

Competition Act 1998

Decision of the Office of Fair Trading

CA98/01/2013

Distribution of Mercedes-Benz commercial vehicles (vans)

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 Names have been replaced by a general descriptor of the individual's role.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 (vans)

Decision No. CA98/01/2013

H & L Garages Limited

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

27 March 2013

CONTENTS

SECTION I INTRODUCTION.....	3
A. The purpose of this document.....	3
B. Summary of the infringement and the OFT's enforcement action	3
SECTION II COMPANY PROFILES	5
A. Introduction	5
B. The OFT's approach to assessing liability	5
C. H & L Garages Limited and Dusted Powder Limited	7
D. Northside Truck & Van Limited and S.A.H. Limited	12
SECTION III THE OFT'S INVESTIGATION	19
A. Introduction	19
B. Infringement 4 (trucks).....	20
C. Mercedes' participation	20
D. The types of evidence in this case	21
E. Issue of Statement of Objections.....	24
SECTION IV INDUSTRY OVERVIEW AND THE RELEVANT MARKET	25
A. Introduction	25
Industry Overview – Commercial Vehicles	25
B. Vans	25
C. Types of van customers	29
D. Supplementary products.....	30
Mercedes and its Dealership Network	31
E. Selective distribution system and franchise agreements	31
F. Zones of Influence	33
G. Mercedes' pricing, commission and bonus structure	35
H. Key roles and individuals	36

Relevant Market	36
I. Introduction	36
J. Product market	38
K. Geographic market	39
L. Conclusion	39
SECTION V LEGAL BACKGROUND	40
A. Introduction	40
B. The Chapter I prohibition	40
C. Undertakings	41
D. Agreements and concerted practices between undertakings	42
E. Prevention, restriction or distortion of competition.....	51
F. Appreciable prevention, restriction or distortion of competition	56
G. Effect on trade within the UK	58
H. Burden and standard of proof.....	58
I. Exclusion and exemptions	63
J. Article 101	64
SECTION VI THE CONDUCT OF THE PARTIES AND LEGAL ASSESSMENT	66
Conduct of the Parties	66
A. The OFT's analysis of the evidence and findings	66
B. Evidence of the Infringement	67
C. Mercedes' alleged participation	80
D. Evidence relating to the termination of the Infringement.....	80
Legal Assessment	80
E. Introduction	80
F. Agreement and/or concerted practice.....	81
G. Anti-competitive object	85
H. Appreciability	86
I. Effect on trade within the UK	88
J. Conclusion on the application of the Chapter I prohibition	88
SECTION VII THE OFT'S ACTION	89
A. Introduction	89
B. The OFT's decision.....	89
C. Directions.....	89
D. Financial penalties	89
E. Northside's application for immunity	92
F. Calculation of H & L Garages' penalty.....	92
G. Payment of penalty.....	99

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 23 March 2007 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 vans to customers based in the Parties' areas (the 'Infringement' or 'Infringement 1').

I.4 The Infringement took the form of an agreement and/or concerted practice that each of the Parties would contact the other before providing a quotation to a customer based in the other's area and that they would coordinate their responses in order to allow the local Party to win the sale. If they were unable to contact one another, they were to incorporate sufficiently high margins in their quotations to give the local Party an opportunity to win the sale. The Parties subsequently contacted

each other on a number of occasions to discuss specific customers under the terms of the agreement and/or concerted practice.¹

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.

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

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 1, that is, between 23 March 2007 and 26 January 2010; see paragraph VI.55 (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 Fernwärmetechnik 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 paragraph II.25 and II.38 to II.39.

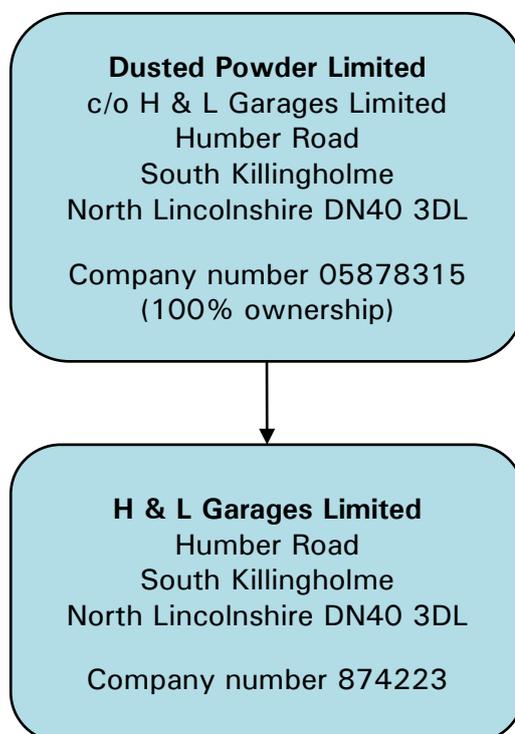
¹⁶ See paragraph III.1 (The OFT's Investigation).

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; Dusted Powder Limited Annual Return 2008, OFT Document Reference 4088 and Dusted Powder Limited Annual Return 2007, OFT Document Reference 4087. The last document states that in 2007 Dusted Powder Limited had an additional shareholder, Endless (No 2) LLP, with 12,258,065 Type A Ordinary Shares. The Report and Financial Statements of Dusted Powder Limited dated 31 December 2007 ('Dusted Powder Limited Report 2007'), OFT Document Reference 3928, page 25 states that '[d]uring the financial period all the ordinary 'A' shares were repurchased [...] and were subsequently cancelled'.

Turnover and profit/loss of H & L Garages Limited

II.20 H & L Garages' turnover and profits for the financial years 2007 to 2010²⁹ were as follows:

Year ending	31/12/10 ³⁰	31/12/09 ³¹	31/12/08 ³²	31/12/07 ³³
Turnover	£34,643,000	£33,576,000	£42,861,000	£39,605,000
Gross profit (loss)	£7,782,000	£7,882,000	£8,800,000	£8,622,000
Operating profit (loss)	£638,000	£533,000	£611,000	£523,000
Profit (loss) on ordinary activities before taxation	£371,000	£247,000	£384,000	£311,000
Profit (loss) for the financial year	£282,000	£166,000	£260,000	£278,000

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 ('H & L Garages Limited Report 2009'), OFT Document Reference 3921, page 2.

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

³³ H & L Garages Limited Report and Financial Statements for the year ended 31 December 2007 ('H & L Garages Limited Report 2007'), OFT Document Reference 3923, page 7.

Consolidated turnover and profit/loss of Dusted Powder Limited

II.21 Dusted Powder Limited's consolidated turnover and profits for the financial years 2007 to 2010³⁴ were as follows:

Year ending	31/12/10 ³⁵	31/12/09 ³⁶	31/12/08 ³⁷	31/12/07 ³⁸
Turnover	£34,643,000	£33,576,000	£42,861,000	£49,288,000
Gross profit (loss)	£7,782,000	£7,882,000	£8,800,000	£10,690,000
Operating profit (loss)	£635,000	£531,000	£611,000	£586,000
Profit (loss) on ordinary activities before taxation	£398,000	£198,000	£307,000	£122,000
Profit (loss) for the financial year	£303,000	£131,000	£223,000	£115,000

II.22 According to its published reports, Dusted Powder Limited's entire turnover during the Relevant Period arose within the UK.³⁹

³⁴ As outlined in paragraph II.15, 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.

³⁵ 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.

³⁶ Dusted Powder Limited Report and Financial Statements to 31 December 2009 ('Dusted Powder Limited Report 2009'), OFT Document Reference 3926, page 9.

³⁷ Dusted Powder Limited Report and Financial Statements to 31 December 2008 ('Dusted Powder Limited Report 2008'), OFT Document Reference 3927, page 9.

³⁸ Dusted Powder Limited Report 2007, OFT Document Reference 3928, page 8. Page 12 states that the report consolidates the accounts of Dusted Powder Limited and all of its subsidiary undertakings and that the results of subsidiaries acquired during the period are included from the effective date of acquisition. Page 2 states that '[t]he Company was incorporated on 17 July 2006 and on 29 September 2006 acquired the whole of the share capital of H&L Garages Ltd and its dormant subsidiary H&L (Scunthorpe) Ltd from PD Ports Plc [...]. Following the acquisition the directors changed the year end of all companies within the group to 31 December in common with the normal practice within the motor trade. Therefore the first consolidated accounts for the Group are prepared for a 17 month period to 31 December 2007. This period recognises 15 months of trading post acquisition of H&L Garages Ltd'.

³⁹ Dusted Powder Limited Report 2010, OFT Document Reference 2668, page 14; Dusted Powder Limited Report 2009, OFT Document Reference 3926, page 14; Dusted Powder Limited Report 2008, OFT Document Reference 3927, page 15 and Dusted Powder Limited Report 2007, OFT Document Reference 3928, page 13.

Appointments

- II.23 During the Relevant Period, the same directors made up the Board of Management for H & L Garages⁴⁰ and Dusted Powder Limited,⁴¹ as follows:

Name	Appointment	Position in January 2010
Anthony Timmins	07/02/2007	In post
Brett Whittingham	Prior to 2007	In post
Peter Worsnup	Prior to 2007	In post

Liability

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

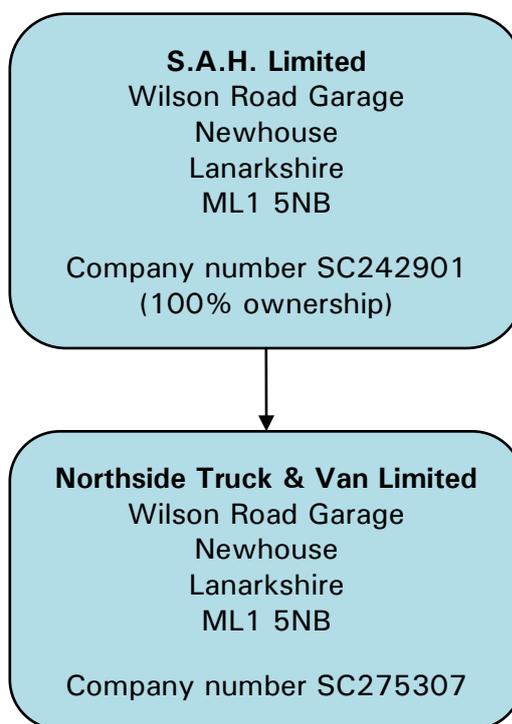
D. Northside Truck & Van Limited and S.A.H. Limited

- 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.

⁴⁰ H & L Garages Limited Financial Analysis Made Easy ('FAME') Report containing financial accounts to year-end 31 December 2010 ('H & L Garages Limited FAME Report 2010'), OFT Document Reference 4011. FAME is a database for company information.

⁴¹ Dusted Powder Limited FAME Report containing financial accounts to year-end 31 December 2010, OFT Document Reference 4010.

II.27 The registered company details of S.A.H. Limited⁴² and Northside Truck & Van Limited,⁴³ and their corporate relationship, are outlined below:



Northside Truck & Van Limited

II.28 Northside Truck & Van Limited is a dealer in Mercedes-Benz commercial vehicle services⁴⁴ operating out of four locations in Bradford, Leeds, Sheffield and Doncaster.⁴⁵ 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.⁴⁶

⁴² 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.

⁴³ 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.

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

⁴⁵ Northside Truck & Van Limited Report 2011, OFT Document Reference 4607, page 1.

⁴⁶ Northside Truck & Van Limited Report 2011, OFT Document Reference 4607, page 1.

II.29 Northside Truck & Van Limited is a wholly-owned subsidiary of S.A.H. Limited.⁴⁷

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.⁴⁸

II.31 During the Relevant Period, the shares in S.A.H. Limited were held by the following individuals:⁴⁹

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) Limited, T McMillian (Transport) Limited and F Short Limited (all haulage contractors) and Anderson Commercial (Newhouse) Limited (property investment).⁵⁰ The OFT does not have any evidence that any of these subsidiaries were directly involved in the Infringement.

⁴⁷ 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.

⁴⁸ S.A.H. Limited Report 2011, OFT Document Reference 4609, page 1.

⁴⁹ S.A.H. Limited Annual Return 2010, OFT Document Reference 3940; S.A.H. Limited Annual Return 2009, OFT Document Reference 3941; S.A.H. Limited Annual Return 2008, OFT Document Reference 3942 and S.A.H. Limited Annual Return 2007, OFT Document Reference 3943.

⁵⁰ S.A.H. Limited Report 2011, OFT Document Reference 4609, page 28.

Turnover and profit/loss of Northside Truck & Van Limited

II.33 Northside Truck & Van Limited's turnover and profits for the financial years 2007 to 2011 were as follows:

Year ending	31/12/11 ⁵¹	31/12/10 ⁵²	31/12/09 ⁵³	31/12/08 ⁵⁴	31/12/07 ⁵⁵
Turnover	£97,595,660	£76,213,500	£62,812,361	£95,048,421	£85,927,116
Gross profit (loss)	£11,278,048	£10,292,955	£9,094,375	£12,136,542	£11,496,324
Operating profit (loss)	£794,929	£210,754	(£747,599)	£836,782	£1,138,333
Profit (loss) on ordinary activities before taxation	£159,165	(£280,531)	(£1,230,898)	£32,543	£542,383
Profit (loss) for the financial year ⁵⁶	£12,006	(£309,009)	(£1,053,804)	(£37,889)	£329,309

⁵¹ 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'.

