

**Competition Act 1998**

**Decision of the Office of Fair Trading**

**CA98/03/2013**

**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 Names have been replaced by a general descriptor of the individual's role.

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**COMPETITION ACT 1998**

**Distribution of Mercedes-Benz commercial vehicles (vans)**

**Decision No. CA98/03/2013**

**Ciceley Commercials Limited and Ciceley Limited**

**Road Range Limited**

**27 March 2013**

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## **SECTION I INTRODUCTION**

### **A. The purpose of this document**

I.1 By this decision (the 'Decision'), the Office of Fair Trading ('OFT') has concluded that:

- Ciceley Commercials Limited and its ultimate parent Ciceley Limited (together, 'Ciceley') and
- Road Range Limited ('Road Range')

(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 1 February 2008 and 26 January 2010 in an agreement and/or concerted practice which had the object of preventing, restricting or distorting competition for the sale of vans to customers based in the Parties' areas (the 'Infringement' or 'Infringement 3').

I.4 By this Decision, the OFT is imposing financial penalties under section 36 of the Act.

## 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',<sup>1</sup> 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',<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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<sup>1</sup> The Relevant Period corresponds to the duration of Infringement 3, that is, between 1 February 2008 and 26 January 2010; see paragraph VI.38 (The Conduct of the Parties and Legal Assessment).

<sup>2</sup> See paragraph V.9 (Legal Background).

<sup>3</sup> Case C-170/83 *Hydrotherm Gerätebau GmbH v Compact del Dott Ing Mario Andreoli & C Sas* [1984] ECR 2999, paragraph 11.

<sup>4</sup> 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.<sup>5</sup>
- 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.<sup>6</sup>
- 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.<sup>7</sup>
- 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.<sup>8</sup> Such indicia have been found to include a parent being active on the same or adjacent markets to its subsidiary,<sup>9</sup> direct instructions being given by a parent to a subsidiary<sup>10</sup> or the two entities having shared directors.<sup>11</sup>
- II.9 Financial penalties that are imposed both on a parent and a subsidiary may be imposed jointly and severally.<sup>12</sup>
- II.10 Where a legal entity which was responsible for an infringement of the Chapter I prohibition is later sold and transferred to a third party, liability for the infringement generally remains with its former parent company

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<sup>5</sup> *Alliance One* (fn4), paragraph 45.

<sup>6</sup> Case C-97/08P *Akzo Nobel v Commission* [2009] ECR I-8237 ('*Akzo Nobel*'), paragraphs 60 to 61 and *Alliance One* (fn4), paragraphs 46 and 47.

<sup>7</sup> *Akzo Nobel* (fn6), paragraphs 73 to 74.

<sup>8</sup> *Durkan Holdings Limited and Others v OFT* [2011] CAT 6 ('*Durkan*'), at [22]; *Akzo Nobel* (fn6), paragraph 62 and Case C-286/98 P *Stora Kopparbergs Bergslags AB v Commission* [2000] ECR I-9925, paragraphs 28 to 29.

<sup>9</sup> Opinion of Advocate-General Mischo in Case C-286/98 P *Stora Kopparbergs Bergslags AB v Commission* [2000] ECR I-9925, paragraph 49.

<sup>10</sup> Case T-48/69 *Imperial Chemicals Industries v Commission* [1972] ECR I-619 ('*Dyestuffs*'), paragraphs 132 to 133.

<sup>11</sup> *Sepia Logistics Limited v Office of Fair Trading* [2007] CAT 13, at [77] to [80].

<sup>12</sup> 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.

provided that the latter still exists. A new parent company usually will not be liable for infringements which pre-date its acquisition, unless, for example, that new parent company forms part of the original undertaking responsible for the infringement.<sup>13</sup>

- II.11 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 whether liability for the Infringement should be shared with another legal entity on the basis that both form part of the same undertaking.
- II.12 Where a Party which was directly involved in the Infringement was owned by natural persons during the Relevant Period, liability for the Infringement will not extend to those individuals.
- II.13 The OFT considers that both Parties constitute undertakings for the purposes of the Chapter I prohibition.
- II.14 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.<sup>14</sup>

### **C. Ciceley Commercials Limited and Ciceley Limited**

- II.15 The OFT considers that Ciceley Commercials Limited was directly involved in the Infringement. However given that its parent company, Ciceley Limited, can be presumed to have exercised decisive influence over its subsidiary, this Decision is also addressed to Ciceley Limited. The OFT considers that Ciceley Limited forms part of the same undertaking and therefore is jointly and severally liable with Ciceley Commercials Limited for the Infringement.

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<sup>13</sup> Case C-279/98 P *Cascades v Commission* [2000] ECR I-9693, paragraphs 73 to 82.

<sup>14</sup> See paragraphs II.28 to II.29 and II.40.

II.16 The registered company details of Ciceley Limited<sup>15</sup> and Ciceley Commercials Limited,<sup>16</sup> and their corporate relationship, are outlined below:



### **Ciceley Commercials Limited**

II.17 Ciceley Commercials Limited's principal activity is that of a dealer of Mercedes-Benz commercial vehicles.<sup>17</sup> It operates from regional offices based in Bolton, Blackburn, Carlisle and Dumfries.<sup>18</sup>

II.18 Ciceley Commercials Limited is a wholly-owned subsidiary of Ciceley Limited.<sup>19</sup> In its Directors' Report and Financial Statements for the year ended 31 December 2011, it states that '[t]he company is controlled by

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<sup>15</sup> Ciceley Limited Financial Analysis Made Easy ('FAME') Report containing financial accounts to year-end 31 December 2011 ('Ciceley Limited FAME Report 2011'), OFT Document Reference 5045. FAME is a database for company information. The company number was recorded at Companies House ([www.companieshouse.gov.uk](http://www.companieshouse.gov.uk)) as at 26 March 2013.

<sup>16</sup> Ciceley Commercials Limited FAME Report containing financial accounts to year-end 31 December 2011 ('Ciceley Commercials Limited FAME Report 2011'), OFT Document Reference 5046. The company number was recorded at Companies House ([www.companieshouse.gov.uk](http://www.companieshouse.gov.uk)) as at 26 March 2013.

<sup>17</sup> Ciceley Commercials Limited Directors' Report and Financial Statements for the year ended 31 December 2011 ('Ciceley Commercials Limited Report 2011'), OFT Document Reference 5047, page 3.

<sup>18</sup> Ciceley Commercials Limited's website, OFT Document Reference 4045, pages 3 to 6.

<sup>19</sup> Ciceley Limited Directors' Report and Financial Statements for the year ended 31 December 2011 ('Ciceley Limited Report 2011'), OFT Document Reference 5048, page 23.

Ciceley Limited [...] In the opinion of the directors this is the company's ultimate parent company'.<sup>20</sup>

### **Ciceley Limited**

- II.19 The principal activities of the group (Ciceley Limited and its subsidiaries) comprise that of dealers in Mercedes-Benz commercial vehicles, the sale of used vehicles, the sale of accessories and the supply of commercial vehicles on contract hire, including as an approved repairer of Mercedes-Benz passenger vehicles.<sup>21</sup>
- II.20 During the Relevant Period, the shares in Ciceley Limited were held by the following individuals:<sup>22</sup>

<b>Name</b>	<b>Shares held</b>
Russell Ian Morgan	6,000 ordinary shares
Brian Morgan	5,500 ordinary shares
Dorothy Morgan	4,700 ordinary shares
Sally Ann Morgan	3,800 ordinary shares

- II.21 Ciceley Limited has two other wholly-owned subsidiaries, Ciceley Contracts Limited and Ciceley Continental Limited, the latter of which is not currently trading.<sup>23</sup> Previously, it also wholly-owned Ciceley Chrysler Limited, which ceased trading in 2009.<sup>24</sup> The OFT has no evidence that any of these subsidiaries were directly involved in the Infringement.

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<sup>20</sup> Ciceley Commercials Limited Report 2011, OFT Document Reference 5047, page 19.

<sup>21</sup> Ciceley Limited Report 2011, OFT Document Reference 5048, page 3.

<sup>22</sup> Ciceley Limited Annual Return June 2010, OFT Document Reference 4078; Ciceley Limited Annual Return 2009, OFT Document Reference 4077 and Ciceley Limited Annual Return 2008, OFT Document Reference 4076.

<sup>23</sup> Ciceley Limited Report 2011, OFT Document Reference 5048, page 23.

<sup>24</sup> Ciceley Limited Directors' Report and Financial Statements for the year ended 31 December 2009 ('Ciceley Limited Report 2009'), OFT Document Reference 3948, page 4.

## Turnover and profit/loss of Ciceley Commercials Limited

II.22 Ciceley Commercials Limited's turnover and profits for the financial years 2008 to 2011 were as follows:

Year ending	31/12/11 <sup>25</sup>	31/12/10 <sup>26</sup>	31/12/09 <sup>27</sup>	31/12/08 <sup>28</sup>
Turnover	£54,249,218	£57,042,987	£59,603,716	£47,462,215
Gross profit (loss)	£7,676,633	£8,131,522	£8,130,795	£8,573,640
Operating profit (loss)	£397,893	£565,428	£86,520	£225,166
Profit (loss) on ordinary activities before taxation	£303,316	£425,977	(£196,267)	(£34,483)
Profit (loss) for the financial year	£216,294	£292,518	(£160,716)	£20,175

<sup>25</sup> Ciceley Commercials Limited Report 2011, OFT Document Reference 5047, page 8. Page 10 states that '*turnover comprises revenue recognised by the company in respect of goods and services supplied during the year, exclusive of Value Added Tax and trade discounts*'.

<sup>26</sup> Ciceley Commercials Limited Abbreviated Accounts for the year ended 31 December 2010, OFT Document Reference 3991, page 7.

<sup>27</sup> Ciceley Commercials Limited Abbreviated Accounts for the year ended 31 December 2009, OFT Document Reference 3945, page 7.

<sup>28</sup> Ciceley Commercials Limited Directors' Report and Financial Statements for the year ended 31 December 2008, OFT Document Reference 3946, page 8.

## Consolidated turnover and profit/loss of Ciceley Limited

II.23 Ciceley Limited's consolidated turnover and profits for the financial years 2008 to 2011 were as follows:

Year ending	31/12/11 <sup>29</sup>	31/12/10 <sup>30</sup>	31/12/09 <sup>31</sup>	31/12/08 <sup>32</sup>
Turnover	£57,694,248	£60,956,994	£65,210,721	£57,289,103
Gross profit (loss)	£7,455,895	£7,602,742	£6,231,426	£8,050,633
Operating profit (loss)	(£273,597)	£658,159	(£873,667)	(£64,968)
Profit (loss) on ordinary activities before taxation	(£336,519)	£541,315	£301,134	£6,565
Profit (loss) for the financial year	(£484,863)	£485,257	£415,872	(£458,802)

II.24 According to its published accounts, Ciceley Limited's entire turnover during the Relevant Period arose within the UK.<sup>33</sup>

<sup>29</sup> Ciceley Limited Report 2011, OFT Document Reference 5048, page 9. Page 13 states that '[t]urnover comprises revenue recognised by the company in respect of goods and services supplied during the year, exclusive of Value Added Tax and trade discounts'.

<sup>30</sup> Ciceley Limited Directors' Report and Financial Statements for the year ended 31 December 2010 ('Ciceley Limited Report 2010'), OFT Document Reference 3992, page 8

<sup>31</sup> Ciceley Limited Report 2010, OFT Document Reference 3992, page 8 as the figures for 2009 were restated to correct the fact that certain interest charges between group companies had not been eliminated in the group financial statements. In addition, the overall turnover figure is broken down into £63,631,880 for continuing operations and £1,578,841 for discontinued operations.

<sup>32</sup> Ciceley Limited Directors' Report and Financial Statements for the year ended 31 December 2008 ('Ciceley Limited Report 2008'), OFT Document Reference 3949, page 8.

<sup>33</sup> Ciceley Limited Report 2010, OFT Document Reference 3992, page 14; Ciceley Limited Report 2009, OFT Document Reference 3948, page 14 and Ciceley Limited Report 2008, OFT Document Reference 3949, page 14.

## Appointments

The directors of Ciceley Commercials Limited during the Relevant Period were as follows: <sup>34</sup> <b>Name</b>	<b>Appointment</b>	<b>Position in January 2010</b>
Russell Morgan	02/01/2008	In post
Brian Morgan	Prior to 2008	In post
Colin Briggs	02/01/2008	In post
Michael Lewis	01/01/2009	In post
Simon Wilson	02/01/2008	In post

II.25 The directors of Ciceley Limited during the Relevant Period were as follows:<sup>35</sup>

<b>Name</b>	<b>Appointment</b>	<b>Position in January 2010</b>
Russell Morgan	Prior to 2008	In post
Brian Morgan	Prior to 2008	In post
Colin Briggs	Prior to 2008	In post
Simon Wilson	Prior to 2008	In post
Dorothy Morgan	Prior to 2008	In post
Sally Ann Morgan	Prior to 2008	In post

## Liability

II.26 Ciceley did not apply for leniency.

II.27 The OFT considers that Ciceley Limited, as 100 per cent owner of Ciceley Commercials Limited, can be presumed to have exercised decisive influence over Ciceley Commercials 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 there were four directors in common between Ciceley Limited and Ciceley Commercials Limited throughout the Relevant Period.

II.28 The OFT, therefore, considers that Ciceley Limited and Ciceley Commercials Limited form part of the same economic entity. As such,

<sup>34</sup> Ciceley Commercials Limited FAME Report 2011, OFT Document Reference 5046.

<sup>35</sup> Ciceley Limited FAME Report 2011, OFT Document Reference 5045.

they are jointly and severally liable for Ciceley Commercials Limited's participation in the Infringement and for the payment of the financial penalty being imposed by the OFT for this Infringement. This Decision is therefore addressed to Ciceley Commercials Limited and Ciceley Limited.

**D. Road Range Limited**

II.29 The OFT considers that Road Range was directly involved in and is therefore liable for the Infringement.

II.30 The registered company details of Road Range are outlined below:<sup>36</sup>

**Road Range Limited**  
151 Rathbone Road  
Wavetree  
Liverpool  
Merseyside L13 1BA  
  
Company number 05336774

II.31 Road Range's principal activity is the operation of the Mercedes-Benz commercial vehicle franchise in Merseyside and North Wales.<sup>37</sup> It has premises in Liverpool, Bootle, Deeside and Llandudno.<sup>38</sup>

II.32 Road Range has one wholly-owned subsidiary, Premier Vehicle Rental Limited,<sup>39</sup> but the OFT does not have any evidence of the latter's involvement in the Infringement.

