

- VII.47 The penalty also includes a reduction of five per cent at Step 4 for procedural co-operation as a mitigating factor to reflect the fact that H & L provided voluntary co-operation above and beyond its legal obligations. Specifically, H & L made key staff available for interview, which enabled the enforcement process to be concluded more effectively.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

- VII.48 The OFT may not fix a penalty for the Infringement that exceeds 10 per cent of the worldwide turnover of the undertaking in its last business year before the date of the OFT's Decision, calculated in accordance with the provisions of the 2000 Order, as amended (the 'section 36(8) turnover').⁴³⁰ The section 36(8) turnover is not restricted to a party's turnover in the relevant market.
- VII.49 In addition, the OFT must, when setting the amount of a penalty for a particular agreement and/or concerted practice, take into account any penalty or fine that has been imposed by the Commission or by a court or other body in another Member State in respect of that agreement or concerted practice.⁴³¹ There have been no other penalties or fines imposed in relation to the Infringement.
- VII.50 The OFT has assessed H & L Garages' penalty against these tests (as applicable). No reduction was required at Step 5 of the penalty calculation because the penalty after Step 4 is below the maximum penalty that the OFT may impose.

⁴³⁰ Section 36(8) of the Act and the 2000 Order, as amended by the 2004 Order.

⁴³¹ Section 38(9) of the Act and *2004 Penalty Guidance* (fn2), paragraph 2.20.

G. Payment of penalty

- VII.51 The penalty for H & L Garages' involvement in Infringement 4 is £92,855.⁴³²

Penalty component	Description		Penalty after each step
Step 1	Relevant turnover of £[C]		[C]
	Starting point	6%	
Step 2	Duration multiplier	x1.75	[C]
Step 3	Proportionality/deterrence	-75%	[C]
	Overall proportionality	-30%	
Step 4	Aggravating factors	+ 10%	[C]
	Mitigating factors	-5%	
Step 5	Statutory maximum	N/A	[C]
Penalty for Infringement 4			£92,855

- VII.52 The OFT therefore requires H & L Garages to pay the penalty set out in the table above no later than by close of banking business on 31 May 2013.⁴³³ If the penalty is not paid by the stipulated date and either an appeal against the imposition or amount of that penalty has not been made within the applicable time period for so doing or such an appeal has been made and determined, the OFT may commence proceedings to recover any amount payable that remains outstanding as a civil debt.⁴³⁴

⁴³² H & L Garages' penalty for Infringement 1, pursuant to Decision 1, is £149,221. The sum of the penalties for its involvement in Infringement 1 and Infringement 4 is £242,076.

⁴³³ Details on how to pay are set out in the letter accompanying this Decision.

⁴³⁴ Section 37 of the Act.

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27 March 2013

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