⁵² 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.

⁵³ 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.

⁵⁴ 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.

⁵⁵ Northside Truck & Van Limited Directors' Report and Financial Statements for the year ended 31 December 2007 ('Northside Truck & Van Limited Report 2007'), OFT Document Reference 3933, page 6.

⁵⁶ Northside Limited's profit in 2007 and the subsequent years' losses 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; Northside Truck & Van Limited Report 2008, OFT Document Reference 3932, page 1 and Northside Truck & Van Limited Report 2007, OFT Document Reference 3933, 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 2007 to 2011 were as follows:

Year ending	31/12/11 ⁵⁷	31/12/10 ⁵⁸	31/12/09 ⁵⁹	31/12/08 ⁶⁰	31/12/07 ⁶¹
Turnover	£109,635,344	£86,758,665	£72,482,171	£107,215,264	£116,408,555
Gross profit (loss)	£12,428,376	£11,214,897	£5,915,827	£13,209,643	£15,336,638
Operating profit (loss)	£1,429,122	£924,737	(£74,494)	£1,542,530	£1,267,951 ⁶²
Profit (loss) on ordinary activities before taxation	£524,925	£115,763	(£917,650)	£603,637	£1,633,429
Profit (loss) on ordinary activities after taxation ⁶³	£183,051	(£90,667)	(£849,787)	£237,991	£1,356,242

II.35 According to its published reports, S.A.H. Limited's entire turnover

⁵⁷ 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.

⁵⁸ 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.

⁵⁹ 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.

⁶⁰ 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.

⁶¹ S.A.H. Limited Directors' Report and Financial Statements for the year ended 31 December 2007 ('S.A.H. Limited Report 2007'), OFT Document Reference 3936, page 7. Please note that for this year's turnover comprises Continuing operations £99,151,648, Discontinued operations £17,256,907. S.A.H. Limited Report 2007, OFT Document Reference 3936, page 7. Page 1 states that '[...] the group has continued with its strategy of disposing of business activities and properties which no longer fit in with the directors' long term plans for the group. The sale of the service bus operations to First Glasgow was completed in June 2007 and later in the year a deal was concluded to sell the trading assets and business of the motor car dealerships to The Verve Limited'.

⁶² Operating profit comprises Continuing operations £1,762,857, Acquisitions (£178,267), Discontinued operations (£316,639). S.A.H. Limited Report 2007, OFT Document Reference 3936, page 7.

⁶³ 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, while in 2007 the goodwill amortisation charged was £1.1 million. 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; S.A.H. Limited Report 2008, OFT Document Reference 3935, page 1 and S.A.H. Limited Report 2007, OFT Document Reference 3936, page 1.

during the Relevant Period arose within the UK.⁶⁴

Appointments

II.36 The directors of Northside Truck & Van Limited during the Relevant Period were as follows:⁶⁵

Name	Appointment	Position in January 2010
Jennifer Anderson	Prior to 2007	In post
Samuel Irvine Anderson	Prior to 2007	In post
Samuel Stewart Anderson	Prior to 2007	In post
Fergus Leitch	Prior to 2007	In post
Timothy Ward	Prior to 2007	In post

II.37 The directors of S.A.H. Limited during the Relevant Period were as follows:⁶⁶

Name	Appointment	Position in January 2010
Jennifer Anderson	Prior to 2007	In post
Samuel Irvine Anderson	Prior to 2007	In post
Samuel Stewart Anderson	Prior to 2007	In post
Fergus Leitch	Prior to 2007	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

⁶⁴ S.A.H. Limited Report 2010, OFT Document Reference 3997, page 13; S.A.H. Limited Report 2009, OFT Document Reference 3934, page 14; S.A.H. Limited Report 2008, OFT Document Reference 3935, page 14 and S.A.H. Limited Report 2007, OFT Document Reference 3936, page 14.

⁶⁵ Northside Limited FAME Report containing financial accounts to year-end 31 December 2011, OFT Document Reference 5037.

⁶⁶ S.A.H. Limited FAME Report containing financial accounts to year-end 31 December 2011, OFT Document Reference 5038.

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 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.⁶⁷

⁶⁷ 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 Statement⁶⁸ 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')
- 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 competition for the sale of trucks between 13 June 2008 and 26 January 2010 ('Infringement 4') and

⁶⁸ See paragraph II.13 (Company Profiles).

- 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 1 ('Decision 1').

III.4 Although the Statement was also addressed to Ciceley, Enza, Mercedes and Road Range, they were not parties to Infringement 1 and this Decision, therefore, is not addressed to them.⁶⁹ 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 4 (trucks)

III.5 In addition to this Infringement, both Northside and H & L were also involved in Infringement 4.

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 trucks between 13 June 2008 and 26 January 2010. The OFT's decision concerning that infringement ('Decision 4') 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 4 has been taken into consideration in setting the penalty for H & L Garages' involvement in Infringement 1.⁷⁰

C. Mercedes' participation

III.8 In the Statement, the OFT provisionally concluded that Mercedes was also a party to Infringement 1 in view of the role played by [Mercedes Sales Manager A] in the formation of the agreement and/or concerted practice.

III.9 However, in light of new evidence put forward by Mercedes, the OFT has ultimately concluded that the totality of the evidence does not

⁶⁹ See paragraphs III.8 to III.9 in relation to Mercedes' involvement in Infringement 1.

⁷⁰ See paragraphs VII.38 to VII.41 (The OFT's Action).

support a finding that Mercedes participated in Infringement 1.⁷¹ The OFT therefore considers that it has no grounds for action against Mercedes in relation to Infringement 1. This Decision, therefore, is not addressed to Mercedes.

D. The types of evidence in this case

Section 28 inspections of premises in January 2010

- III.10 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.
- III.11 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, BlackBerries, 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').⁷²
- III.12 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 2012.⁷³
- III.13 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.

⁷¹ See paragraphs VI.52 to VI.54 (The Conduct of the Parties and Legal Assessment).

⁷² 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.

⁷³ Signed Northside immunity agreement, OFT Document Reference 4580.

Section 28 inspections of premises in September 2010

- III.14 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.15 These inspections also included the use of forensic IT and the OFT's seize and sift powers referred to in paragraph III.11 above. The inspections provided the OFT with further evidence of suspected breaches of competition law.

Interviews conducted

- III.16 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.⁷⁴
- III.17 Ciceley⁷⁵ and Road Range⁷⁶ 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.

⁷⁴ 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.

⁷⁵ Email exchange between OFT and Addleshaw Goddard dated 27 September to 22 October 2010 re Ciceley - interviews, OFT Document Reference 1207.

⁷⁶ Letter from Brabners Chaffe Street to OFT dated 22 November 2010 re cooperation by Road Range with OFT investigation, OFT Document Reference 1423.

- III.18 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.19 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 receipt of the Statement.⁷⁷ Mercedes subsequently provided the OFT with witness statements from [Mercedes Sales Manager B]⁷⁸ and from [Mercedes Sales Manager A].⁷⁹
- III.20 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.21 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.22 As discussed above in paragraphs III.11 and III.15, 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 CIPA. 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.

⁷⁷ Note of a meeting between the OFT, Nabarro and Mercedes dated 23 November 2011, OFT Document Reference 4583, page 4.

⁷⁸ [C] Witness Statement, OFT Document Reference 5071.

⁷⁹ [C] Witness Statement, OFT Document Reference 5041.

E. Issue of Statement of Objections

III.23 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')⁸⁰ of its proposed infringement decision.

III.24 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 the Statement.⁸¹ 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.⁸²

Written representations

III.25 In relation to this Infringement, in addition to the representations from Mercedes (see paragraphs III.8 to III.9), the OFT received written representations from [H & L Director].⁸³ These representations are considered further at paragraphs VI.19 to VI.20 (The Conduct of the Parties and Legal Assessment).

Oral representations

III.26 None of the Parties to Infringement 1 requested the opportunity to make oral representations.

⁸⁰ The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751).

⁸¹ OFT's Rules, Rules 5(3) and 1(1).

⁸² OFT's Rules, Rules 5(2)(c) and 5(4).

⁸³ 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 stated 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), 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.⁸⁴ 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 vans and so this section focuses on this category.

B. Vans

IV.3 Based on the Society of Motor Manufacturers and Traders ('SMMT') data, sales of vans and trucks comprised 257,373 registrations in 2010.⁸⁵ Vans make up the largest sector of this market. As shown in Table 1, around 230,000 vans were registered in the UK in 2010. This represented a decline from 347,087 vans registered in 2007.

⁸⁴ 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.

⁸⁵ SMMT Newsletter January 2011, OFT Document Reference 4375, page 1.

	2010	2009	2008	2007	2006
Total van registrations	230,358	193,930	299,489	347,087	333,282

Source: SMMT⁸⁶

Mercedes' van models

IV.4 Mercedes' van product range comprises vehicles of various body types and load capacities, but the vans category is typically broken down by gross vehicle weight ('GVW'). Vans are categorised by the SMMT according to their GVW as 'small-sized' (below 2.5t), 'medium-sized' (2.5 to 3.5t) and 'large-sized' (over 3.5t), with some vans weighing up to 7.5t (for example the Mercedes-Benz Vario model). Mercedes does not produce small-sized vans.

Model	Size	Type	GVW
Vito	medium-sized	Panel model	2.7t to 3.2t
Sprinter	medium-sized & large-sized	Panel & Chassis model	2.8t to 5.0t
Vario	large-sized	Panel & Chassis model	5.9t to 7.5t

Source: Mercedes⁸⁷

⁸⁶ 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 data (the 'SMMT Databases') are used to estimate van 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 20 September 2011 attaching data on vehicle weights, OFT Document Reference 4356 and SMMT Spreadsheet (light 4x4 utility, pick-ups, microvans), OFT Document Reference 4357. 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 Reference 4379. Note that the SMMT reports vehicles of 3.5 tonnes (t) and above as trucks and below 3.5t as vans, even though some modern vans can weigh up to 7.5t. See Note on Customer Segmentation prepared by Mercedes for the OFT dated 5 July 2011 ('Mercedes Customer Segmentation Note'), OFT Document Reference 2782, paragraph 3.2.

⁸⁷ Mercedes Response dated 21 January 2011 ('Mercedes Response'), OFT Document Reference 1506, question 2, page 1.

IV.5 The vast majority of Mercedes' registrations are for its medium-sized models, with the medium-sized Sprinter being the most popular van in the range.

Model	2010	2009	2008	2007	2006	2005
Sprinter	14,852	11,876	7,308	17,597	13,333	14,430
Vito	5,321	5,548	7,281	8,141	7,869	7,827
Total	22,183	19,433	26,597	27,745	23,208	24,262

Model	2010	2009	2008	2007	2006	2005
Sprinter	1,621	1,236	1,427	1,159	1,278	1,571
Vario	217	245	530	613	403	429
Total	1,838	1,481	1,957	1,772	1,681	2,000

Source: SMMT⁸⁸

Shares of supply

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

⁸⁸ SMMT Databases. 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 and SMMT Spreadsheet, OFT Document Reference 3633.

Table 5: Share of supply - all vans in the UK						
	2010	2009	2008	2007	2006	2005
Total registrations	230,358	193,930	299,489	347,087	333,282	330,225
Ford	27%	29%	28%	28%	28%	27%
Vauxhall	12%	12%	17%	15%	14%	16%
VW	11%	11%	9%	8%	8%	7%
Mercedes-Benz	10%	10%	9%	8%	7%	7%
Citroen	8%	8%	7%	7%	7%	7%
Renault	8%	5%	6%	6%	7%	7%
Peugeot	7%	7%	5%	5%	5%	5%
Fiat	4%	3%	4%	4%	4%	4%
Other	13%	15%	15%	19%	20%	20%

Table 6: Share of supply - medium-sized vans in the UK						
	2010	2009	2008	2007	2006	2005
Total registrations	149,359	127,255	205,182	237,124	218,609	209,876
Ford	33%	32%	30%	29%	29%	29%
Mercedes-Benz	14%	14%	12%	11%	10%	11%
VW	10%	10%	9%	8%	9%	8%
Renault	8%	6%	7%	7%	7%	7%
Vauxhall	7%	7%	10%	9%	10%	10%
Mitsubishi	5%	4%	3%	5%	7%	6%
Citroen	4%	4%	4%	4%	2%	2%
Toyota	4%	5%	4%	4%	3%	3%
Other	15%	18%	21%	23%	23%	24%

Table 7: Share of supply - large-sized vans in the UK						
	2010	2009	2008	2007	2006	2005
Total registrations	7,443	7,544	10,027	9,351	6,120	7,295
Ford	38%	35%	26%	28%	25%	24%
Mercedes-Benz	25%	20%	20%	20%	29%	29%
Fiat	16%	15%	15%	11%	0%	0%
Iveco	12%	16%	17%	17%	22%	24%
Peugeot	3%	3%	3%	1%	0%	0%
VW	3%	2%	4%	4%	9%	8%
Other	3%	9%	15%	19%	15%	15%

Source: SMMT⁸⁹

C. Types of van customers

IV.7 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.