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<sup>36</sup> Road Range Limited FAME Report containing financial accounts to year-end 31 December 2011 ('Road Range Limited FAME Report 2011'), OFT Document Reference 5057. The company number was recorded at Companies House ([www.companieshouse.gov.uk](http://www.companieshouse.gov.uk)) as at 26 March 2013.

<sup>37</sup> Road Range Limited Directors' Report and Financial Statements for the year ended 31 December 2011 ('Road Range Limited Report 2011'), OFT Document Reference 5058, page 1.

<sup>38</sup> Road Range Limited website, OFT Document Reference 4048, page 1.

<sup>39</sup> Road Range Limited Report 2011, OFT Document Reference 5058, page 13.

II.33 During the Relevant Period, the shares in Road Range were held as follows:<sup>40</sup>

Name	Shares held
Robert Smith	700 ordinary shares
Christopher Smith	150 ordinary shares
Belinda Diamond	150 ordinary shares
Robert Smith Group Directors Pension Scheme	1,000,000 redeemable preference shares <sup>41</sup>

II.34 The entirety of the shares in Road Range was transferred to Robert Smith Group Limited<sup>42</sup> on 22 December 2010 (after the end of the Relevant Period). Road Range is now a wholly-owned subsidiary of Robert Smith Group Limited.<sup>43</sup>

II.35 Throughout the Relevant Period, the directors of Road Range considered that Robert Talbot Arthur Smith (an individual) was the controlling party of the company.<sup>44</sup>

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<sup>40</sup> Road Range Limited Annual Return 2011, OFT Document Reference 3958; Road Range Limited Annual Return 2010, OFT Document Reference 4083; Road Range Limited Annual Return 2009, OFT Document Reference 4082 and Road Range Limited Annual Return 2008, OFT Document Reference 4081.

<sup>41</sup> With regard to the redeemable preference shares, Road Range Limited Report and Accounts 31 December 2009 ('Road Range Limited Report 2009'), OFT Document Reference 3955, page 13 states that '*[t]he arrears of dividend on the cumulative preference shares are £463,590 (2008 £360,140). The cumulative preference shares and arrears of dividend may be redeemed at any time [...]*'.

<sup>42</sup> Robert Smith Group Limited is a private limited company, company number 05400888, In addition, the entire share capital of Robert Smith Group Limited as at 2010 was held by Robert Talbot Arthur Smith (an individual). See Robert Smith Group Annual Return 2010, OFT Document Reference 3960. See also Road Range FAME Report 2010, OFT Document Reference 4018.

<sup>43</sup> Road Range Limited Annual Return 2011, OFT Document Reference 3958, page 7.

<sup>44</sup> Road Range Limited Report 2009, OFT Document Reference 3955, page 15.

## Turnover and profit/loss of Road Range Limited

II.36 Road Range's turnover and profits for the financial years 2008 to 2011 were as follows:

Year ending	31/12/2011 <sup>45</sup>	31/12/10 <sup>46</sup>	31/12/09 <sup>47</sup>	31/12/08 <sup>48</sup>
Turnover	£27,893,757	£29,305,565	£26,679,157	£34,806,663
Gross profit (loss)	£4,469,825	£4,528,468	£4,243,725	£5,281,896
Operating profit (loss)	£102,964 <sup>49</sup>	£438,627	£162,861 <sup>50</sup>	£274,795 <sup>51</sup>
Profit (loss) on ordinary activities before taxation	£47,605	£340,311	£93,196	£105,803
Profit (loss) for the financial year	£29,311	£220,911	£42,023	£57,257

II.37 According to its published reports, Road Range's turnover is fully attributable to the operation of the Mercedes-Benz commercial vehicle franchise in Merseyside and North Wales and as such its entire turnover during the Relevant Period arose within the UK.<sup>52</sup>

### Liability

II.38 Road Range did not apply for leniency.

II.39 The OFT considers that Road Range is liable for the Infringement and that it is liable for payment of the financial penalty being imposed by the

<sup>45</sup> Road Range Limited Report 2011, OFT Document Reference 5058, page 5. Page 7 states that '[t]urnover comprises revenue recognised by the company in respect of goods and services supplied during the year, exclusive of Value Added Tax and trade discounts'.

<sup>46</sup> Road Range Limited Directors' Report and Financial Statements for year ended 31 December 2010 ('Road Range Limited Report 2010'), OFT Document Reference 3998, page 5.

<sup>47</sup> Road Range Limited Report 2009, OFT Document Reference 3955, page 4.

<sup>48</sup> Road Range Limited Report and Accounts to 31 December 2008 ('Road Range Limited Report 2008'), OFT Document Reference 3956, page 4.

<sup>49</sup> This includes profit from an exceptional item for 2011 generated by the disposal of land and buildings amounting to £66,437, See Road Range Limited Report 2011, OFT Document Reference 5058, page 5.

<sup>50</sup> This includes profit from an exceptional item for 2009 generated by the disposal of plant and machinery amounting to £6,373. See Road Range Limited Report 2009, OFT Document Reference 3955, page 4.

<sup>51</sup> This includes profit from an exceptional item for 2008 generated by the disposal of plant and machinery amounting to £5,408. See Road Range Limited Report 2009, OFT Document Reference 3955, page 4.

<sup>52</sup> Road Range Limited Report 2010, OFT Document Reference 3998, pages 1 and 8; Road Range Limited Report 2009, OFT Document Reference 3955, page 8 and Road Range Limited Report 2008, OFT Document Reference 3956, page 8.

OFT for its participation in the Infringement. This Decision is therefore addressed to Road Range.

## SECTION III THE OFT'S INVESTIGATION

### A. Introduction

III.1 This Decision follows the Statement of Objections ('Statement') issued on 28 June 2012. The Statement was addressed to Ciceley and Road Range along with:

- Enza Motors Limited, its parent Enza Holdings Limited and its ultimate parent Enza Group Limited (together, 'Enza')
- H & L Garages Limited and its parent Dusted Powder Limited (together, 'H & L')
- Mercedes-Benz UK Limited, its parent Daimler UK Limited and its ultimate parent Daimler AG (together, 'Mercedes') and
- Northside Truck & Van Limited and its ultimate parent S.A.H. Limited (together, 'Northside')

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')<sup>53</sup>
- 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')

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<sup>53</sup> Note however that in its decision in relation to Infringement 1 the OFT concluded that the totality of the evidence does not support a finding that Mercedes participated in Infringement 1. The OFT therefore considers that it has no grounds for action against Mercedes in relation to Infringement 1.

- 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
- 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 3 ('Decision 3').

III.4 Although the Statement was also addressed to Enza, H & L, Mercedes and Northside, they were not parties to Infringement 3 and this Decision, therefore, is not addressed to them. This Decision, however, refers to evidence obtained from all Parties to the OFT's Investigation in relation to their products and businesses as well as background on the industry. In addition, where appropriate this Decision refers to evidence in relation to the other infringements set out in the Statement.

## **B. Infringements 2 (vans) and 5 (trucks)**

III.5 In addition to this Infringement, Ciceley was involved in Infringement 2 and both Ciceley and Road Range were also involved in Infringement 5.

III.6 The OFT has concluded that Ciceley, along with Northside, infringed the Chapter I prohibition by entering into an agreement and/or concerted practice which had the object of preventing, restricting or distorting competition for the sale of vans between 15 January 2008 and 26 January 2010. The OFT's decision concerning that infringement ('Decision 2') is being issued at the same time as this Decision.

III.7 In addition, the OFT has concluded that Ciceley, Enza, Mercedes and Road Range 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 8 December 2009 and 26 January 2010. The OFT's decision concerning that infringement ('Decision 5') is being issued at the same time as this Decision.

III.8 The financial penalties imposed by the OFT for Ciceley's involvement in Infringement 2 and Infringement 5 and for Road Range's involvement in Infringement 5 have been taken into consideration in setting the

penalties for their involvement in Infringement 3.<sup>54</sup>

### **C. The types of evidence in this case**

#### **Section 28 inspections of premises in January 2010**

- III.9 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.10 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').<sup>55</sup>
- III.11 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.<sup>56</sup>
- III.12 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.

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<sup>54</sup> See paragraphs VII.32 to VII.33 (The OFT's Action).

<sup>55</sup> 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.

<sup>56</sup> Signed Northside immunity agreement, OFT Document Reference 4580.

## **Section 28 inspections of premises in September 2010**

- III.13 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.14 These inspections also included the use of forensic IT and the OFT's seize and sift powers referred to in paragraph III.10 above. The inspections provided the OFT with further evidence of suspected breaches of competition law.

### **Interviews conducted**

- III.15 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.<sup>57</sup>
- III.16 Ciceley<sup>58</sup> and Road Range<sup>59</sup> refused the OFT's request. 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.

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<sup>57</sup> 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.

<sup>58</sup> Email exchange between OFT and Addleshaw Goddard dated 27 September to 22 October 2010 re Ciceley - interviews, OFT Document Reference 1207.

<sup>59</sup> Letter from Brabners Chaffe Street to OFT dated 22 November 2010 re cooperation by Road Range with OFT investigation, OFT Document Reference 1423.

- III.17 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.18 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.<sup>60</sup> Mercedes subsequently provided the OFT with witness statements from [Mercedes Sales Manager B]<sup>61</sup> and [Mercedes Sales Manager A].<sup>62</sup>
- III.19 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.20 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.

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<sup>60</sup> Note of a meeting between the OFT, Nabarro and Mercedes dated 23 November 2011, OFT Document Reference 4583, page 4.

<sup>61</sup> [C] Witness Statement, OFT Document Reference 5071.

<sup>62</sup> [C] Witness Statement, OFT Document Reference 5041.

## **Forensic IT output**

III.21 As discussed above in paragraphs III.10 and III.14, 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.

### **D. Issue of Statement of Objections**

III.22 As outlined in paragraph III.1, on 28 June 2012, the OFT issued the Statement, giving Ciceley 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')<sup>63</sup> of its proposed infringement decision.

III.23 As required under 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.<sup>64</sup> They were also notified of the period for making written representations and of the possibility of making oral representations to the OFT on the matters referred to in the Statement.<sup>65</sup>

III.24 As part of the settlement agreements entered into between the OFT and each of the Parties, as set out in paragraphs III.25 to III.29, the Parties have agreed to a streamlined procedure.<sup>66</sup> The Parties agreed not to request an oral hearing in respect of the Statement. The Parties also agreed not to provide any written representations on the Statement with the exception of a memorandum indicating any material factual inaccuracies. The Parties have not provided such a memorandum.

### **E. Settlement agreements**

III.25 When the OFT issued the Statement, it advised all the addressees<sup>67</sup> that it was open to the possibility of discussing settlement.<sup>68</sup>

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<sup>63</sup> The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751).

<sup>64</sup> OFT's Rules (fn63), Rules 5(3) and 1(1).

<sup>65</sup> OFT's Rules (fn63), Rules 5(2)(c) and 5(4).

<sup>66</sup> See paragraph III.28.

<sup>67</sup> With the exception of Northside which was granted immunity on 11 April 2012, see Signed Northside immunity agreement, OFT Document Reference 4580.

<sup>68</sup> Statement of Objections cover letter to Dusted Powder limited dated 28 June 2012, OFT Document Reference 4734; Statement of Objections cover letter to Daimler UK Limited dated 28

III.26 On 20 February 2013, the OFT announced that it had concluded settlement agreements (each a 'Settlement Agreement', together the 'Settlement Agreements') with:

- Ciceley, in respect of Infringements 2, 3 and 5
- Enza, in respect of Infringement 5
- Mercedes, in respect of Infringement 5 and
- Road Range, in respect of Infringements 3 and 5.<sup>69</sup>

III.27 The Settlement Agreements are substantially identical in form, save in relation to the infringements being settled (as set out in paragraph III.26) and the penalty being imposed on each undertaking. In addition, for the dealers, the Settlement Agreements provided that the OFT would offer the dealers the option of paying the penalty in instalments (with interest) over a period of three years. Copies of the Settlement Agreements with Ciceley and Road Range can be found in Annex A.

III.28 The Parties admitted liability for the infringement(s) being settled. They also admitted the facts set out in the relevant sections of the Statement. In addition, the Parties agreed to a streamlined procedure<sup>70</sup> and to co-operate with the OFT in expediting the conclusion of its investigation.

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June 2012, OFT Document Reference 4735; Statement of Objections cover letter to Daimler AG dated 28 June 2012, OFT Document Reference 4736; Statement of Objections cover letter to Ciceley Commercials Limited dated 28 June 2012, OFT Document Reference 4737; Statement of Objections cover letter to Ciceley Limited dated 28 June 2012, OFT Document Reference 4740; Statement of Objections cover letter to Road Range Limited dated 28 June 2012, OFT Document Reference 4741; Statement of Objections cover letter to Mercedes-Benz UK Limited dated 28 June 2012, OFT Document Reference 4745; Statement of Objections cover letter to Enza Motors Limited dated 28 June 2012, OFT Document Reference 4747; Statement of Objections cover letter to Enza Holdings Limited dated 28 June 2012, OFT Document Reference 4748 and Statement of Objections cover letter to Enza Group Limited dated 28 June 2012, OFT Document Reference 4749.

<sup>69</sup> OFT Press Release '*Mercedes-Benz and three commercial vehicle dealers to pay £2.6 million for breaching competition law*', dated 21 February 2013 ([www.of.gov.uk/news-and-updates/press/2013/16-13](http://www.of.gov.uk/news-and-updates/press/2013/16-13)) and Signed Settlement Agreement between OFT and Ciceley, dated 20 February 2013, OFT Document Reference 5065; Signed Settlement Agreement between OFT and Enza, dated 20 February 2013, OFT Document Reference 5067; Signed Settlement Agreement between OFT and Mercedes, dated 20 February 2013, OFT Document Reference 5068 and Signed Settlement Agreement between OFT and Road Range, dated 20 February 2013, OFT Document Reference 5063.

<sup>70</sup> For details of what the streamlined procedure included, see paragraph III.24.

III.29 As part of settlement, only 85 per cent of the penalty determined for each Party for Infringement 3 is payable on the date specified in paragraph VII.60 (The OFT's Action).<sup>71</sup>

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<sup>71</sup> See paragraphs VII.40 to VII.41 (The OFT's Action).