IV.8 According to the SMMT, sales made to customers operating a fleet of 25 or more vehicles should be designated as fleet sales.⁹⁰

IV.9 In relation to vans, Mercedes splits customers as follows:⁹¹

- Direct account customers: these are very large accounts, which are generally dealt with by Mercedes directly
- National fleet customers: Mercedes' criterion for classifying a customer as a national fleet customer is that it has in excess of [C] vehicles. For these customers, the Mercedes fleet team will engage directly with the end user including the provision of quotations

⁸⁹ SMMT Databases. These data were used to estimate van shares of supply according to the weights which typically correspond to small-, medium- and large-sized vans. The figures in Table 5 include sales for all three segments. 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 20 September 2011 attaching data on vehicle weights, OFT Document Reference 4356 and SMMT Spreadsheet (light 4x4 utility, pick-ups, microvans), OFT Document Reference 4357.

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

⁹¹ Mercedes Fleet and Zol Submission, OFT Document Reference 2739, pages 2 to 3.

(together with dealers) for vehicles. All of these deals are then transacted by the dealer. The dealer sets the final price but is assisted by financial support (known as contingency) provided by Mercedes⁹²

- SME fleet customers: customers with fleets of between [C] and [C] vehicles
- Retail customers: customers with fleets of fewer than [C] vehicles.

IV.10 Mercedes indicated that approximately [C] per cent of van customers are fleet customers (that is customers with more than [C] vans).⁹³

D. Supplementary products

IV.11 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.

After-sales services

IV.12 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,⁹⁴ 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.⁹⁵

IV.13 For vans, some standard Mercedes-Benz after-sales packages are available to retail and fleet customers at the time of purchase of the vehicle. The purchase price of all Mercedes-Benz retail vans includes an integrated service package ('ISP'),⁹⁶ covering basic servicing costs for five years or 60,000 miles. Fleet customers can choose from various servicing packages which are paid for in addition to the purchase price.⁹⁷ Northside stated that the majority of van customers (whether retail or fleet) do not purchase full repair and maintenance contracts, that is,

⁹² Annex 3 to Mercedes Fleet and Zol Submission, OFT Document Reference 2742.

⁹³ Mercedes Fleet and Zol Submission, OFT Document Reference 2739, page 3.

⁹⁴ Mercedes Response, OFT Document Reference 1506, question 5.

⁹⁵ Mercedes Response, OFT Document Reference 1506, question 5, paragraph 5.5(a).

⁹⁶ Northside Supplementary Response dated 7 April 2011, OFT Document Reference 2663, question 4, page 2.

⁹⁷ Enza Response, OFT Document Reference 1499, question 8(ii).

contracts covering repair and maintenance of all electrical and mechanical components.⁹⁸

Financing

IV.14 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).⁹⁹ Mercedes-Benz Financial Services, the commercial vehicle financial services arm of Daimler AG, provides a range of financing and contract hire options.¹⁰⁰

Mercedes and its Dealership Network

E. Selective distribution system and franchise agreements

IV.15 At the beginning of 2011, Mercedes' dealership network in the UK comprised 26 dealers for vans and 23 dealers for trucks.¹⁰¹ In common with the majority of the Mercedes dealership network, during the Relevant Period, both Parties supplied vans and trucks. All of Mercedes' dealers also provide spare parts and after sales services.¹⁰² Each dealer is a separate undertaking and does not form a single economic entity with Mercedes.

IV.16 Mercedes, in common with many manufacturers of commercial vehicles, operates a selective distribution system involving franchise agreements with its dealers. According to Mercedes,¹⁰³ its selective distribution network meets the requirements of the *Motor Vehicle Block Exemption Regulation*.¹⁰⁴ 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

⁹⁸ Northside Response, OFT Document Reference 1484, question 4(iv).

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

¹⁰⁰ Mercedes Response, OFT Document Reference 1506, question 13, paragraphs 13.1 and 13.6.

¹⁰¹ Since then H & L Garages has gone into liquidation.

¹⁰² MB Margin Model paper submitted with Mercedes Letter dated 13 January 2011 ('Mercedes Margin Model Paper'), OFT Document Reference 1406, paragraph 2.2.

¹⁰³ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.1.

¹⁰⁴ 461/2010/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*').

services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system'.

- IV.17 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,¹⁰⁵ 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,¹⁰⁶ and the qualitative criteria include site and location, management structure and selection, business management and controls, marketing and planning and corporate identity.¹⁰⁷
- IV.18 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.¹⁰⁸
- IV.19 The benefit of the exemption under the *Motor Vehicle Block Exemption Regulation*¹⁰⁹ does not extend to selective distribution systems where the manufacturer restricts its distributors from making either active or passive sales.¹¹⁰ According to Mercedes, its franchise agreements do not incorporate any restrictions either on active or passive sales.¹¹¹ The OFT

¹⁰⁵ Mercedes uses the term 'partners' and 'franchise partners', see Mercedes Supplementary Response dated 29 September 2011 ('Mercedes Supplementary Response'), OFT Document Reference 3717.

¹⁰⁶ Mercedes Response dated 7 October 2011 outlining its selective distribution system criteria, OFT Document Reference 3726.

¹⁰⁷ Mercedes Supplementary Response, OFT Document Reference 3717.

¹⁰⁸ Commission Notice *Guidelines on Vertical Restraints* C(2010) 2365 ('*Guidelines on Vertical Restraints*'), paragraph 175.

¹⁰⁹ 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*').

¹¹⁰ *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.

¹¹¹ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.4.

does not make any findings in this Decision in relation to the compatibility of Mercedes' selective distribution system with the *Motor Vehicle Block Exemption Regulation*.

F. Zones of Influence

- IV.20 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.¹¹²
- IV.21 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).¹¹³
- IV.22 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'.¹¹⁴
- IV.23 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).¹¹⁵ 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.¹¹⁶ 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

¹¹² Mercedes Fleet and Zol Submission, OFT Document Reference 2739, page 5.

¹¹³ Mercedes Fleet and Zol Submission, OFT Document Reference 2739, page 5.

¹¹⁴ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.6.

¹¹⁵ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 7.2.

¹¹⁶ 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).¹¹⁷

IV.24 Nevertheless, Mercedes stated that '[d]ealers are commercially driven to maximise sales opportunities in and around their selling locations'.¹¹⁸ 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 sales¹¹⁹ because local sales are more likely to generate the more profitable after-sales business.¹²⁰ Costs involved in visiting a potential customer and delivering the vehicles are also a consideration when dealers are quoting to customers.

IV.25 The OFT was told that customers also take into account the physical proximity to the dealer when choosing where to buy a commercial vehicle.¹²¹ 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.¹²²

IV.26 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

¹¹⁷ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraphs 7.3 and 7.4.

¹¹⁸ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.5.

¹¹⁹ 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.

¹²⁰ 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).

¹²¹ See for example [C] Witness Statement, OFT Document Reference 3869, paragraph 6.

¹²² Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.5.

national requirements.

- d. MB also negotiates directly with some major fleet customers to provide new vehicles and aftersales services'.¹²³

IV.27 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...'.¹²⁴

G. Mercedes' pricing, commission and bonus structure

IV.28 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].¹²⁵ 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.¹²⁶

IV.29 Mercedes has a list of recommended retail prices for its van products¹²⁷ and provides all of its dealers with a standard off-invoice discount of [C] per cent for van sales.¹²⁸ In addition, as outlined in IV.28, Mercedes offers a further bonus which rewards volume of sales and the achievement of certain qualitative targets.¹²⁹ However, Mercedes stated that it does not seek to determine, control or influence the dealer's price and that a dealer can discount below the recommended margin, and also accept a loss on the vehicle price.¹³⁰

¹²³ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.9.

¹²⁴ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.9 and Annex 6.

¹²⁵ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraphs 3.1 to 3.7.

¹²⁶ Mercedes Response dated 7 October 2011 outlining its selective distribution system criteria, OFT Document Reference 3726.

¹²⁷ Mercedes Response, OFT Document Reference 1506, question 6, paragraph 6.1 and Annex 3.

¹²⁸ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 3.2.

¹²⁹ See also Mercedes Margin Model Paper, OFT Document Reference 1406, paragraphs 3.3 to 3.7.

¹³⁰ Submission by Mercedes dated 15 June 2011 regarding: (A) Fleet Customers and (B) Zones of Influence ('Mercedes Fleet and Zol Submission'), OFT Document Reference 2739, page 4.

Model	2010	2009	2008	2007	2006	2005
Vito	[C]	[C]	[C]	[C]	14,941	15,128
Sprinter	[C]	[C]	[C]	[C]	18,941	18,940
Sprinter C	[C]	[C]	[C]	[C]	N/A	N/A
Vario	[C]	[C]	[C]	[C]	31,773	32,286

Source: Mercedes¹³¹

H. Key roles and individuals

IV.30 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.

IV.31 This division between van sales and truck sales teams is also reflected in the roles of Mercedes' Regional Sales Managers ('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.32 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.¹³² The 'Relevant Turnover' for penalties purposes is the

¹³¹ Average prices by year calculated using quarterly 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 1, page 12.

¹³² 2004 Penalty Guidance (fn2).

turnover of the undertaking in the relevant market in the financial year preceding the date when the infringement ended.¹³³

- IV.33 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.¹³⁴ 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.¹³⁵
- IV.34 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 penalty.¹³⁶ Rather, the OFT must be 'satisfied on a reasonable, and properly reasoned basis, of what is the relevant product market affected by the Infringement'.¹³⁷ 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'.¹³⁸ The OFT considers that this principle also applies when assessing the relevant geographic market.
- IV.35 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.

¹³³ *2004 Penalty Guidance* (fn2), paragraph 2.7 and *2012 Penalty Guidance* (fn2), paragraph 2.7.

¹³⁴ 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.

¹³⁵ 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).

¹³⁶ *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].

¹³⁷ *Argos, Littlewoods and JJB* (fn136), at paragraph 170.

¹³⁸ *Argos, Littlewoods and JJB* (fn136), at paragraphs 170 to 173 and 228.

IV.36 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.37 The OFT considers that the key product affected by the Infringement is new Mercedes-Benz vans. The Parties do not supply other marques of vans, and although the Parties sold both vans and trucks during the Relevant Period, this Infringement does not concern trucks. It was not necessary in this case to consider whether trucks and vans were in the same relevant market (see paragraph IV.36).

Segmentation by van size

IV.38 In the Relevant Period, the Parties sold Mercedes-Benz medium- and large-sized vans. The Parties did not sell new small-sized vans.¹³⁹ 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 both medium- and large-sized vans. Given that the Parties have turnover in both segments, the Relevant Turnover is not affected by whether the relevant market for medium- and large-sized vans is combined or comprises two separate segments. The OFT therefore has not concluded on whether medium- and large-sized vans form part of the same relevant market or whether there are two separate relevant markets.

After-sales

IV.39 The OFT has considered whether after-sales services for vans should be included within the product market. As described at paragraph IV.13,

¹³⁹ Mercedes Customer Segmentation Note, OFT Document Reference 2782, paragraph 2.4.

the sale price of vans for retail customers includes an ISP.¹⁴⁰ Therefore the OFT considers that the sale of ISPs for retail customers, which are included in the sale price of the van, should be included in the relevant market since they form part of the van purchase price. It was not necessary in this case to consider whether other after-sales services were in the same relevant market as vans (see paragraph IV.36).

K. Geographic market

IV.40 The Infringement refers to an arrangement to restrict competition in the areas (Zols) of the Parties.¹⁴¹

IV.41 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.36).

L. Conclusion

IV.42 In summary, for the purposes of calculating financial penalties in this case, the OFT considers that the Relevant Turnover¹⁴² is that achieved with the sale of new Mercedes-Benz vans within the combined Zols of the Parties. In respect of retail customers, this includes sales of services packages which are included in the sale price of the vehicles.¹⁴³

IV.43 The OFT is identifying the relevant product and geographic market 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.

¹⁴⁰ SME and national fleet customers can choose from a number of servicing packages, but they are not included in the price of the vehicle.

¹⁴¹ See paragraph IV.20 and Section VI (The Conduct of the Parties and Legal Assessment).

¹⁴² See paragraph IV.32.

¹⁴³ 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.9).

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,¹⁴⁴ and references to it will therefore be made where appropriate.¹⁴⁵

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 UK¹⁴⁶ 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.¹⁴⁷ 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.¹⁴⁸

¹⁴⁴ See paragraphs V.5 to V.7.

¹⁴⁵ 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.

¹⁴⁶ 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.

¹⁴⁷ Competition Act 1998 (Commencement No 5) Order 2000 SI 2000/344, Article 2 and Schedule 1.

¹⁴⁸ 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'.¹⁴⁹

¹⁴⁹ 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.10 (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'.¹⁵⁰
- 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.¹⁵¹ 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'.¹⁵²
- V.12 This reasoning has been expressly cited by the European Courts and the CAT in several recent cases.¹⁵³ The Court of Justice in *T-Mobile Netherlands*, referring to the opinion of Advocate-General Kokott,¹⁵⁴ 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'.¹⁵⁵

¹⁵⁰ Section 2(1) of the Act and Article 101(1) of the TFEU.

¹⁵¹ *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.

¹⁵² *Anic* (fn151), paragraph 131; followed in *HFB Holding* (fn14), paragraph 190. See also *Argos, Littlewoods and JJB* (fn136), 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)]).

¹⁵³ 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* (fn151), paragraphs 108 and 130 to 131. See also *Apex Asphalt* (fn152), at [201] and [206(ii)] (followed in *Makers* (fn152), at [103(ii)]).

¹⁵⁴ Opinion of Advocate-General Kokott in *T-Mobile Netherlands* (fn153), paragraph 38.

¹⁵⁵ *T-Mobile Netherlands* (fn153), 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,¹⁵⁶ 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'.¹⁵⁷

V.14 This position was upheld by the Court of Appeal.¹⁵⁸

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.¹⁵⁹ The Chapter I prohibition is intended to catch a wide range of agreements, including oral agreements¹⁶⁰ and 'gentlemen's agreements',¹⁶¹ since anti-competitive agreements are, by their nature, rarely in written form.¹⁶² An agreement may be express or it may be implied from the conduct of the

¹⁵⁶ 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).

¹⁵⁷ *JJB/Allsports* (fn153), at [644] and *Argos/Littlewoods* (fn153), at [665].

¹⁵⁸ *Argos, Littlewoods and JJB* (fn136), at paragraph 21.

¹⁵⁹ 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.

¹⁶⁰ Case 28/77 *Tepea v Commission* [1978] ECR 1391 ('*Tepea*'), paragraph 41.

¹⁶¹ Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, paragraphs 106 to 114.

¹⁶² See also OFT Guidance 401, *Agreements and concerted practices* (December 2004) (the '*Agreements and Concerted Practices Guidance*'), paragraph 2.7.

parties.¹⁶³ It may also consist of an isolated act, a series of acts or a course of conduct.¹⁶⁴

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'.¹⁶⁵

V.18 The intention of the parties must be to conduct themselves on the market in a specific way,¹⁶⁶ 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.¹⁶⁷

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'.¹⁶⁸

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

¹⁶³ See for example *Tepea* (fn160).

¹⁶⁴ *Anic* (fn151), paragraph 81.

¹⁶⁵ 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* (fn153), at [156] and [637]; *Argos/Littlewoods* (fn153), at [151] and [658] and *Argos, Littlewoods and JJB* (fn136), at paragraph 21(iv).

¹⁶⁶ Joined Cases 209/78 to 215/78 and 218/78 *Heintz Van Landewyck and Others v Commission* [1980] ECR 3125, paragraph 86; *Hercules Chemicals* (fn151), paragraph 256; *Limburgse Vinyl* (fn151), paragraph 715 and *Bayer* (fn165), paragraph 67. See also *JJB/Allsports* (fn153), at [156] and [637] and *Argos/Littlewoods* (fn153), at [151] and [658].

¹⁶⁷ 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.

¹⁶⁸ *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* (fn151), paragraph 115 and Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287 ('*Hüls*'), paragraph 158). See also *JJB/Allsports* (fn153), at [151]; *Argos/Littlewoods* (fn153), at [146]; *Argos, Littlewoods and JJB* (fn136), at paragraph 21(i) and *Apex Asphalt* (fn152), at [196] and [206(iii)] (followed in *Makers* (fn152), 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'.¹⁶⁹

V.21 In its judgment in *Anic*, the Court of Justice re-affirmed its earlier interpretation of the requirement of independence in *Suiker Unie*,¹⁷⁰ 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'.¹⁷¹

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

¹⁶⁹ *Suiker Unie* (fn17), paragraph 173; *Anic* (fn151), paragraph 116 and *Hüls* (fn168), paragraph 159. See also *Apex Asphalt* (fn152), at [198] and [206(iv)] (followed in *Makers* (fn152), at [102] and [103(iv)]).

¹⁷⁰ *Suiker Unie* (fn17), paragraph 174.

¹⁷¹ *Anic* (fn151), paragraph 117 (followed in *Hüls* (fn168), paragraphs 159 to 160 and *HFB Holding* (fn14), paragraph 212). See also *Apex Asphalt* (fn152), at [198] and [206(v)] (followed in *Makers* (fn152), 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.¹⁷²

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'.¹⁷³

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'.¹⁷⁴

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.¹⁷⁵

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.¹⁷⁶

V.27 However, where an undertaking participating in a concerted arrangement remains active on the market, there is a presumption that it will take

¹⁷² Joined Cases T-25/95 etc. *Cimenteries and Others v Commission* [2000] ECR II-491 ('*Cimenteries*'), paragraph 1852.

¹⁷³ *Cimenteries* (fn172), paragraphs 1849 and 1852. See also *Apex Asphalt* (fn152), at [206(vii)] and [206(viii)] (followed in *Makers* (fn152), at [103(vii)] and [103(viii)]).

¹⁷⁴ *JJB/Allsports* (fn153), 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* (fn152), at [200]; *JJB/Allsports* (fn153), at [159] and *Argos/Littlewoods* (fn153), at [155].

¹⁷⁵ *Hüls* (fn168), paragraph 155 and *Anic* (fn151), paragraph 96.

¹⁷⁶ *Anic* (fn151), paragraph 118 and *Hüls* (fn168), paragraph 161. See also *Apex Asphalt* (fn152), at [206(ix)] (followed in *Makers* (fn152), 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'.¹⁷⁷

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.¹⁷⁸

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.¹⁷⁹ 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.¹⁸⁰

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.¹⁸¹

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

¹⁷⁷ *Anic* (fn151), paragraph 121; *Hüls* (fn168), paragraph 162 and *Cimenteries* (fn172), paragraphs 1865 and 1910. See also *Apex Asphalt* (fn152), at [206(x)] (followed in *Makers* (fn152), at [103(x)]).

¹⁷⁸ *T-Mobile Netherlands* (fn153), paragraphs 58 to 59.

¹⁷⁹ *Anic* (fn151), paragraph 124. See also *Apex Asphalt* (fn152), at [206(xi)] (followed in *Makers* (fn152), at [103(xi)]).

¹⁸⁰ *Hüls* (fn168), paragraphs 163 to 164 and *Anic* (fn151), paragraph 123. See also *Apex Asphalt* (fn152), at [206(xii)] (followed in *Makers* (fn152), at [103(xii)]).

¹⁸¹ *Agreements and Concerted Practices Guidance* (fn162), paragraph 2.8. See for example also *Anic* (fn151), paragraph 80; *Cimenteries* (fn172), paragraphs 1389 and 2557 and Case T-28/99 *Sigma Technologie di Rivestimento v Commission* [2002] ECR II-1845, paragraph 40.

undertaking'.¹⁸² 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.¹⁸³ Even if the employees were acting contrary to instructions, this does not affect the liability of the undertaking.¹⁸⁴

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.¹⁸⁵ 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.¹⁸⁶

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.¹⁸⁷ 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

¹⁸² *Tesco Stores Ltd, Tesco Holdings Ltd and Tesco plc v OFT* [2012] CAT 31 ('*Tesco Stores*'), at [74(a)].

¹⁸³ Joined Cases 100/80 to 103/80 *Musique Diffusion française v Commission* [1983] ECR 1825 ('*Musique Diffusion française*'), paragraph 97.

¹⁸⁴ Case T-53/03 *BPB v Commission* [2008] ECR II-1333, [2008] 5 CMLR 1201, paragraphs 360 and 431.

¹⁸⁵ Case T-141/89 *Tréfileurope Sales v Commission* [1995] ECR II-791 ('*Tréfileurope Sales*'), paragraphs 53 to 60 and 72.

¹⁸⁶ 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* (fn156), paragraph 189.

¹⁸⁷ *Tréfileurope Sales* (fn185), paragraph 85 (citing *Hercules Chemicals* (fn151), 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'.¹⁸⁸

V.34 The General Court has held that 'the notion of public distancing as a means of excluding liability must be interpreted narrowly'.¹⁸⁹ 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.¹⁹⁰

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'.¹⁹¹

V.36 The CAT also noted that '[r]eporting what transpired to the OFT puts the matter beyond doubt'.¹⁹²

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

¹⁸⁸ *Aalborg Portland* (fn187), paragraph 84.

¹⁸⁹ Case T-303/02 *Westfalen Gassen Nederland v Commission* [2006] ECR II-4567 ('*Westfalen Gassen*'), paragraph 103.

¹⁹⁰ *Westfalen Gassen* (fn189), paragraph 103.

¹⁹¹ *JJB/Allsports* (fn153), at [1046].

¹⁹² *JJB/Allsports* (fn153), 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'.¹⁹³

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'.¹⁹⁴

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'.¹⁹⁵ 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 [...]'.¹⁹⁶

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

¹⁹³ *Anic* (fn151), paragraph 79.

¹⁹⁴ *Anic* (fn151), paragraph 80.

¹⁹⁵ Case T-99/04 *AC Treuhand v Commission* [2008] ECR II-1501 ('*AC Treuhand*'), paragraph 132.

¹⁹⁶ *AC Treuhand* (fn195), paragraph 133.

endorse the objectives of the cartel and to support its implementation'.¹⁹⁷

E. Prevention, restriction or distortion of competition¹⁹⁸

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.¹⁹⁹
- 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.²⁰⁰ 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.²⁰¹
- 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.²⁰²
- V.44 However, no agreement or concerted practice is automatically restrictive by object. Instead, the objective analysis of whether an agreement or

¹⁹⁷ *AC Treuhand* (fn195), paragraph 134.

¹⁹⁸ 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.

¹⁹⁹ 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* (fn153), paragraph 29.

²⁰⁰ Joined Cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines and Rheinzinc v Commission* [1984] ECR 1679 ('*CRAM*'), paragraphs 25 to 26.

²⁰¹ Case C-551/03P *General Motors v Commission* [2006] ECR I-3173 ('*General Motors*'), paragraph 64.

²⁰² *Cityhook v OFT* [2007] CAT 18, at [270]; *General Motors* (fn201), paragraphs 77 to 78 and *T-Mobile Netherlands* (fn153), 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.²⁰³

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.²⁰⁴
- 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'.²⁰⁵ 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.²⁰⁶ 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.²⁰⁷
- 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

²⁰³ See for example also Joined Cases 96/82 etc. *NV IAZ International Belgium v Commission* [1983] ECR 3369, paragraphs 22 to 25; *CRAM* (fn200), paragraphs 25 to 26 and Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969, paragraph 110.

²⁰⁴ *Agreements and Concerted Practices Guidance* (fn162), paragraphs 2.2 to 2.3.

²⁰⁵ *Agreements and Concerted Practices Guidance* (fn162), paragraph 3.10.

²⁰⁶ *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.

²⁰⁷ 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.²⁰⁸

- 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.²⁰⁹
- 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'.²¹⁰ 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,²¹¹ 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.²¹² An agreement may restrict price competition even if it does not eliminate it entirely.²¹³
- 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.²¹⁴

²⁰⁸ 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).

²⁰⁹ 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).

²¹⁰ *Agreements and Concerted Practices Guidance* (fn162), 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.

²¹¹ *Cast Iron and Steel Rolls* (fn207).

²¹² See for example Case 8/72 *Vereeniging van Cementhandelaren v Commission* [1972] ECR 877.

²¹³ *Agreements and Concerted Practices Guidance* (fn162), paragraph 3.6.

²¹⁴ *Tate & Lyle* (fn174), paragraphs 58 and 60. See also *Rhône-Poulenc* (fn174), paragraphs 122 to 123.

- V.51 In its *Bananas* decision,²¹⁵ 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'.²¹⁶ 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]'.²¹⁷
- 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.²¹⁸ 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'.²¹⁹
- 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.²²⁰

²¹⁵ *Bananas* (fn186).

²¹⁶ *Bananas* (fn186), paragraph 292.

²¹⁷ *Bananas* (fn186), 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.

²¹⁸ 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.

²¹⁹ 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'.

²²⁰ For example *Hercules Chemicals* (fn151), 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'.²²¹

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'.²²² The European Courts have also held that this is equally the case where the conduct in question concerns a concerted practice.²²³

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.²²⁴ Under Article 101, concerted practices are therefore prohibited regardless of their effect, when they have an anti-competitive object.²²⁵

thresholds, customer identities). See also *SPO* (fn134), 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).

²²¹ *T-Mobile Netherlands* (fn153), paragraphs 40 to 41.

²²² 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* (fn151), paragraph 99; *Cimenteries* (fn172), paragraphs 837, 1531 and 2589; *BIDS and Barry Brothers* (fn199), paragraph 16 and *T-Mobile Netherlands* (fn153), paragraph 29).

²²³ *Anic* (fn151), paragraph 123 and *T-Mobile Netherlands* (fn153), paragraphs 28 to 30.

²²⁴ *Anic* (fn151), paragraph 124; *Hüls* (fn168), 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* (fn174)). See also *Apex Asphalt* (fn152), at [206(xi)] (followed in *Makers* (fn152), at [103(xi)]).

²²⁵ *Anic* (fn151), paragraphs 122 to 123. See also *Apex Asphalt* (fn152), at [206(xii)] (followed in *Makers* (fn152), 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.²²⁶

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.²²⁷ 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.²²⁸

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'.²²⁹

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*.²³⁰ 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 undertakings²³¹ or exceed 15 per cent on any of the relevant

²²⁶ *Argos/Littlewoods* (fn153), at [357].

²²⁷ *T-Mobile Netherlands* (fn153), paragraph 31.

²²⁸ *T-Mobile Netherlands* (fn153), paragraph 43.

²²⁹ Case 5-69 *Franz Völk v S.P.R.L. Ets J. Vervaecke* [1969] ECR 295 ('*Völk*'), paragraph 5/7.

²³⁰ 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.

²³¹ 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.²³²

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.²³³

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'.²³⁴

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'.²³⁵

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.²³⁶

²³² Non-competing undertakings are undertakings which are neither actual nor potential competitors on any of the markets concerned.