## **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 The Parties sell commercial vehicles manufactured by Mercedes through its dealership network to end customers.<sup>72</sup> 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.<sup>73</sup> 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.

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<sup>72</sup> 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.

<sup>73</sup> SMMT Newsletter January 2011, OFT Document Reference 4375, page 1.

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

Source: SMMT<sup>74</sup>

### **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.

<b>Model</b>	<b>Size</b>	<b>Type</b>	<b>GVW</b>
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: Mercedes<sup>75</sup>

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.

<sup>74</sup> 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.

<sup>75</sup> Mercedes Response dated 21 January 2011 ('Mercedes Response'), OFT Document Reference 1506, question 2, page 1.

<b>Table 3: Registrations of Mercedes-Benz medium-sized vans in the UK</b>						
<b>Model</b>	<b>2010</b>	<b>2009</b>	<b>2008</b>	<b>2007</b>	<b>2006</b>	<b>2005</b>
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
<b>Total</b>	<b>22,183</b>	<b>19,433</b>	<b>26,597</b>	<b>27,745</b>	<b>23,208</b>	<b>24,262</b>

<b>Table 4: Registrations of Mercedes-Benz large-sized vans in the UK</b>						
<b>Model</b>	<b>2010</b>	<b>2009</b>	<b>2008</b>	<b>2007</b>	<b>2006</b>	<b>2005</b>
Sprinter	1,621	1,236	1,427	1,159	1,278	1,571
Vario	217	245	530	613	403	429
<b>Total</b>	<b>1,838</b>	<b>1,481</b>	<b>1,957</b>	<b>1,772</b>	<b>1,681</b>	<b>2,000</b>

Source: SMMT<sup>76</sup>

### Shares of supply

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

<b>Table 5: Share of supply - all vans in the UK</b>						
	<b>2010</b>	<b>2009</b>	<b>2008</b>	<b>2007</b>	<b>2006</b>	<b>2005</b>
<b>Total registrations</b>	<b>230,358</b>	<b>193,930</b>	<b>299,489</b>	<b>347,087</b>	<b>333,282</b>	<b>330,225</b>
Ford	27%	29%	28%	28%	28%	27%
Vauxhall	12%	12%	17%	15%	14%	16%
VW	11%	11%	9%	8%	8%	7%
<b>Mercedes-Benz</b>	<b>10%</b>	<b>10%</b>	<b>9%</b>	<b>8%</b>	<b>7%</b>	<b>7%</b>
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%

<sup>76</sup> 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.

<b>Table 6: Share of supply - medium-sized vans in the UK</b>						
	<b>2010</b>	<b>2009</b>	<b>2008</b>	<b>2007</b>	<b>2006</b>	<b>2005</b>
<b>Total registrations</b>	149,359	127,255	205,182	237,124	218,609	209,876
Ford	33%	32%	30%	29%	29%	29%
<b>Mercedes-Benz</b>	<b>14%</b>	<b>14%</b>	<b>12%</b>	<b>11%</b>	<b>10%</b>	<b>11%</b>
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%

<b>Table 7: Share of supply - large-sized vans in the UK</b>						
	<b>2010</b>	<b>2009</b>	<b>2008</b>	<b>2007</b>	<b>2006</b>	<b>2005</b>
<b>Total registrations</b>	7,443	7,544	10,027	9,351	6,120	7,295
Ford	38%	35%	26%	28%	25%	24%
<b>Mercedes-Benz</b>	<b>25%</b>	<b>20%</b>	<b>20%</b>	<b>20%</b>	<b>29%</b>	<b>29%</b>
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: SMMT<sup>77</sup>

### **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

<sup>77</sup> 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.

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.<sup>78</sup>

IV.9 In relation to vans, Mercedes splits customers as follows:<sup>79</sup>

- 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 (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 Mercedes<sup>80</sup>
- 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).<sup>81</sup>

#### **D. Supplementary products**

IV.11 In addition to selling vans and trucks, the Parties are 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,<sup>82</sup> and consequently a dealer may choose to make a low margin (or even sell at a loss) if

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<sup>78</sup> Motor Industry Facts 2011, OFT Document Reference 4317, page 39.

<sup>79</sup> Mercedes Fleet and Zol Submission, OFT Document Reference 2739, pages 2 to 3.

<sup>80</sup> Annex 3 to Mercedes Fleet and Zol Submission, OFT Document Reference 2742.

<sup>81</sup> Mercedes Fleet and Zol Submission, OFT Document Reference 2739, page 3.

<sup>82</sup> Mercedes Response, OFT Document Reference 1506, question 5.

significant ongoing after-sales revenue is likely to be generated by a sale.<sup>83</sup>

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'),<sup>84</sup> 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.<sup>85</sup> Northside stated that the majority of van customers (whether retail or fleet) do not purchase full repair and maintenance contracts, that is, contracts covering repair and maintenance of all electrical and mechanical components.<sup>86</sup>

### **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).<sup>87</sup> Mercedes-Benz Financial Services, the commercial vehicle financial services arm of Daimler AG, provides a range of financing and contract hire options.<sup>88</sup>

## **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.<sup>89</sup> In common with the majority of the Mercedes dealership network, both Parties supply vans and trucks. All of Mercedes' dealers also provide spare parts

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<sup>83</sup> Mercedes Response, OFT Document Reference 1506, question 5, paragraph 5.5(a).

<sup>84</sup> Northside Supplementary Response dated 7 April 2011, OFT Document Reference 2663, question 4, page 2.

<sup>85</sup> Enza Response, OFT Document Reference 1499, question 8(ii).

<sup>86</sup> Northside Response, OFT Document Reference 1484, question 4(iv).

<sup>87</sup> Mercedes Response, OFT Document Reference 1506, question 5, paragraph 5.5(b).

<sup>88</sup> Mercedes Response, OFT Document Reference 1506, question 13, paragraphs 13.1 and 13.6.

<sup>89</sup> Since then H & L Garages Limited has gone into liquidation.

and after sales services.<sup>90</sup> 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,<sup>91</sup> its selective distribution network meets the requirements of the *Motor Vehicle Block Exemption Regulation*.<sup>92</sup> Article 1(1)(i) of the *Motor Vehicle Block Exemption Regulation* defines a selective distribution system as 'a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to 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,<sup>93</sup> 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,<sup>94</sup> and the qualitative criteria include site and location, management structure and selection, business management and controls, marketing and planning and corporate identity.<sup>95</sup>
- 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,

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<sup>90</sup> MB Margin Model paper submitted with Mercedes Letter dated 13 January 2011 ('Mercedes Margin Model Paper'), OFT Document Reference 1406, paragraph 2.2.

<sup>91</sup> Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.1.

<sup>92</sup> 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*').

<sup>93</sup> Mercedes uses the term 'partners' and 'franchise partners', see Mercedes Supplementary Response dated 29 September 2011 ('Mercedes Supplementary Response'), OFT Document Reference 3717.

<sup>94</sup> Mercedes Response dated 7 October 2011 outlining its selective distribution system criteria, OFT Document Reference 3726.

<sup>95</sup> Mercedes Supplementary Response, OFT Document Reference 3717.

softening of competition and facilitation of collusion between suppliers or buyers.<sup>96</sup>

IV.19 The benefit of the exemption under the *Motor Vehicle Block Exemption Regulation*<sup>97</sup> does not extend to selective distribution systems where the manufacturer restricts its distributors from making either active or passive sales.<sup>98</sup> According to Mercedes, its franchise agreements do not incorporate any restrictions either on active or passive sales.<sup>99</sup> The OFT 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.<sup>100</sup>

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).<sup>101</sup>

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

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<sup>96</sup> Commission Notice *Guidelines on Vertical Restraints* C(2010) 2365 ('*Guidelines on Vertical Restraints*'), paragraph 175.

<sup>97</sup> 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*').

<sup>98</sup> *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.

<sup>99</sup> Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.4.

<sup>100</sup> Mercedes Fleet and Zol Submission, OFT Document Reference 2739, page 5.

<sup>101</sup> Mercedes Fleet and Zol Submission, OFT Document Reference 2739, page 5.

opportunities available to its dealers and measure the dealer's performance'.<sup>102</sup>

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).<sup>103</sup> 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.<sup>104</sup> 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 quote the **same** price ... to dealers which are known to be quoting to the same customer ...' (emphasis in the original).<sup>105</sup>

IV.24 Nevertheless, Mercedes stated that '[d]ealers are commercially driven to maximise sales opportunities in and around their selling locations'.<sup>106</sup> 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 sales<sup>107</sup> because local sales are more likely to generate the more profitable after-sales business.<sup>108</sup> Costs involved in visiting a potential customer and delivering the vehicles are also a consideration when dealers are quoting to customers.

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<sup>102</sup> Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.6.

<sup>103</sup> Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 7.2.

<sup>104</sup> Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 7.3.

<sup>105</sup> Mercedes Margin Model Paper, OFT Document Reference 1406, paragraphs 7.3 and 7.4.

<sup>106</sup> Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.5.

<sup>107</sup> 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.

<sup>108</sup> 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).

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.<sup>109</sup> 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.<sup>110</sup>

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 national requirements.
- d. MB also negotiates directly with some major fleet customers to provide new vehicles and aftersales services'.<sup>111</sup>

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...'.<sup>112</sup>

## **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].<sup>113</sup> 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.<sup>114</sup>

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<sup>109</sup> See for example [C] Witness Statement, OFT Document Reference 3869, paragraph 6.

<sup>110</sup> Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.5.

<sup>111</sup> Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.9.

<sup>112</sup> Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.9 and Annex 6.

<sup>113</sup> Mercedes Margin Model Paper, OFT Document Reference 1406, paragraphs 3.1 to 3.7.

<sup>114</sup> Mercedes Response dated 7 October 2011 outlining its selective distribution system criteria, OFT Document Reference 3726.

IV.29 Mercedes has a list of recommended retail prices for its van products<sup>115</sup> and provides all of its dealers with a standard off-invoice discount of [C] per cent for van sales.<sup>116</sup> In addition, as outlined in IV.28, Mercedes offers a further bonus which rewards volume of sales and the achievement of certain qualitative targets.<sup>117</sup> 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.<sup>118</sup>

<b>Model</b>	<b>2010</b>	<b>2009</b>	<b>2008</b>	<b>2007</b>	<b>2006</b>	<b>2005</b>
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: Mercedes<sup>119</sup>

## **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

<sup>115</sup> Mercedes Response, OFT Document Reference 1506, question 6, paragraph 6.1 and Annex 3.

<sup>116</sup> Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 3.2.

<sup>117</sup> See also Mercedes Margin Model Paper, OFT Document Reference 1406, paragraphs 3.3 to 3.7.

<sup>118</sup> 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.

<sup>119</sup> 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.

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.<sup>120</sup> The 'Relevant Turnover' for penalties purposes is the turnover of the undertaking in the relevant market in the financial year preceding the date when the infringement ended.<sup>121</sup>

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.<sup>122</sup> 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.<sup>123</sup>

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.<sup>124</sup> Rather, the OFT must be 'satisfied on a reasonable, and properly reasoned basis, of what is the relevant product market affected

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<sup>120</sup> 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).

<sup>121</sup> *2004 Penalty Guidance* (fn120), paragraph 2.7 and *2012 Penalty Guidance* (fn120), paragraph 2.7.

<sup>122</sup> 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.

<sup>123</sup> 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).

<sup>124</sup> *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].

by the Infringement'.<sup>125</sup> 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'.<sup>126</sup> 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.

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 sell both vans and trucks, 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 The Parties sell Mercedes-Benz medium- and large-sized vans. The Parties do not sell new small-sized vans.<sup>127</sup> 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

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<sup>125</sup> *Argos, Littlewoods and JJB* (fn124), at paragraph 170.

<sup>126</sup> *Argos, Littlewoods and JJB* (fn124), at paragraphs 170 to 173 and 228.

<sup>127</sup> Mercedes Customer Segmentation Note, OFT Document Reference 2782, paragraph 2.4.

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, the sale price of vans for retail customers includes an ISP.<sup>128</sup> 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.<sup>129</sup>

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 Turnover<sup>130</sup> 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.<sup>131</sup>

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<sup>128</sup> SME and national fleet customers can choose from a number of servicing packages, but they are not included in the price of the vehicle.

<sup>129</sup> See paragraph IV.20 and Section VI (The Conduct of the Parties and Legal Assessment).

<sup>130</sup> See paragraph IV.32.

<sup>131</sup> 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).

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.

## 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,<sup>132</sup> and references to it will therefore be made where appropriate.<sup>133</sup>

### 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 UK<sup>134</sup> 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.<sup>135</sup> 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.<sup>136</sup>

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<sup>132</sup> See paragraphs V.5 to V.7.

<sup>133</sup> 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.

<sup>134</sup> 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.

<sup>135</sup> Competition Act 1998 (Commencement No 5) Order 2000 SI 2000/344, Article 2 and Schedule 1.

<sup>136</sup> 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'.<sup>137</sup>

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<sup>137</sup> 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.12 (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'.<sup>138</sup>
- 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.<sup>139</sup> 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'.<sup>140</sup>
- V.12 This reasoning has been expressly cited by the European Courts and the CAT in several recent cases.<sup>141</sup> The Court of Justice in *T-Mobile Netherlands*, referring to the opinion of Advocate-General Kokott,<sup>142</sup> 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'.<sup>143</sup>

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<sup>138</sup> Section 2(1) of the Act and Article 101(1) of the TFEU.

<sup>139</sup> *HFB Holding* (fn12), 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.

<sup>140</sup> *Anic* (fn139), paragraph 131; followed in *HFB Holding* (fn12), paragraph 190. See also *Argos, Littlewoods and JJB* (fn124), 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)]).

<sup>141</sup> 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* (fn139), paragraphs 108 and 130 to 131. See also *Apex Asphalt* (fn140), at [201] and [206(ii)] (followed in *Makers* (fn140), at [103(ii)]).

<sup>142</sup> Opinion of Advocate-General Kokott in *T-Mobile Netherlands* (fn141), paragraph 38.

<sup>143</sup> *T-Mobile Netherlands* (fn141), 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,<sup>144</sup> 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'.<sup>145</sup>

V.14 This position was upheld by the Court of Appeal.<sup>146</sup>

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.<sup>147</sup> The Chapter I prohibition is intended to catch a wide range of agreements, including oral agreements<sup>148</sup> and 'gentlemen's agreements',<sup>149</sup> since anti-competitive agreements are, by their nature, rarely in written form.<sup>150</sup> An agreement may be express or it may be implied from the conduct of the

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<sup>144</sup> 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).