²³³ *Notice on Agreements of Minor Importance* (fn230), paragraph 11.

²³⁴ *North Midland Construction v OFT* [2011] CAT 14 ('*North Midland Construction*'), at [53].

²³⁵ C-266/11 *Expedia Inc. v Autorité de la concurrence and Others*, judgment of 13 December 2012 (not yet published), paragraph 37.

²³⁶ *North Midland Construction* (fn234), at [56] to [61]. See also *Apex Asphalt* (fn152), 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.²³⁷
- 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.²³⁸
- 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.²³⁹

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.²⁴⁰ 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,²⁴¹ 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

²³⁷ 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.

²³⁸ *Agreements and Concerted Practices Guidance* (fn162), paragraph 2.25.

²³⁹ *Aberdeen Journals v OFT* [2003] CAT 11 ('*Aberdeen Journals*'), at [459] to [460].

²⁴⁰ *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* (fn153), at [164].

²⁴¹ 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'.²⁴²

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 [...]'.²⁴³

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

²⁴² *Napp* (fn240), at [110].

²⁴³ *Tesco Stores* (fn182), 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'.²⁴⁴

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'.²⁴⁵

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.²⁴⁶

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]'.²⁴⁷

²⁴⁴ *Aalborg Portland* (fn187), 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.

²⁴⁵ *Joined Cases T-109/02 etc. Bolloré and Others v Commission* [2007] ECR II-947 ('*Bolloré*'), paragraphs 257 to 258, citing *Volkswagen* (fn134), paragraph 43 and *Limburgse Vinyl* (fn151), 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.

²⁴⁶ *FMC Foret* (fn245), paragraph 122, citing *Cimenteries* (fn172), paragraph 1838.

²⁴⁷ *JJB/Allsports* (fn153), at [206].

V.77 Most recently, in *Quarmby*,²⁴⁸ 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)'.²⁴⁹

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'²⁵⁰
- Reliance may be placed, as against an undertaking, on statements made by other incriminated undertakings, including leniency applicants.²⁵¹ 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

²⁴⁸ *Quarmby* (fn243).

²⁴⁹ *Quarmby* (fn243), at [86]. See also *Durkan* (fn10), at [95] to [96].

²⁵⁰ *FMC Foret* (fn245), 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* (fn245), 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.

²⁵¹ *FMC Foret* (fn245), paragraph 116 (citing *Limburgse Vinyl* (fn151), paragraph 512).

adequate proof as against those other undertakings unless it is supported by other evidence²⁵²

- 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.²⁵³

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,²⁵⁴ 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'.²⁵⁵

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

²⁵² *FMC Foret* (fn245), 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* (fn245), paragraph 167; *Lafarge* (fn250), 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* (fn245), paragraphs 183 to 186 and 232 and *Bolloré* (fn245), paragraphs 168 to 184).

²⁵³ *FMC Foret* (fn245), paragraph 120 (referring to *JFE Engineering* (fn252), 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]).

²⁵⁴ See, for example, *JFE Engineering* (fn252), 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* (fn250), paragraphs 87 to 89.

²⁵⁵ *Mitsubishi* (fn250), paragraphs 81 and 85 (citing Case T-50/00 *Dalmine v Commission* [2004] ECR II2395, 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'.²⁵⁶

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'.²⁵⁷

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.²⁵⁸

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

²⁵⁶ *Claymore Dairies and Express Dairies v OFT* [2003] CAT 18, at [8].

²⁵⁷ See *JFE Engineering* (fn252), paragraph 211.

²⁵⁸ *Quarmby* (fn243), at [114]. However, as referred to in fn253, 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* (fn253), 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 Commission²⁵⁹ 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 101.²⁶⁰

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

²⁵⁹ 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.

²⁶⁰ 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.²⁶¹ This is a jurisdictional requirement demarcating the boundary between EU competition law and national competition law.²⁶²

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.²⁶³

- 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.²⁶⁴ 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.²⁶⁵ The guidance also provides that agreements that are local in nature are in themselves not capable of appreciably affecting trade between Member States.²⁶⁶
- 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 States²⁶⁷ 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.²⁶⁸ On the basis of the foregoing, the OFT considers that it has no grounds for action under Article 101.²⁶⁹

²⁶¹ *Völk* (fn229), paragraph 5/7 and Case 22-71 *Béguélin Import v SAGL Import Export* [1971] ECR 949, paragraph 16.

²⁶² Case 22/78 *Hugin Kassaregister and Hugin Cash Registers v Commission* [1979] ECR 1869, paragraph 17. See also *Aberdeen Journals* (fn239), at [459].

²⁶³ *Völk* (fn229), paragraph 5/7 and Case T-77/92 *Parker Pen v Commission* [1944] ECR II-549, paragraph 40. .

²⁶⁴ 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*').

²⁶⁵ *Notice on the Effect on Trade* (fn264), paragraphs 89 and 92.

²⁶⁶ *Notice on the Effect on Trade* (fn264), paragraph 91.

²⁶⁷ See paragraphs II.22 and II.35 (Company Profiles).

²⁶⁸ See paragraph IV.42 (Industry Overview and the Relevant Market).

²⁶⁹ 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 Northside and H & L Garages have 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 the Conduct Section,²⁷⁰ but the OFT's conclusions are reached in light of the totality of the evidence.
- VI.2 On or before 23 March 2007, [H & L Manager A] and [Northside Manager A], contacted each other and entered into an agreement and/or concerted practice. The agreement and/or concerted practice was that each of the Parties would contact the other before providing a quotation to a customer based in the other's area and that they would coordinate their responses in order to allow the local Party to win the sale. If they were unable to contact one another, they were to incorporate sufficiently high margins in their quotations to give the local Party an opportunity to win the sale.²⁷¹
- VI.3 There is also evidence that the Parties subsequently contacted each other on a number of occasions to discuss specific customers under the terms of the agreement and/or concerted practice.²⁷² The OFT notes, however, that the Parties were able to behave on the market in accordance with the objective of the arrangement (that is, allowing the local Party to win the sale) without necessarily contacting the other Party on each occasion.
- VI.4 The OFT considers that this constituted an agreement and/or concerted practice which had the object of preventing, restricting or distorting

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

²⁷⁰ References to the 'Conduct Section' in relation to this Infringement are to paragraphs VI.1 to VI.55.

²⁷¹ See paragraphs VI.5 to VI.11.

²⁷² See paragraphs VI.27 to VI.47.

competition for the sale of vans to customers based in the Parties' areas.²⁷³

B. Evidence of the Infringement

Email exchanges on 23 March 2007

VI.5 The fact that the Parties reached an agreement and/or concerted practice on or before 23 March 2007²⁷⁴ is documented by emails from [Northside Manager A] to Northside staff (copied to [Mercedes Sales Manager A] and forwarded by [Mercedes Sales Manager A] to [H & L Manager A]), from [H & L Manager A] to H & L staff (copied [Northside Manager A]), and by bilateral emails between [Northside Manager A] and [H & L Manager A], all sent on 23 March 2007.

VI.6 On 23 March 2007 at 08:13 am, [Northside Manager A] sent the following email to Northside's Van Sales Executives, copied to [Northside Director], with the subject '*H and L Garages*', informing them of the agreement with H & L. The email was also copied to [Mercedes Sales Manager A].

'Morning All

'Just to let you know that [H & L Manager A] helped us out of a hole yesterday and let us have a vehicle that cost him a deal. As a result of [H & L Manager A]'s helpful attitude I have agreed with him that if we get any enquiries from there area we will let [H & L Manager A] know before we quote and they will do the same for us. If in the event that we cannot get hold of [H & L Manager A] I suggest that if we must give a

²⁷³ See paragraphs VI.6 and VI.16.

²⁷⁴ The precise date when [H & L Manager A] and [Northside Manager A] first contacted each other is not clear from the available evidence. The OFT notes, however, that the email exchanges described in paragraphs VI.5 to VI.11 indicate that, by 23 March 2007, [H & L Manager A] and [Northside Manager A] had entered into the agreement and/or concerted practice. [Northside Manager A] explained that he sent the email of 08:13 am because, although he had already previously entered into an agreement with [H & L Manager A], some of his sales staff were not adhering to that arrangement. In addition he noted that, because [H & L Manager A] had just '*helped him out*', he would insist to his sales executives that Northside adhere to the agreement. See [C] Witness Statement, OFT Document Reference 3868, paragraph 40. For the avoidance of doubt, the OFT is not making a finding that the Infringement started before 23 March 2007, but it cannot exclude the possibility that the agreement and/or concerted practice was entered into before then and merely reinforced on 23 March 2007.

figure that we leave a minimum margin of £[C] in a Vito and £[C] in a Sprinter.²⁷⁵

'Please ensure you adhere to this with immediate effect.

'[Mercedes Sales Manager A], can you forward this to [H & L Manager A] as I cannot find his e mail address'.²⁷⁶

VI.7 [Northside Manager A]'s email was forwarded by [Mercedes Sales Manager A] to [H & L Manager A] two minutes later.²⁷⁷

VI.8 Less than an hour after [Northside Manager A]'s email, [Northside Sales Executive A] replied to him: 'Great idea [Northside Manager A], but what about York? [former Northside Sales Executive] is now at H&L York and will happily sell into our area for £[C] profit!!! Might be an idea to have a word'.²⁷⁸ [Northside Manager A] forwarded [Northside Sales Executive A]'s email to [H & L Manager A] at 10:02 am.²⁷⁹ At 11:16 am, [H & L Manager A] replied to [Northside Manager A] as follows:

'We have to start some where [former Northside Sales Executive] is on holiday and only just started with us, but if we do it right i assure you i will play the game he hasnt done any deal at £[C] as he dosnt have that authority but i would be keen to have a name and share the info with you to keep the slate clean, i cannot back date quotes we have already

²⁷⁵ The OFT notes the witness evidence to the effect that these were high margins for these vans. See for example [C] Witness Statement, OFT Document Reference 3824, paragraph 5. [Ciceley Manager A] noted that £[C] would represent the typical margin on a '*competitive deal*' ([C] First Witness Statement, OFT Document Reference 1403, paragraph 14). [H & L Manager A] stated that, at the time when the anti-competitive arrangement was concluded, H & L was aiming for at least £[C] of profit on the sale of a Vito van ([C] Witness Statement, OFT Document Reference 2773, paragraph 10). However, [Mercedes Sales Manager A] has stated that '[t]he composite national average margin for sales at this time of a van to a retail customer was £[C]' (see [C] Witness Statement, OFT Document Reference 5041, paragraph 34). [H & L Sales Executive B] stated '[H & L Manager A] set margins for us of around £[C] for a Vito' but he could go down to £[C] if he wanted ([C] Witness Statement, OFT Document Reference 3593, paragraph 4).

²⁷⁶ Email from [Northside Manager A] to Northside Van Sales Executives cc: [Mercedes Sales Manager A] and [Northside Director] dated 23 March 2007 re H and L Garages, OFT Document Reference 0624.

²⁷⁷ Email (forward) from [Mercedes Sales Manager A] to [H & L Manager A] dated 23 March 2007 re H and L Garages, OFT Document Reference 1272.

²⁷⁸ Email exchange between [Northside Sales Executive A], [Northside Manager A] and [H & L Manager A] dated 23 March 2007 re H and L Garages, OFT Document Reference 1548.

²⁷⁹ Email exchange between [Northside Sales Executive A], [Northside Manager A] and [H & L Manager A] dated 23 March 2007 re H and L Garages, OFT Document Reference 1548.

done [...] Its got to be the right way forward I wont let you down, dont let your guys blow it [...]' .²⁸⁰

VI.9 [Northside Manager A] stated that, through the email of 11:16 am, [H & L Manager A] 'also assured me that he would 'play the game'. I took this to mean that [H & L Manager A] was quite keen to stick to what we had agreed'.²⁸¹

VI.10 On the same day at 12:38 pm, [H & L Manager A] sent an email to all of his van executives, to [H & L Manager C and copied to [Northside Manager A]. The email was headed 'Truce with Northside' and read:

'I Have Agreed with [Northside Manager A] we will stay out of each others area in an attempt to prevent cut throat deals and a better working relationship to make this work we all need to play ball so please play your part, any one with issues in adjoining areas please talk to me this includes Northside quoting in our area. This is an opportunity to improve profit and Your Income'.²⁸²

VI.11 The OFT considers that these email exchanges evidence the reciprocal nature of the arrangement. Both Parties confirmed their intention to implement and adhere to the agreement and/or concerted practice.

Witness evidence

VI.12 The finding that the Parties reached an anti-competitive agreement and/or concerted practice is further supported by witness evidence.

VI.13 [H & L Manager A] stated that he and [Northside Manager A] '[...] said that we should work together rather than fight against each other. We agreed that we would contact each other if asked to quote for a customer from the other area. We would then have a discussion as to how to deal with the situation with the aim that the customer bought from his or her local dealer'.²⁸³

VI.14 He also stated:

²⁸⁰ Email exchange between [Northside Sales Executive A], [Northside Manager A] and [H & L Manager A] dated 23 March 2007 re H and L Garages, OFT Document Reference 1548.

²⁸¹ [C] Witness Statement, OFT Document Reference 3868, paragraphs 44 to 45.