<sup>145</sup> *JJB/Allsports* (fn141), at [644] and *Argos/Littlewoods* (fn141), at [665].

<sup>146</sup> *Argos, Littlewoods and JJB* (fn124), at paragraph 21.

<sup>147</sup> 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.

<sup>148</sup> Case 28/77 *Tepea v Commission* [1978] ECR 1391 ('*Tepea*'), paragraph 41.

<sup>149</sup> Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, paragraphs 106 to 114.

<sup>150</sup> See also OFT Guidance 401, *Agreements and concerted practices* (December 2004) (the '*Agreements and Concerted Practices Guidance*'), paragraph 2.7.

parties.<sup>151</sup> It may also consist of an isolated act, a series of acts or a course of conduct.<sup>152</sup>

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'.<sup>153</sup>

V.18 The intention of the parties must be to conduct themselves on the market in a specific way,<sup>154</sup> 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.<sup>155</sup>

### 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'.<sup>156</sup>

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

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<sup>151</sup> See for example *Tepea* (fn148).

<sup>152</sup> *Anic* (fn139), paragraph 81.

<sup>153</sup> 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* (fn141), at [156] and [637]; *Argos/Littlewoods* (fn141), at [151] and [658] and *Argos, Littlewoods and JJB* (fn124), at paragraph 21(iv).

<sup>154</sup> Joined Cases 209/78 to 215/78 and 218/78 *Heintz Van Landewyck and Others v Commission* [1980] ECR 3125, paragraph 86; *Hercules Chemicals* (fn139), paragraph 256; *Limburgse Vinyl* (fn139), paragraph 715 and *Bayer* (fn153), paragraph 67. See also *JJB/Allsports* (fn141), at [156] and [637] and *Argos/Littlewoods* (fn141), at [151] and [658].

<sup>155</sup> 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.

<sup>156</sup> *Dyestuffs* (fn10), paragraph 64 (followed in Case 40/73 *Suiker Unie v Commission* [1975] ECR 1663 ('*Suiker Unie*'), paragraph 26; Joined Cases 89/85 etc. *Alhström Osakeyhtiö v Commission* [1993] ECR I-1307, paragraph 63; *Anic* (fn139), paragraph 115 and Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287 ('*Hüls*'), paragraph 158). See also *JJB/Allsports* (fn141), at [151]; *Argos/Littlewoods* (fn141), at [146]; *Argos, Littlewoods and JJB* (fn124), at paragraph 21(i) and *Apex Asphalt* (fn140), at [196] and [206(iii)] (followed in *Makers* (fn140), 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'.<sup>157</sup>

V.21 In its judgment in *Anic*, the Court of Justice re-affirmed its earlier interpretation of the requirement of independence in *Suiker Unie*,<sup>158</sup> 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'.<sup>159</sup>

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

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<sup>157</sup> *Suiker Unie* (fn156), paragraph 173; *Anic* (fn139), paragraph 116 and *Hüls* (fn156), paragraph 159. See also *Apex Asphalt* (fn140), at [198] and [206(iv)] (followed in *Makers* (fn140), at [102] and [103(iv)]).

<sup>158</sup> *Suiker Unie* (fn156), paragraph 174.

<sup>159</sup> *Anic* (fn139), paragraph 117 (followed in *Hüls* (fn156), paragraphs 159 to 160 and *HFB Holding* (fn12), paragraph 212). See also *Apex Asphalt* (fn140 at [198] and [206(v)] (followed in *Makers* (fn140), 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.<sup>160</sup>

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'.<sup>161</sup>

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'.<sup>162</sup>

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.<sup>163</sup>

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.<sup>164</sup>

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

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<sup>160</sup> Joined Cases T-25/95 etc. *Cimenteries and Others v Commission* [2000] ECR II-491 ('*Cimenteries*'), paragraph 1852.

<sup>161</sup> *Cimenteries* (fn160), paragraphs 1849 and 1852. See also *Apex Asphalt* (fn140), at [206(vii)] and [206(viii)] (followed in *Makers* (fn140), at [103(vii)] and [103(viii)]).

<sup>162</sup> *JJB/Allsports* (fn141), 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* (fn140), at [200]; *JJB/Allsports* (fn141), at [159] and *Argos/Littlewoods* (fn141), at [155].

<sup>163</sup> *Hüls* (fn156), paragraph 155 and *Anic* (fn139), paragraph 96.

<sup>164</sup> *Anic* (fn139), paragraph 118 and *Hüls* (fn156), paragraph 161. See also *Apex Asphalt* (fn140), at [206(ix)] (followed in *Makers* (fn140), 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'.<sup>165</sup>

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.<sup>166</sup>

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.<sup>167</sup> 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.<sup>168</sup>

### **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.<sup>169</sup>

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

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<sup>165</sup> *Anic* (fn139), paragraph 121; *Hüls* (fn156), paragraph 162 and *Cimenteries* (fn160), paragraphs 1865 and 1910. See also *Apex Asphalt* (fn140), at [206(x)] (followed in *Makers* (fn140), at [103(x)]).

<sup>166</sup> *T-Mobile Netherlands* (fn141), paragraphs 58 to 59.

<sup>167</sup> *Anic* (fn139), paragraph 124. See also *Apex Asphalt* (fn140), at [206(xi)] (followed in *Makers* (fn140), at [103(xi)]).

<sup>168</sup> *Hüls* (fn156), paragraphs 163 to 164 and *Anic* (fn139), paragraph 123. See also *Apex Asphalt* (fn140), at [206(xii)] (followed in *Makers* (fn140), at [103(xii)]).

<sup>169</sup> *Agreements and Concerted Practices Guidance* (fn150), paragraph 2.8. See for example also *Anic* (fn139), paragraph 80; *Cimenteries* (fn160), paragraphs 1389 and 2557 and Case T-28/99 *Sigma Technologie di Rivestimento v Commission* [2002] ECR II-1845, paragraph 40.

undertaking'.<sup>170</sup> 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.<sup>171</sup> Even if the employees were acting contrary to instructions, this does not affect the liability of the undertaking.<sup>172</sup>

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.<sup>173</sup> 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.<sup>174</sup>

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.<sup>175</sup> 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

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<sup>170</sup> *Tesco Stores Ltd, Tesco Holdings Ltd and Tesco plc v OFT* [2012] CAT 31 ('*Tesco Stores*'), at [74(a)].

<sup>171</sup> Joined Cases 100/80 to 103/80 *Musique Diffusion française v Commission* [1983] ECR 1825 ('*Musique Diffusion française*'), paragraph 97.

<sup>172</sup> Case T-53/03 *BPB v Commission* [2008] ECR II-1333, [2008] 5 CMLR 1201, paragraphs 360 and 431.

<sup>173</sup> Case T-141/89 *Tréfileurope Sales v Commission* [1995] ECR II-791 ('*Tréfileurope Sales*'), paragraphs 53 to 60 and 72.

<sup>174</sup> 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* (fn144), paragraph 189.

<sup>175</sup> *Tréfileurope Sales* (fn173), paragraph 85 (citing *Hercules Chemicals* (fn139), paragraph 232); *HFB Holding* (fn12), 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'.<sup>176</sup>

V.34 The General Court has held that 'the notion of public distancing as a means of excluding liability must be interpreted narrowly'.<sup>177</sup> 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.<sup>178</sup>

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'.<sup>179</sup>

V.36 The CAT also noted that '[r]eporting what transpired to the OFT puts the matter beyond doubt'.<sup>180</sup>

### **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

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<sup>176</sup> *Aalborg Portland* (fn175), paragraph 84.

<sup>177</sup> Case T-303/02 *Westfalen Gassen Nederland v Commission* [2006] ECR II-4567 ('*Westfalen Gassen*'), paragraph 103.

<sup>178</sup> *Westfalen Gassen* (fn177), paragraph 103.

<sup>179</sup> *JJB/Allsports* (fn141), at [1046].

<sup>180</sup> *JJB/Allsports* (fn141), 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'.<sup>181</sup>

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'.<sup>182</sup>

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'.<sup>183</sup> 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 [...]'.<sup>184</sup>

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

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<sup>181</sup> *Anic* (fn139), paragraph 79.

<sup>182</sup> *Anic* (fn139), paragraph 80.

<sup>183</sup> Case T-99/04 *AC Treuhand v Commission* [2008] ECR II-1501 ('*AC Treuhand*'), paragraph 132.

<sup>184</sup> *AC Treuhand* (fn183), paragraph 133.

endorse the objectives of the cartel and to support its implementation'.<sup>185</sup>

#### **E. Prevention, restriction or distortion of competition<sup>186</sup>**

##### **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.<sup>187</sup>
- 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.<sup>188</sup> 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.<sup>189</sup>
- 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.<sup>190</sup>
- V.44 However, no agreement or concerted practice is automatically restrictive by object. Instead, the objective analysis of whether an agreement or

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<sup>185</sup> *AC Treuhand* (fn183), paragraph 134.

<sup>186</sup> 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.

<sup>187</sup> *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* (fn141), paragraph 29.

<sup>188</sup> *Joined Cases 29/83 and 30/83 Compagnie Royale Asturienne des Mines and Rheinzinc v Commission* [1984] ECR 1679 ('*CRAM*'), paragraphs 25 to 26.

<sup>189</sup> *Case C-551/03P General Motors v Commission* [2006] ECR I-3173 ('*General Motors*'), paragraph 64.

<sup>190</sup> *Cityhook v OFT* [2007] CAT 18, at [270]; *General Motors* (fn189), paragraphs 77 to 78 and *T-Mobile Netherlands* (fn141), 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.<sup>191</sup>

### **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.<sup>192</sup>
- 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'.<sup>193</sup> 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.<sup>194</sup> 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.<sup>195</sup>
- 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

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<sup>191</sup> See for example also Joined Cases 96/82 etc. *NV IAZ International Belgium v Commission* [1983] ECR 3369, paragraphs 22 to 25; *CRAM* (fn188), paragraphs 25 to 26 and Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969, paragraph 110.

<sup>192</sup> *Agreements and Concerted Practices Guidance* (fn150), paragraphs 2.2 to 2.3.

<sup>193</sup> *Agreements and Concerted Practices Guidance* (fn150), paragraph 3.10.

<sup>194</sup> *Suiker Unie* (fn156); 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.

<sup>195</sup> 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.<sup>196</sup>

- 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.<sup>197</sup>
- 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'.<sup>198</sup> 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,<sup>199</sup> or an agreement not to charge less than any other price in the market, which the Court of Justice found had the object of restricting competition.<sup>200</sup> An agreement may restrict price competition even if it does not eliminate it entirely.<sup>201</sup>
- 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.<sup>202</sup>

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<sup>196</sup> 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).

<sup>197</sup> 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).

<sup>198</sup> *Agreements and Concerted Practices Guidance* (fn150), 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.

<sup>199</sup> *Cast Iron and Steel Rolls* (fn195).

<sup>200</sup> See for example Case 8/72 *Vereeniging van Cementhandelaren v Commission* [1972] ECR 877.

<sup>201</sup> *Agreements and Concerted Practices Guidance* (fn150), paragraph 3.6.

<sup>202</sup> *Tate & Lyle* (fn162), paragraphs 58 and 60. See also *Rhône-Poulenc* (fn162), paragraphs 122 to 123.

- V.51 In its *Bananas* decision,<sup>203</sup> 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'.<sup>204</sup> 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]'.<sup>205</sup>
- 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.<sup>206</sup> 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'.<sup>207</sup>
- 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.<sup>208</sup>

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<sup>203</sup> *Bananas* (fn174).

<sup>204</sup> *Bananas* (fn174), paragraph 292.

<sup>205</sup> *Bananas* (fn174), 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.

<sup>206</sup> 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.

<sup>207</sup> 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'.

<sup>208</sup> For example *Hercules Chemicals* (fn139), 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'.<sup>209</sup>

**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'.<sup>210</sup> The European Courts have also held that this is equally the case where the conduct in question concerns a concerted practice.<sup>211</sup>

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.<sup>212</sup> Under Article 101, concerted practices are therefore prohibited regardless of their effect, when they have an anti-competitive object.<sup>213</sup>

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thresholds, customer identities). See also *SPO* (fn122), 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).

<sup>209</sup> *T-Mobile Netherlands* (fn141), paragraphs 40 to 41.

<sup>210</sup> 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* (fn139), paragraph 99; *Cimenteries* (fn160), paragraphs 837, 1531 and 2589; *BIDS and Barry Brothers* (fn187), paragraph 16 and *T-Mobile Netherlands* (fn141), paragraph 29).

<sup>211</sup> *Anic* (fn139), paragraph 123 and *T-Mobile Netherlands* (fn141), paragraphs 28 to 30.

<sup>212</sup> *Anic* (fn139), paragraph 124; *Hüls* (fn156), 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* (fn162)). See also *Apex Asphalt* (fn140), at [206(xi)] (followed in *Makers* (fn140), at [103(xi)]).

<sup>213</sup> *Anic* (fn139), paragraphs 122 to 123. See also *Apex Asphalt* (fn140), at [206(xii)] (followed in *Makers* (fn140), 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.<sup>214</sup>

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.<sup>215</sup> 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.<sup>216</sup>

#### 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'.<sup>217</sup>

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*.<sup>218</sup> 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 undertakings<sup>219</sup> or exceed 15 per cent on any of the relevant

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<sup>214</sup> *Argos/Littlewoods* (fn141), at [357].

<sup>215</sup> *T-Mobile Netherlands* (fn141), paragraph 31.

<sup>216</sup> *T-Mobile Netherlands* (fn141), paragraph 43.

<sup>217</sup> Case 5-69 *Franz Völk v S.P.R.L. Ets J. Vervaecke* [1969] ECR 295 ('*Völk*'), paragraph 5/7.

<sup>218</sup> 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.

<sup>219</sup> 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.<sup>220</sup>

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.<sup>221</sup>

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'.<sup>222</sup>

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'.<sup>223</sup>

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.<sup>224</sup>

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<sup>220</sup> Non-competing undertakings are undertakings which are neither actual nor potential competitors on any of the markets concerned.

<sup>221</sup> *Notice on Agreements of Minor Importance* (fn218), paragraph 11.

<sup>222</sup> *North Midland Construction v OFT* [2011] CAT 14 ('*North Midland Construction*'), at [53].

<sup>223</sup> C-266/11 *Expedia Inc. v Autorité de la concurrence and Others*, judgment of 13 December 2012 (not yet published), paragraph 37.

<sup>224</sup> *North Midland Construction* (fn222), at [56] to [61]. See also *Apex Asphalt* (fn140), 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.<sup>225</sup>
- 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.<sup>226</sup>
- 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.<sup>227</sup>

## **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.<sup>228</sup> 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,<sup>229</sup> 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

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<sup>225</sup> 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.

<sup>226</sup> *Agreements and Concerted Practices Guidance* (fn150), paragraph 2.25.

<sup>227</sup> *Aberdeen Journals v OFT* [2003] CAT 11 ('*Aberdeen Journals*'), at [459] to [460].

<sup>228</sup> *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* (fn141), at [164].

<sup>229</sup> 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'.<sup>230</sup>

### **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 [...]'.<sup>231</sup>

### **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

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<sup>230</sup> *Napp* (fn228), at [110].

<sup>231</sup> *Tesco Stores* (fn170), 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'.<sup>232</sup>

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'.<sup>233</sup>

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.<sup>234</sup>

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]'.<sup>235</sup>

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<sup>232</sup> *Aalborg Portland* (fn175), 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.

<sup>233</sup> *Joined Cases T-109/02 etc. Bolloré and Others v Commission* [2007] ECR II-947 ('*Bolloré*'), paragraphs 257 to 258, citing *Volkswagen* (fn122), paragraph 43 and *Limburgse Vinyl* (fn139), 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.

<sup>234</sup> *FMC Foret* (fn233), paragraph 122, citing *Cimenteries* (fn160), paragraph 1838.

<sup>235</sup> *JJB/Allsports* (fn141), at [206].

V.77 Most recently, in *Quarmby*,<sup>236</sup> 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)'.<sup>237</sup>

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'<sup>238</sup>
- Reliance may be placed, as against an undertaking, on statements made by other incriminated undertakings, including leniency applicants.<sup>239</sup> 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

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<sup>236</sup> *Quarmby* (fn231).

<sup>237</sup> *Quarmby* (fn231), at [86]. See also *Durkan* (fn8), at [95] to [96].

<sup>238</sup> *FMC Foret* (fn233), 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* (fn233), 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.

<sup>239</sup> *FMC Foret* (fn233), paragraph 116 (citing *Limburgse Vinyl* (fn139), paragraph 512).

adequate proof as against those other undertakings unless it is supported by other evidence<sup>240</sup>

- 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.<sup>241</sup>

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,<sup>242</sup> 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'.<sup>243</sup>

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

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<sup>240</sup> *FMC Foret* (fn233), 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; *Bollore* (fn233), paragraph 167; *Lafarge* (fn238), 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* (fn233), paragraphs 183 to 186 and 232 and *Bollore* (fn233), paragraphs 168 to 184).

<sup>241</sup> *FMC Foret* (fn233), paragraph 120 (referring to *JFE Engineering* (fn240), 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]).

<sup>242</sup> See, for example, *JFE Engineering* (fn240), 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* (fn238), paragraphs 87 to 89.

<sup>243</sup> *Mitsubishi* (fn238), 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'.<sup>244</sup>

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'.<sup>245</sup>

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.<sup>246</sup>

## **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

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<sup>244</sup> *Claymore Dairies and Express Dairies v OFT* [2003] CAT 18, at [8].

<sup>245</sup> See *JFE Engineering* (fn240), paragraph 211.

<sup>246</sup> *Quarmby* (fn231), at [114]. However, as referred to in fn241, 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* (fn241), 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 Commission<sup>247</sup> 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.<sup>248</sup>

#### **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

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<sup>247</sup> 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.

<sup>248</sup> 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.<sup>249</sup> This is a jurisdictional requirement demarcating the boundary between EU competition law and national competition law.<sup>250</sup>

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.<sup>251</sup>

- 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.<sup>252</sup> 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.<sup>253</sup> The guidance also provides that agreements that are local in nature are in themselves not capable of appreciably affecting trade between Member States.<sup>254</sup>
- 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 States<sup>255</sup> 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.<sup>256</sup> On the basis of the foregoing, the OFT considers that it has no grounds for action under Article 101.<sup>257</sup>

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<sup>249</sup> *Völk* (fn217), paragraph 5/7 and Case 22-71 *Béguélin Import v SAGL Import Export* [1971] ECR 949, paragraph 16.

<sup>250</sup> Case 22/78 *Hugin Kassaregister and Hugin Cash Registers v Commission* [1979] ECR 1869, paragraph 17. See also *Aberdeen Journals* (fn227), at [459].

<sup>251</sup> *Völk* (fn217), paragraph 5/7 and Case T-77/92 *Parker Pen v Commission* [1944] ECR II-549, paragraph 40.

<sup>252</sup> 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*').

<sup>253</sup> *Notice on the Effect on Trade* (fn252), paragraphs 89 and 92.

<sup>254</sup> *Notice on the Effect on Trade* (fn252), paragraph 91.

<sup>255</sup> See paragraphs II.24 and II.38 (Company Profiles).

<sup>256</sup> See paragraph IV.42 (Industry Overview and the Relevant Market).

<sup>257</sup> In finding no grounds for action under Article 101 against the Parties, the OFT has not made a non-infringement decision. In Case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele 2 Polska, now Netia SA w Warszawie*, the Court of Justice clarified that, given the risk of undermining the uniform application of Articles 101 and 102, only the Commission is empowered to make a finding that there has been no breach of these provisions

## SECTION VI THE CONDUCT OF THE PARTIES AND LEGAL ASSESSMENT

### Conduct of the Parties

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

- VI.1 The OFT has concluded, on the basis of the evidence viewed as a whole, that the Parties infringed the Chapter I prohibition. The main sources of evidence are summarised in this sub-section A by reference to the corresponding paragraph numbers in this Conduct Section,<sup>258</sup> but the OFT's conclusions are reached in light of the totality of the evidence.
- VI.2 [Ciceley Manager A] and [Road Range Manager] met on 1 February 2008.<sup>259</sup> At that meeting, they discussed their respective commercial strategy in relation to quotations to out-of-area customers and entered into an agreement and/or concerted practice to dampen price competition for the sale of vans to customers based in the Parties' areas.<sup>260</sup>
- VI.3 The Infringement took the form of an agreement and/or concerted practice to include what has been described as a 'good', 'reasonable' or 'sensible' margin in quotations to customers based in the other Party's area.<sup>261</sup> It does not appear from the evidence available to the OFT that the Parties set specific figures for the margins to be included in quotations to out-of-area customers. However, the Parties had a shared understanding of what constituted a 'good' margin for a van, which gave them the ability to put the anti-competitive arrangement into practice.<sup>262</sup>
- VI.4 The OFT considers that this constituted 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.

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

<sup>258</sup> References to the 'Conduct Section' are to paragraphs VI.1 to VI.38.

<sup>259</sup> See paragraphs VI.7 and VI.12.

<sup>260</sup> See paragraphs VI.30 to VI.36.

<sup>261</sup> See paragraphs VI.7. The term '*good*' margins is subsequently used for consistency and covers all characterisations of the proposal, referred to in witness evidence, for '*good*', '*reasonable*' and '*sensible*' margins.

<sup>262</sup> See paragraphs VI.7.

VI.5 The OFT considers that, at the very least, the Parties engaged in an information exchange with the object of restricting competition. The evidence described in paragraphs VI.7 and VI.12 to VI.20 shows that the Parties exchanged information about their future pricing policy for out-of-area customers as well as specific price information in relation to a particular customer.

VI.6 The OFT notes that all Parties have admitted liability for the Infringement, and the facts as set out in the relevant sections of the Statement, insofar as they are relevant to each Party's involvement in the Infringement.<sup>263</sup>

## **B. Evidence of the Infringement**

### **Ciceley's conduct in relation to van sales to out-of-area customers and relationships with surrounding dealers**

VI.7 [Ciceley Manager A]<sup>264</sup> stated:

'There were no agreements with other dealers on how to deal with approaches from customers from adjoining areas. However, I have had separate conversations with both [Road Range Manager] and [Northside Manager A]<sup>265</sup> on the subject. From these separate conversations with [Road Range Manager] and [Northside Manager A], it was understood by both parties that there was no point in selling a van out of area for a low profit margin if there is no possibility of after-sales revenue. I estimate that the topic came up two or three times separately with both [Road Range Manager] and [Northside Manager A].

'In practice this meant that if a customer approached us from Road Range or Northside's area we would respond to the customer's request

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<sup>263</sup> See paragraphs III.26 to III.29 (The OFT's Investigation). Each Party's admission is expressed to be subject to any representations made by that Party in relation to any material factual inaccuracies in the Statement, but no such representations have been made by either Party.

<sup>264</sup> The OFT notes that Ciceley refused the OFT's request to interview its employees during the investigative stage of the case. However, the OFT has interviewed and obtained witness statements from certain former Ciceley employees, including [Ciceley Manager A who was] at Ciceley during the Relevant Period and whom the OFT considers entered into the arrangement on Ciceley's behalf. Following the issue of the Statement, both Parties admitted liability for the Infringement and the facts set out in the relevant sections of the Statement. In light of these admissions, the OFT has not considered it necessary in the particular circumstances of this case to renew its request to Ciceley to provide the OFT with access to any witnesses.

<sup>265</sup> Northside is not a party to this Infringement, it is however a party to Infringement 2, see paragraph III.6. The contacts between [Northside Manager A] and [Ciceley Manager A] are considered in Decision 2.

but would leave a good margin in the deal on the basis that if the customer wants it at that price, that would be fine but we would not put much more effort into the quote and not chase it up. My expectation from my conversations with [Road Range Manager] and [Northside Manager A] was that they would do the same if a customer based in Ciceley's area approached them.

'I did not however discuss or agree a set margin, price or any specific figures with [Road Range Manager] and [Northside Manager A] but we all understood from the nature of our role, what constituted an average and reasonable margin for a van. In other words, we would all know how to pitch the deal. For example, for a competitive deal we may make £[C] profit; whereas a good profit would be generally understood to be about £[C]. This still represented a percentage reduction from the list price for the customer.

'I cannot pin-point exactly when and where these separate conversations with [Road Range Manager] and [Northside Manager A] took place but I'm sure that the topic arose in conversations early on in my employment with Ciceley [[Ciceley Manager A] started at Ciceley on 3 December 2007], probably when I first met [Road Range Manager] and [Northside Manager A]. This sort of thing was not discussed to my recollection in front of [Mercedes Sales Manager A] or any other [C] or anyone else in the main body of regional sales meetings. I cannot state for certain as to whether [Mercedes Sales Manager A] or anyone else from Mercedes was aware of these discussions. [...]

'I do not recall any direct contact between myself and [Road Range Manager] or [Northside Manager A] over any particular customers who had sought quotations from Ciceley and Road Range and/or Ciceley and Northside.<sup>266</sup> Although we border each other's area of influence, the occasions where Ciceley would directly compete with Road Range or Northside were few and far between. My recollection is that our understanding most likely effected occasional quotations from sole traders rather than fleet customers. Despite my expectation on how we would deal with out-of-area customers we would sometimes do the

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<sup>266</sup> See however the evidence of contacts between [Ciceley Manager A] and [Road Range Manager] regarding particular customers, described in paragraphs VI.12 to VI.27.

opposite and compete vigorously against each other for the same customer [...]'.<sup>267</sup>

VI.8 Two former employees of Ciceley said that during at least part of their period of employment there was an anti-competitive arrangement between Ciceley and certain local dealers, including Road Range. [Ciceley Manager B who was] at Ciceley until October 2007 described a 'loose agreement' with Road Range and Enza to set minimum margins for customers 'off-patch'.<sup>268</sup> [Ciceley Sales Executive B] described having been told about a 'loose agreement' by [Ciceley Manager B] and having been instructed to refer all out-of-area quotation requests to him.<sup>269</sup>

VI.9 These statements seem to refer to a period prior to the Relevant Period. However, these statements suggest that there may have been some form of understanding between the Parties in relation to sales to customers in each other's areas prior to 1 February 2008. The OFT considers that the evidence of this Infringement is consistent with the nature of the relationship between Ciceley and Road Range described by [Ciceley Manager B] and [Ciceley Sales Executive B].

**Internal Ciceley email regarding quotations out-of-area sent on 15 January 2008**

VI.10 On 15 January 2008 [Ciceley Manager A] sent an email headed 'Deals out of area' to his sales executives, blind copying in [Ciceley Director] which read:

'Please make sure that if you are involved in deals with customers out of our area, you call me to discuss before a deal is done.

'Although it is perfectly legitimate for us to deal out of area from time to time, I may need to speak to the relevant sales manager in that region in order to maintain our relationship with them.

'We must value our relationships with other dealers, especially if we need to call on their help in the future.

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<sup>267</sup> [C] First Witness Statement, OFT Document Reference 1403, paragraphs 8 to 19.

<sup>268</sup> [C] Witness Statement, OFT Document Reference 2750.

<sup>269</sup> [C] Witness Statement, OFT Document Reference 2611, paragraph 4.

'If you need to discuss this further, please call me'.<sup>270</sup>

- VI.11 This email evidences [Ciceley Manager A]'s intention to contact other dealers in relation to out-of-area sales.<sup>271</sup> [Ciceley Director] was blind-copied in the email and therefore the OFT considers that he was made aware of [Ciceley Manager A]'s intention.<sup>272</sup>

### **Meeting and contact regarding customer [A1 Caravan Services] on 1 February 2008**

- VI.12 The evidence before the OFT shows that [Ciceley Manager A] and [Road Range Manager] met on 1 February 2008. [Ciceley Manager A]'s diary entry for 1 February 2008 has an entry at 10:30 am as follows: '[Road Range Manager] (ROAD RANGE) >L20 8DY'.<sup>273</sup> [Ciceley Manager A] stated in respect of this diary entry:

'I recall that this was a meeting at Road Range just to introduce myself and help build up a good relationship just in case I needed a favour, for example getting a vehicle urgently for a customer from Road Range if it was not available at Ciceley or from Mercedes'.<sup>274</sup>

- VI.13 [Ciceley Manager A] later clarified that '[t]he understanding I had with [Road Range Manager] at Road Range arose out of our first meeting on 1 February 2008'.<sup>275</sup>
- VI.14 Following their meeting, [Road Range Manager] sent an email to [Ciceley Manager A] on the same day at 16:53 pm, saying: 'We've quoted this customer leaving £[C] in. Any queries please let me know'.<sup>276</sup> The customer in question was [A1 Caravan Services] in Bolton (within Ciceley's area).