²⁸² Email from [H & L Manager A] to various inc. [H & L Manager C] cc: [Northside Manager A] dated 23 March 2007 re Truce with Northside, OFT Document Reference 1258.

²⁸³ [C] Witness Statement, OFT Document Reference 2773, paragraph 5.

'[a]s far as I was concerned, this agreement was not set in stone but it was a courteous arrangement between us in that we were both effectively working for Mercedes and we should stop driving each other to give vans away at ridiculous prices. It was just a case of working sensibly together which would be more beneficial for both parties'.²⁸⁴

VI.15 [H & L Manager A] also clarified the aim of the arrangement by saying that '[a]s far as I was concerned, it was an honourable agreement to stop dealers stealing from each other's area without letting each other know what was going on. The general aim was for both dealers to stay out of each other's areas'.²⁸⁵

VI.16 The terms of the agreement and/or concerted practice are also clearly described in [Northside Manager A]'s witness evidence:

'I recall that when I met with [H & L Manager A], we came to an agreement that we would not quote in each other's areas with ridiculously low margins. We agreed that if approached by a customer in H&L's area of influence I would contact [H & L Manager A] before we quoted to ask him what he wanted us to quote, to ensure that their quote would be lower. Similarly [H & L Manager A] would contact me for a figure if H&L was approached by a customer in Northside's area of influence. If for some reason we could not contact each other in time, we agreed to leave a specific minimum margin in the deal. The purpose of doing this was to ensure that if the customer was in our area of influence our quote would be lower and we would win the business and

²⁸⁴ [C] Witness Statement, OFT Document Reference 2773, paragraph 6.

²⁸⁵ [C] Witness Statement, OFT Document Reference 2773, paragraph 7. The OFT notes that [H & L Manager A]'s intention to reach an agreement with other Mercedes dealers in relation to out-of-area sales can also be inferred from an email he sent to [Ciceley Manager B] on 12 March 2007, just a few days before the email exchanges described in paragraphs VI.5 to VI.11. Responding privately to [Ciceley Manager B]'s email to four dealers and [Mercedes Sales Manager A], which asked whether there were any issues for discussion in the Van Council Meeting of 21 March 2007, [H & L Manager A] stated: '[n]othing much to report: Have they considered Direct invoicing on fleet deals to stop everyone under cutting each other and then just paying an handling charge? It would be nice to see an agreement to stop cost price deals getting done by other dealers in our own post codes (yeh wishful thinking!!) theres a betterway of saying this but i aint putting it in writing'. See email from [H & L Manager A] to [Ciceley Manager B] dated 13 March 2007 re Van Council Meeting 21sr March 2007, OFT Document Reference 1259. [H & L Manager A] admitted sending this email to [Ciceley Manager B] but he said that the timing of the agreement with [Northside Manager A] was coincidental (see [C] Witness Statement, OFT Document Reference 2773, paragraphs 21 to 22).

if it was in H&L's area of influence their quote would be lower and they would win the business'.²⁸⁶

VI.17 [Northside Manager A] also stated:

'My view is that if we'd quoted with the agreed margin and the customer still wanted to buy from us for whatever reason, we'd stuck to the agreement and could justify it to H&L'.²⁸⁷

Other contemporaneous documentary evidence - H & L reminder to staff April 2007

VI.18 The agreement and/or concerted practice between Northside and H & L is also documented in slides from a presentation by [H & L Manager A] at a H & L van sales meeting which took place on 4 April 2007, less than two weeks after the email exchanges described in paragraphs VI.5 to VI.11. One of the slides, under the heading 'Competition', stated that H & L had 'recently made a truce with Northside to stay out of each others areas'.²⁸⁸

[Directors]' awareness of the agreement and/or concerted practice

VI.19 [H & L Director] stated in interview that he was not aware of the arrangement.²⁸⁹ In his written representations in response to the Statement, [H & L Director] also denies that he was present at the van sales meeting on 4 April 2007 (referred to in paragraph VI.18) and that he was emailed a copy of the slides from [H & L Manager A]'s presentation referred to in paragraph VI.18.²⁹⁰

VI.20 The OFT notes, however, the e-mail, under the heading 'Sales Meeting' sent by [H & L Manager A] on 2 April 2007 to his sales staff stating '[j]ust a quick reminder we have a Meeting with [H & L Director] on

²⁸⁶ [C] Witness Statement, OFT Document Reference 3868, paragraph 30. See also paragraphs 25 to 36 of the same document.

²⁸⁷ [C] Witness Statement, OFT Document Reference 3868, paragraph 31.

²⁸⁸ H & L Van Sales Meeting April 4th 2007 Presentation Slides, OFT Document Reference 2608, page 7.

²⁸⁹ [C] Interview Transcript, OFT Document Reference 4372, page 51. [H & L Director] repeated this assertion in his written representations in response to the Statement (Written Representations of [H & L Director], OFT Document Reference 4815).

²⁹⁰ Written Representations of [H & L Director], OFT Document Reference 4815. [H & L Director] also questions the reliability of [H & L Manager A]'s witness evidence given that the circumstances under which [H & L Manager A] left H & L.

Wednesday [4 April 2007] [...]'.²⁹¹ [H & L Manager A] also stated in his witness evidence that '[H & L Director] was also present at a van sales meeting a couple of weeks later when the subject came up [...]'.²⁹²

VI.21 This contemporaneous documentary evidence and supporting witness evidence suggests that [H & L Director] attended the van sales meeting on 4 April 2007 and that he was aware of the agreement and/or concerted practice between [H & L Manager A] and [Northside Manager A].

VI.22 [Northside Director] was copied into the email referred to in paragraph VI.6 and confirmed to the OFT that he was aware of an agreement between Northside and H & L.²⁹³

Continuation of anti-competitive arrangement when [H & L Manager B] took over from [H & L Manager A] in June 2008

VI.23 [H & L Manager A] said that the arrangement with Northside lasted at least until he ceased working for H & L in May 2008, although he believed that the arrangement may have continued after his departure.²⁹⁴

VI.24 [H & L Manager B], who replaced [H & L Manager A] from June 2008, stated that he was not aware of the arrangement between [Northside Manager A] and [H & L Manager A]²⁹⁵ and that he 'knew that we couldn't enter into agreements such as that'.²⁹⁶ However, on the basis of the witness evidence and contemporaneous documentary evidence set out below, the OFT considers that, contrary to his statements, [H & L Manager B] was in fact aware of the anti-competitive arrangement between Northside and H & L and that, under his management, H & L's van sales team continued to behave in accordance with the agreement and/or concerted practice previously implemented.

VI.25 [Northside Manager A] stated:

²⁹¹ Email from [H & L Manager A] to various dated 2 April 2007 re Sales Meeting, OFT Document Reference 2607.

²⁹² [C] Witness Statement, OFT Document Reference 2773, paragraphs 12, 15 and 16.

²⁹³ [C] Witness Statement, OFT Document Reference 3869, paragraph 25.

²⁹⁴ [C] Witness Statement, OFT Document Reference 2773, paragraphs 8 and 18.

²⁹⁵ [C] Interview Transcript, OFT Document Reference 4374, pages 71 to 75.

²⁹⁶ [C] Interview Transcript, OFT Document Reference 4374, page 135. [H & L Manager B] stated that he regarded it as surprising that sales executives would enter into arrangements with other dealers (see pages 131 to 135).

'I have had similar conversations to those I had with [H & L Manager A] with [H & L Manager B], [H & L Manager A]'s replacement at H&L. When [H & L Manager B] joined H&L, [Mercedes Sales Manager A] was keen that I meet with him. Shortly after he started we had a discussion regarding the agreement we had with H&L and he said that 'It makes sense to me, I'll speak to you.' And he did – he made as much effort as we did to try and make the agreement work, particularly with customers in the Doncaster area. We have had discussions along the lines of 'this guy has come in how do you want us to handle it' and then we will have agreed that we will have a certain margin in the deal'.²⁹⁷

VI.26 [H & L Sales Executive B] stated that he was unaware of any agreement reached between [H & L Manager A] and [Northside Manager A] but believed 'that there was an unwritten rule or gentleman's agreement between [H & L Manager B] and [Northside Manager A] that Northside would stay out of H & L's area and vice versa. This is because of the conversations I overheard in the Hull office between [H & L Manager B] and [Northside Manager A] and the obvious sharing of information between the two sales managers'.²⁹⁸

Manifestations of the agreement and/or concerted practice

VI.27 The following paragraphs describe contemporaneous documentary evidence, as well as witness evidence, that representatives of Northside and H & L contacted each other on a number of occasions during the Relevant Period. The OFT considers that these contacts were manifestations of the agreement and/or concerted practice.²⁹⁹

VI.28 The OFT notes, however, that the Parties were able to behave on the market in accordance with the objective of the arrangement (that is, to allow the local Party to win local sales) without necessarily contacting

²⁹⁷ [C] Witness Statement, OFT Document Reference 3868, paragraph 49.

²⁹⁸ [C] Witness Statement, OFT Document Reference 3593, paragraph 8. The OFT notes that [H & L Sales Executive B] worked for H & L from around April 2007 until August 2010 and may not have been employed by the company at the time of the van sales meeting on 4 April 2007, when sales staff were reminded of the arrangement with Northside.

²⁹⁹ [H & L Manager A] stated that he was in contact with [Northside Manager A] '*about five or six times*' between reaching the agreement with [Northside Manager A] and his departure from H & L in May 2008, and that they '*may have discussed prices on a couple of occasions*' (see [C] Witness Statement, OFT Document Reference 2773, paragraph 8). [Northside Manager A] stated that '*the agreement may have given rise to a couple of phone calls a month between H&L and Northside*' (see [C] Witness Statement, OFT Document Reference 3868, paragraph 32).

the other on each occasion, as exemplified by the incidents described in paragraphs VI.48 to VI.51.

[Northside Manager A] and [H & L Manager A] – November 2007

VI.29 On 6 November 2007, [H & L Manager A] emailed [Northside Manager A] attaching an email from [H & L Sales Executive A]. [H & L Sales Executive A] had complained to [H & L Manager A] that a H & L customer cancelled an order because Northside was cheaper, remarking 'so much for keeping out of area'.³⁰⁰

VI.30 The OFT considers that [H & L Sales Executive A]'s complaint was a reference to the agreement and/or concerted practice between the Parties and shows that at H & L there was an expectation that Northside would not undercut H & L in quotations to customers in H & L's area.³⁰¹

Customer [B Webster & Sons] – June 2008

VI.31 In June 2008, Northside emailed H & L details regarding the quotation it was providing to a customer based in H & L's area (including the sales price).³⁰² [Northside Director] stated that [H & L Director] had only asked for the specification of the vehicle, not for details of its pricing, but that he mistakenly included the full quotation prices in the deal sheet sent to H & L.³⁰³

VI.32 [H & L Director] forwarded Northside's e-mail to [H & L Manager B] the same day stating '[o]bviously we haven't seen this – [a H & L Sales Executive] will not be aware of the potential issues re competition law so please be careful'.³⁰⁴

³⁰⁰ Email exchange between [H & L Sales Executive A], [H & L Manager A] and [Northside Manager A] dated 6 November 2007 re Vito, OFT Document Reference 1550.

³⁰¹ [C] Witness Statement, OFT Document Reference 2773, paragraph 17 and [C] Witness Statement, OFT Document Reference 3868, paragraph 46.

³⁰² Email (forward) from [Northside Director] to [H & L Director] dated 4 June 2008 re Deal Sheet, OFT Document Reference 1544.

³⁰³ [C] Witness Statement, OFT Document Reference 3869, paragraphs 27 to 28; [C] Interview Transcript, OFT Document Reference 0944, page 14; [C] Interview Transcript, OFT Document Reference 4372, pages 70 to 71 and [C] Interview Transcript, OFT Document Reference 4374, pages 43 to 45.

³⁰⁴ Email exchange between various inc. [Northside Director], [H & L Director] and [H & L Manager B] dated 4 June 2008 re Deal Sheet, OFT Document Reference 1296. This evidence demonstrates that [H & L Director] was aware of the possible competition law implications of the disclosure of pricing information between Northside and H & L.

VI.33 Following H & L's contact, [Northside Manager A] reprimanded [Northside Sales Executive B], the Northside sales executive responsible for the quotation, for having undercut H & L by over £[C]. [Northside Manager A] sent the following memorandum to [Northside Sales Executive B], dated 6 June 2008:

'Following our conversation yesterday I would like to clarify the following points:

'1. With reference to the quote you did for [a contact at B Webster & Sons], you undercut H and L's quote by over £[C] that was completely unnecessary. We have an agreement that we do not undercut local dealers although I do accept that you thought he was in Doncaster. Even if you were to go in cheaper why not undercut them by £[C]?'.³⁰⁵

VI.34 The OFT considers that this memorandum is consistent with the agreement and/or concerted practice between the Parties. [Northside Manager A]'s explanation of the incident corroborates the OFT's finding:

'[B Webster & Sons] was a customer in H&L's area and we had provided a quote to [a contact at B Webster & Sons] which undercut H&L's quote. H&L brought to my attention the fact that we had undercut them. My salesman's excuse was that he did not know it was in H&L's area as he thought they were in Doncaster. However Northside is internally fairly strict about its own salesmen fighting against each other so each salesman has their own postcoded areas to target. Even if [B Webster & Sons] was based in Doncaster this would not have been in [Northside Sales Executive B]'s post code area [...] When I referred to local dealers in the memorandum, I meant H&L, Mertrux and Ciceley'.³⁰⁶

VI.35 The customer ultimately placed its order with H & L.³⁰⁷

Customer [individual/sole trader] – February 2009

VI.36 [Northside Manager A] stated:

'[individual/sole trader] is a customer based in Selby, which is within H & L's area of influence. He requested a quotation on a vehicle from our

³⁰⁵ Memorandum from [Northside Manager A] to [Northside Sales Executive B] cc: [Northside Sales Executive A] dated 6 June 2008 re Conversation Yesterday, OFT Document Reference 0625.