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<sup>270</sup> Email from [Ciceley Manager A] to sales executives bcc: [Ciceley Director] dated 15 January 2008 re Deals out of area, OFT Document Reference 3140.

<sup>271</sup> In this respect, see also Infringement 2, which the OFT considers started on the same day as the date of this email (or before), following contact between [Ciceley Manager A] and [Northside Manager A] (see paragraphs VI.5 to VI.8 of Decision 2 and paragraphs III.5 to III.6 (The OFT's Investigation)).

<sup>272</sup> The OFT did not have the opportunity to interview [Ciceley Director]. As explained in fn264, Ciceley refused the OFT's request to interview its employees during the investigative stage of the case.

<sup>273</sup> Diary of [Ciceley Manager A] dated 2008, OFT Document Reference 1124. L20 8DY is the post code of Road Range's van centre in Bootle.

<sup>274</sup> [C] First Witness Statement, OFT Document Reference 1403, paragraph 30.

<sup>275</sup> [C] Second Witness Statement, OFT Document Reference 2772, paragraph 4.

<sup>276</sup> Email (forward) from [Road Range Manager] to [Ciceley Manager A] dated 1 February 2008 re Ciceley lead, OFT Document Reference 3151.

VI.15 [Ciceley Manager A] stated in respect of this email:

'[i]t was unusual to receive an email from [Road Range Manager] with this information. I don't know why she emailed me but I note that it was on the same date as an entry in my diary for a meeting with her at Road Range. I may have on occasions spoken to [Road Range Manager] to find out if they had quoted a particular customer but I cannot recall any more emails from her'.<sup>277</sup>

VI.16 [Ciceley Manager A] replied to [Road Range Manager] saying:

'Thanks [Road Range Manager]. We managed to keep them, but profit took a knock after someone at Enza quoted them a full [C]% discount!! Just waiting for a conversation with [C] [presumably [Enza Director D]] now'.<sup>278</sup>

VI.17 [Ciceley Manager A] stated: '[i]n this email I confirmed to [Road Range Manager] that we had won the business, but that our profit margin was reduced as Enza were doing their usual trick of quoting with a full discount to try and win business'.

VI.18 In relation to the price of the vehicle, [Ciceley Manager A] stated: 'I would have quoted less than the amount that [Road Range Manager] had told me Road Range had quoted'.<sup>279</sup> [Ciceley Manager A] stated that it was likely he would have spoken at the time to [Enza Director D] to ask whether [Enza Director D] knew about this quote.<sup>280</sup>

VI.19 [Ciceley Manager A] then forwarded the email chain to [Ciceley Sales Executive C] on 4 February 2008 at 11:07 am, saying:

'At least they played fair [...]'.<sup>281</sup>

VI.20 [Ciceley Manager A] stated:

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<sup>277</sup> [C] First Witness Statement, OFT Document Reference 1403, paragraph 18.

<sup>278</sup> Email exchange between various inc. [Road Range Manager] and [Ciceley Manager A] dated 4 February 2008 re Ciceley lead, OFT Document Reference 3201.

<sup>279</sup> [C] Second Witness Statement, OFT Document Reference 2772, paragraph 3.

<sup>280</sup> [Ciceley Manager A] however could not recall the result of the conversation ([C] Second Witness Statement, OFT Document Reference 2772, paragraph 3).

<sup>281</sup> Email exchange between various inc. [Road Range Manager], [Ciceley Manager A] and [Ciceley Sales Executive C] dated 4 February 2008 re Ciceley lead, OFT Document Reference 3153.

'[b]y this I meant that Road Range had quoted with a sensible margin unlike Enza'.<sup>282</sup>

#### **Contact regarding customer [R Wellock & Sons] in April 2009**

VI.21 On 23 April 2009, [Ciceley Manager A] sent an email to [Road Range Manager] headed 'Customer Quote', saying:

'The customer I left a message about last night is [R Wellock & Sons]. He'll be after a 311 Long Chassis Cab'.<sup>283</sup>

VI.22 [Ciceley Manager A] stated:

'I recall this email related to a good repeat customer of Ciceley's located in Blackburn, within Ciceley's territory. I had been asked by [Ciceley Sales Executive A], one of my sales staff, to find out if Road Range were also quoting the customer. I was keen to retain this business so I gave the details to [Road Range Manager] to check. I would have expected [Road Range Manager] to do the same if it was a similar customer of hers. I cannot recall the outcome of this email, however the customer still was ordering with Ciceley by the time I left Ciceley'.<sup>284</sup>

#### **Ciceley's quote to customer [individual/sole trader] in Road Range's area in July 2009**

VI.23 On 9 July 2009 [Ciceley Manager A] forwarded to [Ciceley Sales Executive E]<sup>285</sup> an email from [individual/sole trader] (based in Wirral, within Road Range's area) which asked what deals were available on a Vito Sport X. [Ciceley Manager A]'s email read:

'Please follow this up. (note the area)'.

VI.24 [Ciceley Sales Executive E] replied:

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<sup>282</sup> [C] Second Witness Statement, OFT Document Reference 2772, paragraph 5.

<sup>283</sup> Email from [Ciceley Manager A] to [Road Range Manager] dated 23 April 2009 re Customer Quote, OFT Document Reference 3138.

<sup>284</sup> [C] Second Witness Statement, OFT Document Reference 2772, paragraph 6.

<sup>285</sup> The OFT did not have the opportunity to interview [Ciceley Sales Executive E]. As explained in fn264, Ciceley refused the OFT's request to make its current staff available for interview during the investigative stage of the case.

'with the area in mind, do you want me to quote to lose it or should I try and win it?'

VI.25 [Ciceley Manager A] replied:

'On the basis that it is out of area, and a Sport X, quote it with a £[C] in it and see where it goes from there'.<sup>286</sup>

VI.26 [Ciceley Manager A] stated that this email is an example of how he wanted his sales staff to act in relation to this model and customer and that he 'did not need to contact [Road Range Manager] about this quote'.<sup>287</sup> In interview, [Ciceley Manager A] confirmed that the approach set out in this email adheres to the arrangement with Road Range.<sup>288</sup>

VI.27 [Ciceley Manager A] stated that in his view this particular quote was competitive given that the customer was out-of-area and the vehicle in question was the top of the range model.<sup>289</sup> In interview, [Ciceley Manager A] also said that the quotation included a reasonable profit and that at the time Road Range could have provided a lower quotation and still have made a reasonable amount of profit.<sup>290</sup> The OFT considers that the corollary of this statement is that the quotation provided by Ciceley to customer [individual/sole trader] was in accordance with the terms of the anti-competitive arrangement.

#### **Meeting between Ciceley, Enza, Road Range and Mercedes on 8 December 2009 (regarding trucks)**

VI.28 On 8 December 2009, a meeting took place at the premises of Ciceley in Bolton.<sup>291</sup> The meeting was attended by [Ciceley Manager C], [Ciceley Sales Executive D], [Enza Director A], [Road Range Manager] and [Mercedes Sales Manager C].

VI.29 [Enza Director A] stated that at this meeting [Road Range Manager] 'mentioned that she already had some sort of understanding with Ciceley

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<sup>286</sup> Email exchange between various inc. [Ciceley Manager A] and [Ciceley Sales Executive E] dated 9 to 10 July 2009 re Vito sport x, OFT Document Reference 3243.

<sup>287</sup> [C] Second Witness Statement, OFT Document Reference 2772, paragraph 7.

<sup>288</sup> Note of interview with [C] dated 23 June 2011, OFT Document Reference 4407.

<sup>289</sup> [C] Second Witness Statement, OFT Document Reference 2772, paragraph 7.

<sup>290</sup> Note of interview with [C] dated 23 June 2011, OFT Document Reference 4407.

Commenting on average levels of profit for sales of vans, [Ciceley Manager A] stated that in '*a competitive deal we may make £[C] profit; whereas a good profit would be generally understood to be about £[C]*'. [C] First Witness Statement, OFT Document Reference 1403, paragraph 14.

<sup>291</sup> See Decision 5.

about the sale of vans into each other's area of influence and had a good working relationship with Ciceley's van sales manager although I don't know who this was. She made it clear that there was no such agreement with Enza on vans. She did not elaborate on how this agreement with Ciceley worked and I was surprised by her admission because I know Enza fight with the other two dealers on vans'.<sup>292</sup>

### **C. The OFT's assessment of the evidence**

VI.30 [Ciceley Manager A] and [Road Range Manager] met on 1 February 2008.<sup>293</sup> According to [Ciceley Manager A], at that meeting they discussed their respective commercial strategies in relation to quotations to out-of-area customers, and reached an understanding regarding their strategy in relation to those customers. The strategy was to include 'good' margins in quotations requested by out-of-area customers. The OFT considers that this evidence supports the conclusion that at that meeting the Parties entered into an agreement and/or concerted practice to dampen price competition in the sale of vans to customers based in their areas.<sup>294</sup>

VI.31 The agreement and/or concerted practice reached between the Parties manifested itself in an email exchange between [Ciceley Manager A] and [Road Range Manager] on the day of their meeting. In the course of the email exchange, Road Range disclosed to Ciceley pricing information about a quotation provided to a customer based in Ciceley's area. Contemporaneous documentary evidence shows that Ciceley considered that Road Range's quotation constituted 'fair' behaviour. This is in contrast with the quotation provided by Enza, which was perceived as containing 'a full discount to try and win the business'.<sup>295</sup> The OFT considers this to mean that Ciceley thought that the quotation provided by Road Range was consistent with their agreement and/or concerted practice whereby quotations to customers in each other's area should include 'good' margins. The OFT considers that disclosure by Road Range to Ciceley of the margin which Road Range quoted to a customer in Ciceley's area enabled (or at the least had the potential for enabling) Ciceley to win the business with a quotation higher than they would have provided had they not known Road Range's price.

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<sup>292</sup> [C] Witness Statement, OFT Document Reference 3865, paragraphs 20 to 27.

<sup>293</sup> See paragraphs VI.7 and VI.12.

<sup>294</sup> See paragraphs VI.7 and VI.13.

<sup>295</sup> See paragraphs VI.14 to VI.20.

- VI.32 The OFT also considers that the disclosure of specific price information (as described in paragraphs VI.14 to VI.20) provided further comfort to the Parties that they had a shared understanding of what constituted a 'good' margin under the terms of their agreement and/or concerted practice. Furthermore, the OFT considers that by this contact [Road Range Manager] and [Ciceley Manager A] confirmed to each other their intention to adhere to the anti-competitive arrangement they had entered into on that same day.
- VI.33 The OFT considers that the contact between Ciceley and Road Range in relation to customer [R Wellock & Sons] (see paragraphs VI.21 and VI.22) was another manifestation of the agreement and/or concerted practice. [Ciceley Manager A] said that the purpose of this contact was to ensure that Ciceley retained that customer's business. The OFT considers that Ciceley could not have failed to take into account the information regarding whether Road Range was quoting to this customer when setting its own price. [Ciceley Manager A] also stated that he 'would have expected [Road Range Manager] to do the same if it was a similar customer of hers'.<sup>296</sup> The OFT considers that this contact between Ciceley and Road Range is illustrative of the collusive relationship between them.
- VI.34 The contemporaneous documentary evidence regarding customer [individual/sole trader] is evidence of the fact that Ciceley was still acting in accordance with the terms of the agreement and/or concerted practice with Road Range in July 2009.<sup>297</sup> The OFT considers that the language used by [Ciceley Sales Executive E] in his email reveals his understanding of how Ciceley dealt with approaches from customers based in Road Range's area. His question as to whether he should 'quote to lose it' given the customer's location reflects his expectation that Ciceley might wish to provide a quotation which was deliberately too high if the customer in question was based in Road Range's area.
- VI.35 The OFT notes that [Ciceley Sales Executive E] was not asking whether he should set the margin at a level compatible with any additional costs associated with supplying an out-of-area customer and/or the likelihood of gaining after-sales business, which could provide the basis for a

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<sup>296</sup> [C] Second Witness Statement, OFT Document Reference 2772, paragraph 6.

<sup>297</sup> See paragraphs VI.23 to VI.27. Indeed, [Ciceley Manager A] confirmed that his approach in relation to this customer abided by the arrangement with Road Range (Note of interview with [C] dated 23 June 2011, OFT Document Reference 4407).

unilateral commercial decision. Rather, he asked whether he should provide a quote with the aim of losing the deal. The OFT considers that, in light of the agreement and/or concerted practice between the Parties and in the absence of an alternative explanation by Ciceley, the behaviour outlined above was as a result of the agreement and/or concerted practice in place between the Parties.

VI.36 Finally, the OFT considers that [Enza Director A]'s remark about [Road Range Manager]'s admission of Road Range's agreement with Ciceley in relation to vans (see paragraph VI.29) further supports the finding that there was an anti-competitive arrangement between Ciceley and Road Range.

#### **D. Evidence relating to termination of the Infringement**

VI.37 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. The latest evidence that the Infringement was in force is that referred to in paragraphs VI.28 and VI.29.

VI.38 The Parties involved in the Infringement were only inspected by the OFT in September 2010. However, the OFT considers it likely that following the site inspections at Northside and H & L (as described in paragraph III.9 (The OFT's Investigation), the Parties would have become aware of the OFT's investigation and ceased participation in the Infringement.<sup>298</sup> In light of this, the OFT assumes in the Parties' favour that the Infringement ended with the inspections at Northside and H & L on 26 January 2010.

### **Legal Assessment**

#### **E. Introduction**

VI.39 From the evidence presented in the Conduct Section, the OFT draws the following conclusions concerning its legal assessment of the conduct of the Parties. References to specific paragraph numbers are included in this section for ease of reference to the primary sources of evidence, but the conclusions are reached in light of the totality of the evidence.

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<sup>298</sup> See for example Email (forward) from [Enza Director B] to various inc. [Enza Director D] and [Enza Director A] dated 27 January 2010 re Office of Fair Trading guidelines, OFT Document Reference 3337.

VI.40 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.41 The OFT has concluded that the Parties infringed the Chapter I prohibition by entering into an agreement and/or concerted practice which had the object of preventing, restricting or distorting competition.