³⁰⁶ [C] Witness Statement, OFT Document Reference 3868, paragraph 48.

³⁰⁷ [C] Interview Transcript, OFT Document Reference 4374, page 45.

Doncaster dealership and he was provided with a verbal quote by [Northside Sales Executive C] on 24 February 2009.

'Following this, I received a telephone call from [H & L Manager B] and he stated 'Why have you quoted [individual/sole trader]? You're supposed to let me know and by the sound of it you've undercut us'. I believe I would have told [H & L Manager B] that I would sort it out'.³⁰⁸

VI.37 Following [H & L Manager B]'s call, [Northside Manager A] asked [Northside Sales Executive C] to inform the customer that an error had been made in the quotation – that air conditioning had not been included – which increased the price by £[C].³⁰⁹

VI.38 [Northside Sales Executive C] stated that [Northside Manager A] called him 'and said 'Look, you're quoting somebody in H&L's area. Increase the price' or words to that effect. [Northside Manager A] basically told me to put the price up so H&L got the deal'.³¹⁰ In the lost sales report, the entry referring to the quotation dated 24 February 2009 in respect of customer [individual/sole trader], lists the reason for losing the business as 'Passed to H and L'.³¹¹

VI.39 [H & L Manager B] said he recalled speaking to someone at Northside about [individual/sole trader]. He stated that the purpose of the call was to confirm that Northside's quotation was for a vehicle with the same specification and that he did not discuss prices. Ultimately, the customer placed its order with H & L.³¹² The OFT considers, however, that [H & L Manager B]'s account is not plausible in view of the witness and contemporaneous documentary evidence regarding this incident set out in paragraphs VI.36 to VI.38, and that this incident was a manifestation of the anti-competitive agreement and/or concerted practice. Moreover even if [H & L Manager B]'s version of events is accurate, the OFT does not consider that it would have been appropriate for competitors to contact one another to discuss quotes to potential customers.

³⁰⁸ [C] Witness Statement, OFT Document Reference 3868, paragraphs 50 to 51.

³⁰⁹ [C] Witness Statement, OFT Document Reference 3868, paragraph 52 and [C] Witness Statement, OFT Document Reference 3824, paragraph 16.

³¹⁰ [C] Witness Statement, OFT Document Reference 3824, paragraphs 13 to 18.

³¹¹ Northside Lost Sales Summary 2009, OFT Document Reference 0586, page 3.

³¹² [C] Interview Transcript, OFT Document Reference 4374, pages 125 to 128.

Customer Onyx Conversions – April 2009

VI.40 [Northside Manager A] informed the OFT that [H & L Manager B] contacted him to ask what approach H & L should take to a request for a quotation from Onyx Conversions, a customer based in Northside's area. [Northside Manager A] stated:

'I have also had contact with [H & L Manager B] over a customer called Onyx conversions. [C]. They then went to H&L to get a quote. [H & L Manager B] phoned me and said 'I've had Onyx Conversions in Barnsley seeking a quote. I know they're in your area, what do you want me to do.' I said 'You can have them [C]'.³¹³

VI.41 [H & L Manager B] told the OFT that the reason for his contact with [Northside Manager A] was to understand why Northside's quotation was £[C] cheaper than H & L's.³¹⁴ However, his explanation is contradicted by [Northside Manager A]'s witness statement. In the context of the arrangement discussed in the email exchanges of 23 March 2007 (see paragraphs VI.5 to VI.11) and given the more specific account provided by [Northside Manager A], the OFT considers that [Northside Manager A]'s version of events is more plausible and that H & L sought Northside's consent before providing a quotation.³¹⁵

VI.42 The OFT considers that the fact that H & L sought Northside's consent before quoting means that this contact was another manifestation of the agreement and/or concerted practice. Moreover, even if [H & L Manager B]'s version of events is accurate, the OFT does not consider that it would have been appropriate for competitors to contact one another to discuss quotes to potential customers.

³¹³ [C] Witness Statement, OFT Document Reference 3868, paragraph 54. Ultimately, the customer purchased the vehicle from H & L ([C] Interview Transcript, OFT Document Reference 4374, page 84).

³¹⁴ [C] Interview Transcript, OFT Document Reference 4374, pages 84 to 86. See also email from [a H & L employee] to [H & L Manager B] dated 2 April 2009 re Deals Deals Deals* Reply needed today please, OFT Document Reference 0341, stating that 'price is an issue on the Sprinters, they [Onyx Conversion] don't see why we are £[C] more than Northside for exactly the same vehicle'.

³¹⁵ 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 Manager B]'s interview, was still in business). As such, the incentives of its witnesses to cooperate with the OFT's investigation are limited.

Customer [individual/sole trader] – December 2009

- VI.43 In December 2009, H & L disclosed to Northside details of a quotation provided to customer [individual/sole trader], who was also seeking a quotation from Northside. [individual/sole trader] had historically been an H & L customer.
- VI.44 [Northside Manager A] stated that, having received an enquiry from the customer, he 'may have contacted [H & L Manager B] and said '[w]e've had this guy [individual/sole trader] in, what do you want me to do with him?'''.³¹⁶
- VI.45 On 17 December 2009, [H & L Manager B] emailed [Northside Manager A] in relation to [individual/sole trader]. In the email, [H & L Manager B] explained that [C] and said that if Northside got an order from the customer it was 'fair play'.³¹⁷
- VI.46 According to [H & L Manager B], the purpose of this email was to warn [Northside Manager A] [C].³¹⁸ However, in his email to [Northside Manager A], [H & L Manager B] also provided details of the price quoted to the customer: '[a H & L Sales Executive] quoted him [C]% off list keeping the full Dealer margin and £[C] profit'.³¹⁹ Indeed, [H & L Manager B] admitted, when asked about the inclusion of margin and profit information in the email, that he 'just thought it'd be a quick way to get to the, so quoting similar sort of prices, and then [Northside Sales Executive C] would, if he gets the deal he gets the deal'.³²⁰
- VI.47 The OFT considers that this contact was another manifestation of the agreement and/or concerted practice.

Northside's failure to provide a competitive quotation to customers in H & L's area

- VI.48 There is evidence that Northside failed to provide a competitive quotation to customers in H & L's area during the Relevant Period.

³¹⁶ [C] Witness Statement, OFT Document Reference 3868, paragraph 53.

³¹⁷ Email from [H & L Manager B] to [Northside Manager A] dated 17 December 2009 re [individual/sole trader], OFT Document Reference 1546.

³¹⁸ [C] Interview Transcript, OFT Document Reference 4374, pages 60 to 62.

³¹⁹ Email from [H & L Manager B] to [Northside Manager A] dated 17 December 2009 re [individual/sole trader], OFT Document Reference 1546.

³²⁰ [C] Interview Transcript, OFT Document Reference 4374, page 69.

VI.49 In November 2009, Northside provided a quotation including a high margin to customer Manteam Building Contractors Limited because it was based in H & L's area. The lost sales report indicated that the reason for losing the business was that it had been 'passed to H & L'.³²¹ [Northside Sales Executive C], the sales executive involved in this quotation, stated:

'This customer had phoned round for the best price and to check that the local dealer had given them a good deal. The customer was based in H&L's area of influence so I just left him alone. I quoted a high margin over the phone and never heard from him again. This was in line with instructions from my sales manager'.³²²

VI.50 In November 2009, Northside provided a quotation including a high margin to customer Bogus Brothers Band because it was based in H & L's area. In [Northside Sales Executive C]'s notebook (the sales executive involved in this quotation) it is indicated that the reason for losing the business was that it had been 'passed to H & L'.³²³ With regard to this quotation, he stated:

'This customer was phoning round dealers, and he phoned to ask me for two different prices, for two different vehicles. The customer was based in Selby which is not far from our Doncaster depot but in H & L's area so I quoted a good profit in it and left it alone'.³²⁴

VI.51 The OFT considers that these incidents are evidence that the Parties were able to behave on the market in accordance with the objective of the arrangement (that is, to allow the local Party to win the sale) without necessarily contacting the other Party on each occasion. [Northside Sales Executive C]'s witness evidence, quoted in paragraphs VI.49 and VI.50, shows that he was able to provide a quotation which was sufficiently high so as to result, in effect, in the deal being 'passed to H & L', without necessarily discussing the quotation with H & L.

³²¹ Northside Lost Sales Summary 2009, OFT Document Reference 0586, quotation dated 16 November 2009 in respect of customer Manteam. See also [C] Witness Statement, OFT Document Reference 3824, paragraphs 19 to 21.

³²² [C] Witness Statement, OFT Document Reference 3824, paragraph 20.

³²³ Extract from notebook of [Northside Sales Executive C], OFT Document Reference 0630, page 2 and [C] Witness Statement, OFT Document Reference 3824, paragraphs 8 to 12.

³²⁴ [C] Witness Statement, OFT Document Reference 3824, paragraph 9.

C. Mercedes' alleged participation

- VI.52 In the Statement, the OFT provisionally concluded that Mercedes was also a party to Infringement 1 in view of the role played by [Mercedes Sales Manager A] in the formation of the agreement and/or concerted practice.
- VI.53 Mercedes submitted written representations on the Statement,³²⁵ supported by additional evidence.³²⁶ The additional evidence consists of a witness statement from [Mercedes Sales Manager A], which includes the context in which [Northside Manager A]'s email of 23 March 2007 was received by [Mercedes Sales Manager A] and subsequently forwarded by her to [H & L Manager A].
- VI.54 Following a careful review of Mercedes' written representations and all the evidence, the OFT has 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.

D. Evidence relating to the termination of the Infringement

- VI.55 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

E. Introduction

- VI.56 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

³²⁵ Mercedes' Written Representations 3 September 2012, OFT Document Reference 5040.

³²⁶ [C] Witness Statement, OFT Document Reference 5041.

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.

VI.57 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.

F. Agreement and/or concerted practice

VI.58 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.

VI.59 The agreement and/or concerted practice was that Northside and H & L would each contact the other before providing a quotation to a customer based in the other's area and that they would coordinate their responses in order to allow the local Party to win the sale. If they were unable to contact one another, they were to incorporate sufficiently high margins in their quotations to give the local Party an opportunity to win the sale.

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

VI.60 The OFT notes that including higher margins in quotations to out-of-area customers may constitute a legitimate unilateral commercial decision by dealers. Indeed, the case law recognises the right of economic operators to adapt intelligently to market conditions.³²⁷ However, the law prohibits contacts which have the object or effect of influencing the conduct of an actual or potential competitor in the market or of disclosing an intended course of conduct, where such contact has the object or effect of distorting conditions of competition on the market. As is evident from the Conduct Section, this Infringement did not concern unilateral behaviour but rather conduct which was the result of discussions between the Parties on or before 23 March 2007, regarding their

³²⁷ See paragraph V.21 (Legal Background).

respective commercial strategies and by subsequent contacts between them in respect of that matter.³²⁸

VI.61 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:

- In an email sent on 23 March 2007 to Northside Van Sales Executives, copied to [Mercedes Sales Manager A] with the request to forward the email to [H & L Manager A],³²⁹ [Northside Manager A] confirmed the arrangement that he had reached with [H & L Manager A] around that time that they would inform one another if they received a request for a quotation from a customer based in the other's area and that, if asked to quote, Northside should include certain minimum margins in its quotation.³³⁰ In his witness statement, [Northside Manager A] confirmed the agreement he had reached with [H & L Manager A].³³¹ The email was subsequently forwarded by [Mercedes Sales Manager A] to [H & L Manager A].³³²
- The fact that there was a concurrence of wills between Northside and H & L is corroborated by emails sent later the same day by [H & L Manager A] in reply to [Northside Manager A]³³³ and to his van sales executives, the latter headed: 'Truce with Northside'.³³⁴ [H & L Manager A] confirmed that he had agreed with [Northside Manager A] that they would contact each other if asked to provide a quotation for a customer based in the other dealer's area, with the objective that each dealer would sell to customers based in its own area.³³⁵
- [Northside Director] confirmed that he was aware of the arrangement between Northside and H & L. Contemporaneous

³²⁸ See paragraph V.21 (Legal Background).

³²⁹ See paragraph VI.6.

³³⁰ See paragraph VI.6.

³³¹ See paragraph VI.16.

³³² See paragraph VI.7.

³³³ See paragraph VI.8.

³³⁴ See paragraph VI.10.

³³⁵ See paragraph VI.13.

documentary evidence and witness evidence suggests that [H & L Director] was also aware of this arrangement.³³⁶

- There were a number of subsequent contacts between Northside and H & L regarding specific customers, which the OFT considers were manifestations of the anti-competitive arrangement between them.³³⁷ In addition, there is evidence that Northside behaved in the market in accordance with the objective of the arrangement (that is, to allow the local Party to win the sale) absent further specific contact with H & L.³³⁸

VI.62 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.³³⁹ Indeed, for there to be an agreement under the Chapter I prohibition, it is sufficient that the parties have expressed their joint intention to conduct themselves on the market in a specific way.³⁴⁰ In this case, both Northside and H & L expressed their intention to contact one another before providing quotations to customers based in the other's area, to coordinate their responses in order to allow the local Party to win the sale and to incorporate sufficiently high margins in their quotations to give the local Party an opportunity to win the sale in the event that they were unable to contact one another.³⁴¹

VI.63 The OFT has also concluded that the Parties' conduct constituted at the very least a concerted practice. The OFT notes that reciprocal contacts are established where one competitor discloses its intentions or future conduct in the market and the other requests or at least accepts the information.³⁴² By communicating their commitment to coordinate their responses to requests for quotation and, if unable to contact one another, to quote in such a way as to give the local Party an opportunity to win the sale, Northside and H & L gave each other assurance that they would be competing less vigorously for customers in each other's

³³⁶ See paragraph VI.22. As is evident from the Conduct Section, the van sales managers of both Parties were directly involved in conclusion of the agreement and/or concerted practice.

³³⁷ See paragraphs VI.27 to VI.47.

³³⁸ See paragraphs VI.48 to VI.51.

³³⁹ See paragraph V.16 (Legal Background).

³⁴⁰ See paragraph V.18 (Legal Background).

³⁴¹ See paragraphs VI.5 to VI.26.

³⁴² See paragraph V.23 (Legal Background).

areas.³⁴³ 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.64 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 (that is, to allow the local Party to win the sale) without necessarily contacting the other Party about specific customers.³⁴⁴ 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.³⁴⁵
- VI.65 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.³⁴⁶ 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.
- VI.66 The OFT has received no evidence that, following the email of 23 March 2007, 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 Relevant Period as a result of the agreement and/or concerted practice.³⁴⁷
- VI.67 Throughout the Relevant Period, Northside and H & L were actively involved in the sale of vans 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

³⁴³ See paragraph V.22 (Legal Background).

³⁴⁴ See paragraphs VI.48 to VI.51.

³⁴⁵ See paragraphs V.10 to V.15 (Legal Background).

³⁴⁶ See paragraph V.25 (Legal Background).

³⁴⁷ See paragraphs VI.27 to VI.47.

was a causal connection between the concerted practice and their conduct on that market.³⁴⁸

VI.68 There is some evidence to suggest that the Parties did not consider that the anti-competitive arrangement would apply to, for example, national account customers³⁴⁹ or larger orders.³⁵⁰ The OFT considers that the existence of an anti-competitive agreement and/or concerted practice is not precluded by the possibility that the Parties may occasionally have competed for particular customers in each other's areas (and, as such, might not have adhered to the agreement and/or concerted practice for each and every sale). That the arrangement may also not have applied to all categories of customer and/or sale similarly does not preclude the finding that an anti-competitive agreement and/or concerted practice existed.³⁵¹

G. Anti-competitive object

VI.69 The Parties colluded in order to allow the local dealer to win sales to local customers without the need for competing on price with the other Party. 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.³⁵²

VI.70 Some of the evidence indicates that the agreement and/or concerted practice may have extended to the specific margin to be added to quotations to customers in each other's areas (see [Northside Manager A]'s email, quoted in paragraph VI.6, which was forwarded to [H & L Manager A]). However, in any event the OFT considers that the evidence examined in paragraphs VI.48 to VI.51 indicates that the Parties had a shared understanding of the level of margins which each Party would need to quote to customers outside their respective areas in order to give the local Party an opportunity to win the business. The OFT notes that Mercedes stated that its policy was to quote the same price to dealers which are known to be quoting to the same customer,³⁵³ so that the principal cost associated with the sale of vans (the cost of buying the vehicle from Mercedes) was the same for both of the Parties. The

³⁴⁸ See paragraph V.27 (Legal Background).

³⁴⁹ [C] Witness Statement, OFT Document Reference 2773, paragraph 8.

³⁵⁰ [C] Witness Statement, OFT Document Reference 3868, paragraph 38.

³⁵¹ See paragraph V.32 (Legal Background).

³⁵² See paragraphs V.41 to V.44 (Legal Background).

³⁵³ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 7.4.

OFT therefore considers that, in the commercial context in which the Infringement took place, the agreement and/or concerted practice to include sufficiently high margins to enable the local Party to win the sale constituted a sufficiently clear focal point for collusion between the Parties.³⁵⁴

VI.71 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.³⁵⁵

H. Appreciability

VI.72 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.73 An agreement and/or concerted practice will not meet the appreciability criterion if it has only an insignificant impact on the market.³⁵⁶

VI.74 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*.³⁵⁷ 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.75 The OFT has had regard to the approach to the appreciability test in object cases set out by the CAT in *North Midland Construction*.³⁵⁸ The OFT considers that the nature of the agreement and/or concerted

³⁵⁴ See paragraph V.44 (Legal Background).

³⁵⁵ See paragraph V.58 (Legal Background).

³⁵⁶ See paragraphs V.59 and V.62 (Legal Background).

³⁵⁷ See paragraphs V.60 to V.61 (Legal Background).

³⁵⁸ See paragraphs V.62 and V.64 (Legal Background).

practice is such that, given the circumstances of this case, its potential impact on competition is inherently likely to be appreciable.

- VI.76 The agreement and/or concerted practice concerned the sale of vans distributed by a major manufacturer, Mercedes, which holds a sizeable share of the total sale of vans in the UK.³⁵⁹ Moreover, to the extent (if 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.³⁶⁰
- VI.77 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.³⁶¹
- VI.78 In addition, the Parties could potentially be giving customers the impression that there was competition between them by providing quotations which contained higher but credible margins, which could dissuade customers from seeking further alternative quotations.
- VI.79 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 the Parties are active (such as trucks).
- VI.80 Finally, the OFT notes that there could potentially be an impact on the wider vans market to the extent that the Infringement enabled Mercedes dealers to raise prices, thereby reducing the competitive constraint on dealers of other brands.
- VI.81 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.

³⁵⁹ See paragraph IV.6 (Industry Overview and the Relevant Market).

³⁶⁰ 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/) (OJ 1982 L 232/1) ('*Stichting Sigarettenindustrie Agreements*'), paragraph 100(d).

³⁶¹ See paragraph IV.12 (Industry Overview and the Relevant Market).

I. Effect on trade within the UK

VI.82 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.83 The agreement and/or concerted practice appreciably restricted competition,³⁶² 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 to have affected trade within the UK, or a part of it, or to have been capable of doing so.

VI.84 The requirement of an effect on trade within the UK is therefore satisfied in respect of the Infringement.

J. Conclusion on the application of the Chapter I prohibition

VI.85 In view of the foregoing, the OFT has decided that the Parties infringed the Chapter I prohibition by participating between 23 March 2007 and 26 January 2010 in an agreement and/or concerted practice with the object of preventing, restricting or distorting competition for the sale of vans to customers based in the Parties' areas.

³⁶² See paragraphs VI.72 to VI.81.

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 23 March 2007 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 vans 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.³⁶³

- 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.³⁶⁴ Rather, the OFT makes its assessment on a case-by-case basis³⁶⁵ 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.³⁶⁶
- 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.³⁶⁷

³⁶³ *2012 Penalty Guidance* (fn2), paragraph 1.11.

³⁶⁴ For example, *Eden Brown and Others v OFT* [2011] CAT 8 ('*Eden Brown*'), at [78].

³⁶⁵ 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* (fn364), 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'.

³⁶⁶ *Argos/Littlewoods* (fn153), at [168] and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, at [102].

³⁶⁷ *Musique Diffusion française* (fn183), 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.³⁶⁸ 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'³⁶⁹ 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.³⁷⁰ 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'.³⁷¹

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,

³⁶⁸ Section 36(8) of the Act.

³⁶⁹ '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.

³⁷⁰ Section 36(3) of the Act.

³⁷¹ *Napp* (fn240), 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)³⁷².

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 Turnover³⁷³ 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

³⁷² Case C-280/08 P *Deutsche Telekom v Commission* (OJ 2010 C 346/4), paragraph 124.

³⁷³ As defined in paragraph IV.42 (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.³⁷⁴

Relevant Turnover

VII.20 As set out in paragraph IV.32 (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 2010.³⁷⁵

VII.22 As outlined in paragraph II.16 (Company Profiles), H & L Garages is currently in liquidation. Although requests were made,³⁷⁶ neither its administrators, liquidators nor its parent company, Dusted Powder Limited, were able to assist in the provision of the required Relevant Turnover information.³⁷⁷

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 Mercedes³⁷⁸ as a proxy for its relevant turnover.³⁷⁹ The OFT notes that the wholesale price figures provided by Mercedes do not include any margin that H & L Garages may have made

³⁷⁴ *2004 Penalty Guidance* (fn2), paragraphs 2.3 to 2.5.

³⁷⁵ As set out in paragraph VI.55 (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.

³⁷⁶ 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.

³⁷⁷ 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.

³⁷⁸ Email from Mercedes to OFT dated 12 October 2012 re MBUK Turnover calculation for H & L, OFT Document Reference 5006.

³⁷⁹ 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.³⁸⁰
- 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.³⁸¹ 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.³⁸²
- VII.26 In assessing the seriousness of the Infringement, as indicated in paragraph IV.37 (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.³⁸³ 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

³⁸⁰ *2004 Penalty Guidance* (fn2), paragraph 2.8.

³⁸¹ *2004 Penalty Guidance* (fn2), paragraph 2.4.

³⁸² *2004 Penalty Guidance* (fn2), paragraph 2.5.

³⁸³ *2004 Penalty Guidance* (fn2), paragraphs 2.3 and 2.4, and paragraph VI.71 (The Conduct of the Parties and Legal Assessment).

this respect.³⁸⁴

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.³⁸⁵ 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'.³⁸⁶

VII.30 The OFT has concluded that the Infringement lasted between 23 March 2007 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 three 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 vehicles

³⁸⁴ *Francis/Barrett and Others v Office of Fair Trading*, [2011] CAT 9, at [88].

³⁸⁵ *2004 Penalty Guidance* (fn2), paragraph 2.10.

³⁸⁶ *2004 Penalty Guidance* (fn2), paragraph 2.10.

distribution 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.³⁸⁷ 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 's 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.³⁸⁸
- 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.³⁸⁹

³⁸⁷ *2004 Penalty Guidance* (fn2), paragraph 2.11.

³⁸⁸ Neither H & L Garages nor Dusted Powder Limited submitted accounts to Companies House for 2011 (see fn29 and fn34). 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.

³⁸⁹ *Kier* (fn365), 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 tax³⁹⁰ and relatively high proportions of the other financial indicators of H & L's financial position such as net assets and net assets plus dividends.³⁹¹ 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 4 imposing financial penalties on H & L Garages for its involvement in Infringement 4. 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'.³⁹²

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

³⁹⁰ The penalty amounted to around 390 per cent of H & L's average profits after tax.

³⁹¹ The penalty amounted to around 170 per cent of H & L's net assets and 125 per cent of its net assets plus dividends.

³⁹² *Kier* (fn365), 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 4. 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.³⁹³

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.³⁹⁴ These factors are also not exhaustive.

VII.45 The OFT considered increasing the penalty at Step 4 for the involvement of [H & L Manager A] and [H & L Manager B] in this Infringement but has concluded, in light of [H & L Manager A]'s and [H & L Manager B]'s responsibilities, that an uplift for senior management involvement at Step 4 was not required for their involvement in the particular circumstances of this case.

VII.46 The OFT considers that an uplift of five per cent is appropriate for the

³⁹³ 2004 Penalty Guidance (fn2), paragraph 2.14.

³⁹⁴ 2004 Penalty Guidance (fn2), paragraph 2.16 and footnote 19.

involvement of a director of the company, [H & L Director], in this Infringement, as outlined in paragraphs VI.19 to VI.20 (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').³⁹⁵ 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.³⁹⁶ 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.

G. Payment of penalty

VII.51 The penalty for H & L Garages' involvement in Infringement 1 is £149,221.³⁹⁷

³⁹⁵ Section 36(8) of the Act and the 2000 Order, as amended by the 2004 Order.

³⁹⁶ Section 38(9) of the Act and *2004 Penalty Guidance* (fn2), paragraph 2.20.

³⁹⁷ H & L Garages' penalty for Infringement 4, pursuant to Decision 4, is £92,855. The sum of the penalties for its involvement in Infringement 1 and Infringement 4 is £242,076.

Penalty component	Description		Penalty after each step
Step 1	Relevant turnover of [C]		[C]
	Starting point	6%	
Step 2	Duration multiplier	x3	[C]
Step 3	Proportionality/deterrence	-75%	[C]
	Overall proportionality	-30%	[C]
Step 4	Aggravating factors	+5%	[C]
	Mitigating factors	-5%	
Step 5	Statutory maximum	N/A	[C]
Penalty for Infringement 1			£149,221

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 2013.³⁹⁸ 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.³⁹⁹



Ali Nikpay
Senior Director, Cartels and Criminal Enforcement Group
27 March 2013

Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London
EC4Y 8JX
Tel: 020 7211 8000

³⁹⁸ Details on how to pay are set out in the letter accompanying this Decision.

³⁹⁹ Section 37 of the Act.