VI.42 The Infringement was an agreement and/or concerted practice between the Parties to dampen price competition for the sale of vans to customers based in their areas by including a 'good' margin when providing quotations to customers based in the other Party's area. The OFT considers that, at the very least, the Parties engaged in an information exchange with the object of restricting competition.

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

VI.43 The OFT notes that including a 'good' margin 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.<sup>299</sup> However, the law prohibits contacts which have the object or effect of influencing the conduct of an actual or potential competitor on 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 regarding their respective commercial strategies and subsequent contacts between them in respect of that matter.<sup>300</sup>

VI.44 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

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<sup>299</sup> See paragraph V.21 (Legal Background).

<sup>300</sup> See paragraph V.21 (Legal Background).

agreement and/or at least a concerted practice within the meaning of the Chapter I prohibition.

- VI.45 [Ciceley Manager A] stated that 'there were no agreements with other dealers on how to deal with approaches from customers from adjoining areas' but he stated that he had an 'understanding' with [Road Range Manager].<sup>301</sup> 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.<sup>302</sup>
- VI.46 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 particular way.<sup>303</sup> The evidence indicates that Ciceley and Road Range acted in exactly this way. According to [Ciceley Manager A]'s statement, he met [Road Range Manager] on 1 February 2008 and at that meeting they reached a common understanding that Ciceley and Road Range would each include a 'good' margin in quotations to customers in the other's area.<sup>304</sup> In relation to the contact discussed in paragraphs VI.21 and VI.22, [Ciceley Manager A] stated that he expected Road Range to take the same approach if a customer based in Ciceley's area approached them. The OFT considers that his expectation supports the finding that the meeting on 1 February 2008 resulted in a concurrence of wills between the Parties.
- VI.47 The existence of an agreement and/or concerted practice is also evidenced by contacts between Ciceley and Road Range after the meeting of 1 February 2008 (see paragraphs VI.13 to VI.22), which the OFT considers were manifestations of the arrangement reached at their meeting on 1 February 2008.
- VI.48 The OFT considers that the common understanding 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 on the market and the other requests or at least accepts the information.<sup>305</sup> By communicating to each other their shared view that quotations to customers out-of-area should include 'good' margins (and

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<sup>301</sup> See paragraph VI.7. See also the evidence of an anti-competitive arrangement with Northside in Decision 2.

<sup>302</sup> See paragraph V.16 (Legal Background).

<sup>303</sup> See paragraph V.18 (Legal Background).

<sup>304</sup> See paragraph VI.7.

<sup>305</sup> See paragraph V.23 (Legal Background).

that there was 'no point' in doing otherwise), Ciceley and Road Range gave each other assurance that they would be competing less vigorously for customers in each other's areas.<sup>306</sup>

- VI.49 The mutual disclosure between Ciceley and Road Range 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). The OFT notes that, following that mutual disclosure of future commercial strategy, each of the Parties would have been able to behave on the market in accordance with the objective of the arrangement without necessarily contacting the other Party about specific customers, due to their shared understanding of what constituted a 'good' margin. 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.<sup>307</sup>
- VI.50 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.<sup>308</sup> The OFT has not received any evidence that either of the Parties made clear to the other that they did not wish to take part in the agreement and/or concerted practice. The OFT has received no evidence that, following the meeting of 1 February 2008, the Parties took active steps to clearly distance themselves from the anti-competitive arrangement.
- VI.51 Throughout the Relevant Period, Ciceley and Road Range 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 was a causal connection between the concerted practice and their conduct on that market.<sup>309</sup> In any event, in this case the fact that the agreement and/or concerted practice may have influenced the Parties'

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<sup>306</sup> See paragraph V.22 (Legal Background).

<sup>307</sup> See paragraphs V.10 to V.15 (Legal Background).

<sup>308</sup> See paragraph V.25 (Legal Background).

<sup>309</sup> See paragraph V.27 (Legal Background). The OFT also notes the Parties' admission of liability for the Infringement.

conduct on the market is demonstrated by the evidence described in paragraphs VI.13 to VI.26.

VI.52 The OFT considers that the existence of an 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).<sup>310</sup> 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.<sup>311</sup>

### **G. Anti-competitive object**

VI.53 The Infringement concerns an agreement and/or concerted practice whereby Ciceley and Road Range would each include what has been described as a 'good' margin in quotations to customers based in the other Party's areas, thereby dampening price competition for the sale of vans to customers based in their areas. This arrangement amounts to conduct which can be regarded by its very nature as being injurious to the proper functioning of normal competition.<sup>312</sup>

VI.54 There is no evidence that the Parties agreed on the specific margins which should be included in quotations to out-of-area customers. Rather, they agreed to include a 'good' margin in those and the evidence before the OFT shows that the Parties had a shared understanding of what constituted a 'good' margin (as opposed to a competitive margin).<sup>313</sup> The OFT notes that Mercedes stated that its policy is to quote the same price to dealers which are known to be quoting to the same customers,<sup>314</sup> 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 OFT therefore considers that, in the commercial context in which the Infringement took place, 'good' margins constituted a sufficiently clear focal point for collusion between the Parties.<sup>315</sup>

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<sup>310</sup> [C] First Witness Statement, OFT Document Reference 1403, paragraphs 8 to 9.

<sup>311</sup> See paragraph V.32 (Legal Background).

<sup>312</sup> See paragraphs V.41 to V.44 (Legal Background).

<sup>313</sup> See paragraphs VI.7.

<sup>314</sup> Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 7.4.

<sup>315</sup> See paragraph V.44 (Legal Background).

VI.55 The OFT also considers that, through the communications described in paragraphs VI.7 and VI.12 to VI.20, the Parties disclosed to each other their pricing policy in relation to out-of-area customers and the conduct they intended to adopt on the market in relation to those customers.<sup>316</sup> By doing so, the Parties reduced the uncertainty between them regarding the prices they would be quoting to customers based in each other's areas. In addition, they exchanged specific price information in relation to customer [A1 Caravan Services].<sup>317</sup> The OFT therefore considers that this information exchange had as its object the restriction of competition.<sup>318</sup>

VI.56 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.<sup>319</sup>

#### **H. Appreciability**

VI.57 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.58 An agreement and/or concerted practice will not meet the appreciability criterion if it has only an insignificant impact on the market.<sup>320</sup>

VI.59 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.<sup>321</sup> 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

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<sup>316</sup> See paragraph V.52 (Legal Background).

<sup>317</sup> See paragraphs VI.12 to VI.20.

<sup>318</sup> See paragraph V.52 (Legal Background).

<sup>319</sup> See paragraph V.58 (Legal Background).

<sup>320</sup> See paragraphs V.59 and V.62 (Legal Background).

<sup>321</sup> See paragraphs V.60 to V.61 (Legal Background).

Importance, the approach set out in the Notice on Agreements of Minor Importance would not apply to the Infringement.

- VI.60 The OFT has had regard to the approach to the appreciability test in object cases set out by the CAT in *North Midland Construction*.<sup>322</sup> The OFT considers that the nature of the agreement and/or concerted practice is such that, given the circumstances of this case, its potential impact on competition is inherently likely to be appreciable.
- VI.61 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.<sup>323</sup> 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.<sup>324</sup>
- VI.62 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.<sup>325</sup>
- VI.63 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.64 The anti-competitive arrangement between the Parties had also the potential for opening, reinforcing, or maintaining the channels of communication between them, which could facilitate collusive conduct on other markets where both Parties are active (such as trucks).
- VI.65 Finally, the OFT notes that there could potentially be an impact on the wider vans market to the extent that the Infringement enabled Mercedes

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<sup>322</sup> See paragraphs V.62 and V.64 (Legal Background).

<sup>323</sup> See paragraph IV.6 (Industry Overview and the Relevant Market).

<sup>324</sup> 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).

<sup>325</sup> See paragraph IV.12 (Industry Overview and the Relevant Market).

dealers to raise prices, thereby reducing the competitive constraint on dealers of other brands.

VI.66 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.

**I. Effect on trade within the UK**

VI.67 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.68 The agreement and/or concerted practice appreciably restricted competition,<sup>326</sup> 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.69 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.70 In view of the foregoing, the OFT has decided that the Parties infringed the Chapter I prohibition by participating between 1 February 2008 and 26 January 2010 in an agreement and/or concerted practice with the object of preventing, restricting or distorting competition for the sale of vans to customers based in the Parties' areas.

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<sup>326</sup> See paragraphs VI.57 to VI.66.

## **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 Ciceley and Road Range infringed the Chapter I prohibition by participating between 1 February 2008 and 26 January 2010 in an agreement and/or concerted practice which had the object of preventing, restricting or distorting competition for the sale of 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.<sup>327</sup>

- 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.<sup>328</sup> Rather, the OFT makes its assessment on a case-by-case basis<sup>329</sup> 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.<sup>330</sup>
- 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.<sup>331</sup>

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<sup>327</sup> *2012 Penalty Guidance* (fn120), paragraph 1.11.

<sup>328</sup> For example, *Eden Brown and Others v OFT* [2011] CAT 8 ('*Eden Brown*'), at [78].

<sup>329</sup> 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* (fn328), 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*'.

<sup>330</sup> *Argos/Littlewoods* (fn141), at [168] and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, at [102].

<sup>331</sup> *Musique Diffusion française* (fn171), paragraphs 101 to 110 and *Dansk Rørindustri* (fn12), 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.<sup>332</sup> This is considered further at paragraphs VII.37 to VII.39.

### **Small agreements**

VII.11 Section 39(3) of the Act provides that a party to a 'small agreement'<sup>333</sup> 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 by the undertaking.<sup>334</sup> The CAT has stated that:

'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'.<sup>335</sup>

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

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<sup>332</sup> Section 36(8) of the Act.

<sup>333</sup> '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.

<sup>334</sup> Section 36(3) of the Act.

<sup>335</sup> *Napp* (fn228), at [456] to [457].

rules of the Treaty (see Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 IAZ International Belgium and Others v Commission [1983] ECR 3369, paragraph 45, and *Nederlandsche Banden-Industrie- Michelin v Commission*, paragraph 107)<sup>336</sup>.

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 intentionally or negligently.

## **E. Calculation of penalties**

### **Turnover**

VII.15 For the purpose of penalty calculation, the OFT considers that the Relevant Turnover<sup>337</sup> or total turnover applicable is the turnover of the undertaking which comprises the relevant single economic entity, as defined in paragraphs II.29 and II.40 (Company Profiles).

### **Step 1 – calculation of the starting point**

VII.16 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.<sup>338</sup>

### **Relevant Turnover**

VII.17 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.18 In this Decision, the OFT has taken this to be the financial year ending 31 December 2009 as the Infringement ended during the financial year ending 31 December 2010.<sup>339</sup>

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<sup>336</sup> Case C-280/08 P *Deutsche Telekom v Commission* (OJ 2010 C 346/4), paragraph 124.

<sup>337</sup> As defined in paragraph IV.42 (Industry Overview and the Relevant Market).

<sup>338</sup> *2004 Penalty Guidance* (fn120), paragraphs 2.3 to 2.5.

<sup>339</sup> As set on in paragraph VI.38 (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.

## Seriousness of the infringement

- VII.19 Under the *2004 Penalty Guidance*, the starting point percentage which the OFT applies may not exceed 10 per cent of each undertaking's Relevant Turnover.<sup>340</sup>
- VII.20 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.<sup>341</sup> 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 infringement and the effect on competitors and third parties. The damage caused to consumers, whether directly or indirectly, will also be an important consideration.<sup>342</sup>
- VII.21 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.22 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.<sup>343</sup> 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 this respect.<sup>344</sup>
- VII.23 Taking these factors in the round, the OFT has decided that a starting point of six per cent is appropriate.

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<sup>340</sup> *2004 Penalty Guidance* (fn120), paragraph 2.8.

<sup>341</sup> *2004 Penalty Guidance* (fn120), paragraph 2.4.

<sup>342</sup> *2004 Penalty Guidance* (fn120), paragraph 2.5.

<sup>343</sup> *2004 Penalty Guidance* (fn120), paragraphs 2.3 and 2.4, and paragraph VI.56 (The Conduct of the Parties and Legal Assessment).

<sup>344</sup> *Francis/Barrett and Others v Office of Fair Trading*, [2011] CAT 9, at [88].

## **Step 2 – adjustment for duration**

- VII.24 At Step 2, the starting point under Step 1 may be adjusted to take into account the duration of the Infringement.<sup>345</sup> 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'.<sup>346</sup>
- VII.25 The OFT has concluded that the Infringement occurred between 1 February 2008 and 26 January 2010. The OFT's approach in this case, for the purposes of calculating the penalties, is to round up each part year to the nearest quarter of a year. The OFT has therefore applied multiplier of two to the penalty at this step in the calculation.<sup>347</sup>

## **Step 3 – adjustment for other factors**

- VII.26 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.27 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 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.

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<sup>345</sup> *2004 Penalty Guidance* (fn120), paragraph 2.10.

<sup>346</sup> *2004 Penalty Guidance* (fn120), paragraph 2.10.

<sup>347</sup> There is a typographical error in paragraph VII.29 of the Statement giving the incorrect duration multiplier. This error was notified to the Parties during settlement discussions and in the Settlement Agreements. Signed Settlement Agreement between OFT and Ciceley, dated 20 February 2013, OFT Document Reference 5065, paragraph 2; and Signed Settlement Agreement between OFT and Road Range, dated 20 February 2013, OFT Document Reference 5063, paragraph 2.

- VII.28 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.<sup>348</sup> These can result in either an increase or a decrease of the financial penalty resulting from the application of Steps 1 and 2.
- VII.29 When assessing whether an adjustment is required, the OFT will consider a number of indicators of each 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.30 In this case, the OFT carried out detailed cross-checks by reference to certain relevant indicators of the Parties' size and financial position when considering whether the proposed level of the penalty was appropriate and, in particular, whether it was necessary and proportionate.<sup>349</sup>
- VII.31 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.<sup>350</sup>
- VII.32 As set out in paragraphs III.6 and III.7 (The OFT's Investigation), on the same day as this Decision is adopted, the OFT is adopting Decision 2 and Decision 5 and imposing financial penalties on Ciceley for its involvement in Infringement 2 and Infringement 5 and Road Range for its involvement in Infringement 5. For each of Ciceley and Road Range, the OFT has therefore taken a step back and carried out a cross-check across the penalties to ensure that, taken together, they do not lead to the imposition of total penalties across all infringements that are

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<sup>348</sup> *2004 Penalty Guidance* (fn120), paragraph 2.11.

<sup>349</sup> When assessing the Parties' financial position, the OFT considered in particular its (i) three-year (2009, 2010 and 2011) average total turnover, average gross profits and average profits after tax, (ii) net assets in 2011 and (iii) net assets in 2011 plus two years of dividends (2010 and 2011).

<sup>350</sup> *Kier* (fn329), at [177].

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'.<sup>351</sup>

VII.33 The OFT has made 'totality' adjustments to Ciceley's and Road Range's penalties for overall proportionality (see paragraphs VII.46 and VII.54). These adjustments are only appropriate in the circumstances as set out in this Decision and Infringement Decisions 2 and 5. In particular, the OFT considers this discount is only appropriate if the respective penalties at the end of Step 3 for Ciceley amount to £421,042 for Infringement 2 and £417,571 for Infringement 5 and for Road Range amount to £80,079 for Infringement 5 without the further 'totality' adjustment. If there are changes to the penalties imposed on Ciceley for its involvement in Infringements 2, 3 or 5 or on Road Range for its involvement in Infringements 3 or 5, this further 'totality' adjustment for the party(ies) in question would need to be re-assessed.

#### **Step 4 – adjustment for aggravating and mitigating factors**

VII.34 The OFT may increase the penalty where there are other aggravating factors, or decrease it where there are mitigating factors.<sup>352</sup>

VII.35 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.36 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 policy would not normally receive additional reductions in

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<sup>351</sup> *Kier* (fn329), at [180].

<sup>352</sup> *2004 Penalty Guidance* (fn120), paragraph 2.14.

financial penalties under this head to reflect general cooperation.<sup>353</sup>  
These factors are also not exhaustive.

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

- VII.37 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').<sup>354</sup> The section 36(8) turnover is not restricted to a party's turnover in the relevant market.
- VII.38 In addition, the OFT must, when setting the amount of 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.<sup>355</sup> There have been no other penalties or fines imposed in relation to the Infringement.
- VII.39 The OFT has assessed the Parties' penalties against these tests (as applicable). No reduction was required at Step 5 of the penalty calculation because the penalty for each Party after Step 4 is below the maximum penalty that the OFT may impose.

**F. Settlement**

- VII.40 As set out in paragraphs III.25 to III.29 (The OFT's Investigation), the OFT has entered into Settlement Agreements with each of the Parties. As provided for in the Settlement Agreements, only 85 per cent of the penalty determined for each Party is payable on the date specified in paragraph VII.60 (the 'Settlement Penalty'). The remaining 15 per cent (the 'Settlement Discount'), in relation to each Party, will only become payable in the event that that Party's Settlement Agreement is terminated in accordance with its terms.
- VII.41 In determining the level of the settlement discount, the OFT took into account the administrative efficiencies and resource savings from early resolution of the case.

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<sup>353</sup> *2004 Penalty Guidance* (fn120), paragraph 2.16 and footnote 19.

<sup>354</sup> Section 36(8) of the Act and the 2000 Order, as amended by the 2004 Order.

<sup>355</sup> Section 38(9) of the Act and *2004 Penalty Guidance* (fn120), paragraph 2.20.

## **G. Individual penalties**

- VII.42 As stated in paragraph VII.23, the Step 1 starting point for all the Parties is six per cent, which has been applied to each Party's Relevant Turnover. In addition, as explained in paragraph VII.25, the OFT has applied a multiplier of two for duration to the Parties penalties at Step 2.
- VII.43 The OFT's consideration of the subsequent steps in calculating each Party's financial penalty, followed by a table of the full calculation, are set out below.

### **Penalty for Ciceley**

#### Step 3 – adjustment for other factors

- VII.44 After Step 1 and 2, the OFT has considered the necessity and proportionality of the penalty in all the circumstances of this case. In doing so, the OFT has had regard to a range of factors relating to Ciceley's financial position. The OFT has also had regard to the fact that Ciceley was involved in three infringements (Infringement 2, Infringement 3 and Infringement 5).
- VII.45 Ciceley's penalty at the end of Step 2 constituted multiples of Ciceley's average profits after tax<sup>356</sup> and relatively high proportions of other indicators of Ciceley's financial position, such as average gross profits and average total turnover.<sup>357</sup> The OFT therefore considered that a downwards adjustment was required and applied a reduction of 75 per cent.
- VII.46 In addition, and consistent with the approach taken by the CAT in *Kier*,<sup>358</sup> the OFT took a final step back and considered whether the penalties for Infringement 2, Infringement 3 and Infringement 5, in sum, were necessary and proportionate in order to reflect the seriousness of Ciceley's participation in the three infringements and to deter Ciceley and other companies from further breaches of the same kind (the 'totality principle'). The OFT therefore applied a further reduction of 40 per cent. Without further adjustment, the sum of the three penalties

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<sup>356</sup> The penalty at the end of Step 2 amounted to around 420 per cent of Ciceley's average profits after tax.

<sup>357</sup> The penalty at the end of Step 2 amounted to around 25 per cent of Ciceley's average gross profits and around three per cent of its average total turnover.

<sup>358</sup> *Kier* (fn329), at [180].

would have amounted to over three years of Ciceley's average profits after tax and to just under 20 per cent of its average gross profits.

VII.47 Following this further discount, whilst the sum of the three penalties constitutes around 185 per cent of Ciceley's average profits after tax, it represents between five and 10 per cent of Ciceley's net assets and net assets plus dividends in the last two financial years,<sup>359</sup> and just over one per cent of Ciceley's average total turnover. In view of this, and considering in particular the need to deter future anti-competitive behaviour and to reflect the seriousness of the three infringements in which Ciceley was involved (including two of longer duration which would have had a bigger actual or potential impact), the OFT is satisfied that, in the round, the resulting penalty is necessary and proportionate to achieve the twin policy objectives in all the circumstances of the case.

#### Step 4 – aggravating and mitigating factors

VII.48 The OFT considered increasing the penalty at Step 4 for the involvement of [Ciceley Manager A] in this Infringement, but has concluded, in light of [Ciceley Manager A]'s responsibilities, that an uplift for senior management involvement at Step 4 was not required in the particular circumstances of this case.

VII.49 Apart from the commitments made as part of the Settlement Agreement, the OFT does not consider that it has received cooperation from Ciceley above and beyond its legal obligations which has enabled the process in this case to be concluded more effectively and/or speedily, and which would warrant a penalty reduction at Step 4.

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

VII.50 As stated in paragraph VII.39, no adjustment to Ciceley's penalty is necessary as its penalty after Step 4 is below the maximum penalty that the OFT may impose.

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<sup>359</sup> The OFT notes that Ciceley's net assets are significantly higher than that of the other two dealers that have settled, Road Range and Enza. OFT also notes that Ciceley has distributed much higher dividends in the past two years than those two dealers.

## Penalty imposed by the OFT

VII.51 The total penalty, without the Settlement Discount, for Ciceley's involvement in Infringement 3 is £260,288. The Settlement Penalty is £221,245.<sup>360</sup>

Penalty component	Description		Penalty after each step
Step 1	Relevant turnover of £[C]		[C]
	Starting point	6%	
Step 2	Duration multiplier	x2	[C]
Step 3	Proportionality/deterrence	-75%	[C]
	Overall proportionality	-40%	[C]
Step 4	Aggravating factors	0%	[C]
	Mitigating factors	0%	
Step 5	Statutory maximum	N/A	[C]
<b>Penalty for Infringement 5</b>			<b>£260,288</b>
<b>Settlement Penalty</b>	Settlement Discount	-15%	<b>£211,245</b>

## Penalty for Road Range

Step 3 – adjustment for other factors

VII.52 After Step 1 and 2, the OFT considered the necessity and proportionality of the penalty in all the circumstances of this case. In doing so, the OFT has had regard to a range of factors relating to Road Range's financial position, including the fact that Road Range is, by far, the smaller of the Parties in terms of net assets, turnover and profits after tax.<sup>361</sup>

VII.53 At the end of Step 2, Road Range's penalty for the Infringement constituted nearly 300 per cent of its average profits after tax. It also represented relatively high proportions of other indicators of Road Range's financial position such as net assets and net assets plus

<sup>360</sup> Ciceley's penalties for Infringement 2 and Infringement 5, pursuant to Decision 2 and Decision 5, after the Settlement Discount, are £225,468 and £212,961 respectively. The sum of the penalties for its involvement in Infringement 2, Infringement 3 and Infringement 5 after the Settlement Discount is £659,675.

<sup>361</sup> *Kier* (fn329), at [177].

dividends.<sup>362</sup> The OFT therefore considered that a downwards adjustment was required and applied a reduction of 75 per cent.

VII.54 In addition, and consistent with the approach taken by the CAT in *Kier*,<sup>363</sup> the OFT took a final step back and considered whether the penalties for Infringement 3 and Infringement 5, in sum, were necessary and proportionate in order to reflect the seriousness of Road Range's participation in the two infringements and to deter Road Range and other companies from further breaches of the same kind (the 'totality principle'). The OFT therefore applied a further reduction of 25 per cent. Without further adjustment, the sum of the two penalties would have amounted around 15 per cent of its net assets and net assets plus dividends in the last two financial years and to one year and a third of Road Range's average profits after tax.

VII.55 Following this further discount, the sum of the two penalties represents just over one year of Road Range's average profits after tax, as well as more than 10 per cent of its net assets and net assets plus dividends in the last two years. In view of this, and considering in particular the need to deter future anti-competitive behaviour and to reflect the seriousness of the two infringements (including one of longer duration which would have had a bigger actual or potential impact), the OFT is satisfied that, in the round, the resulting penalty is necessary and proportionate to achieve the twin policy objectives in all the circumstances of the case.

#### Step 4 – aggravating and mitigating factors

VII.56 The OFT considered increasing the penalty at Step 4 for the involvement of [Road Range Manager] in this Infringement but has concluded, in light of [Road Range Manager]'s responsibilities, that an uplift for senior management involvement at Step 4 was not required in the particular circumstances of this case.

VII.57 Apart from the commitments made as part of the Settlement Agreement, the OFT does not consider that it has received cooperation from Road Range above and beyond its legal obligations which has enabled the process in this case to be concluded more efficiently and speedily, and which would warrant a penalty reduction at Step 4.

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<sup>362</sup> The penalty at the end of Step 2 amounted to around 35 per cent of its net assets and its net assets plus dividends.

<sup>363</sup> *Kier* (fn329), at [180].

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

VII.58 As stated in paragraph VII.39, no adjustment to Road Range's penalty is necessary as its penalty after Step 4 is below the maximum penalty that the OFT may impose.

Penalty imposed by the OFT

VII.59 The total penalty, without the Settlement Discount, for Road Range's involvement in Infringement 3 is £76,145. The Settlement Penalty for Infringement 3 is £64,723.<sup>364</sup>

Penalty component	Description		Penalty after each step
Step 1	Relevant turnover of £[C]		[C]
	Starting point	6%	
Step 2	Duration multiplier	x2	[C]
Step 3	Proportionality/deterrence	-75%	[C]
	Overall proportionality	-25%	[C]
Step 4	Aggravating factors	0%	[C]
	Mitigating factors	0%	
Step 5	Statutory maximum	N/A	[C]
Penalty for Infringement 3			£76,145
Settlement Penalty	Settlement Discount	-15%	£64,723

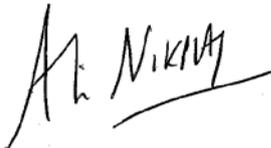
## H. Payment of penalty

VII.60 The OFT therefore requires Ciceley and Road Range to pay their respective Settlement Penalties for Infringement 3 as set out in the tables above at paragraphs VII.51 and VII.59. Payment should be made to the OFT by close of banking business on 31 May 2013 or on such other date or dates as may be agreed in writing with the OFT.<sup>365</sup>

<sup>364</sup> Road Range's penalty for Infringement 5, after the Settlement Discount, pursuant to Decision 5, is £51,050. The sum of the penalties for its involvement in Infringement 3 and Infringement 5, after the Settlement Discount, is £115,774.

<sup>365</sup> Details on how to pay are set out in the letter accompanying this Decision.

- VII.61 In the event that the Settlement Agreement with Ciceley or Road Range is terminated in accordance with the terms of the Settlement Agreement, the OFT requires that Party to pay the Settlement Discount to the OFT no later than 30 days following the date on which the Settlement Agreement is terminated.
- VII.62 If the Settlement Penalty or (where applicable) the Settlement Discount is not paid by the date on which it becomes due 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 in the OFT's favour, the OFT may commence proceedings to recover any amount payable that remains outstanding as a civil debt.<sup>366</sup>



**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**

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<sup>366</sup> Section 37 of the Act.

## **ANNEX A**

**Copies of the Settlement Agreements entered into between the OFT and the Parties on 20 February 2013**

**By email**

**Ciceley Commercials Limited  
Ciceley Limited**

c/o Adam Aldred  
Addleshaw Goddard  
Sovereign House  
Sovereign Street  
Leeds  
LS1 1HQ

Case ref	CE/9161-09	Direct line	020 7211 8153
Date	13 February 2013	Fax	020 7211 8992
Your ref		Email	Stephanie.E.Oneil@oft.gsi.gov.uk

Dear Mr Aldred

**Competition Act 1998 – Investigation into the distribution of Mercedes-Benz commercial vehicles**

As you are aware, the Office of Fair Trading ('OFT') proposes to adopt one or more decisions (a 'Decision'; together, the 'Decisions') that Ciceley Commercials Limited and Ciceley Limited (collectively referred to as 'Ciceley') infringed the prohibition in section 2(1) of the Competition Act 1998 ('the Chapter I prohibition') through:

- 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 ('Settlement Infringement 2');<sup>1</sup>
- 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 ('Settlement Infringement 3');<sup>2</sup> and
- an agreement and/or concerted practice between Ciceley, Enza, Mercedes and Road Range which had the object of preventing, restricting or distorting competition for the sale of trucks between 8 December 2009 and 26 January

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<sup>1</sup> See paragraphs VI.83 to VI.124 of the Statement of Objections.

<sup>2</sup> See paragraphs VI.125 to VI.188 of the Statement of Objections.

2010 ('Settlement Infringement 5');<sup>3</sup>

(together, the 'Settlement Infringements').

The OFT's proposed decision is set out in the Statement of Objections – Distribution of Mercedes-Benz Commercial Vehicles - dated 28 June 2012 ('the Statement of Objections').

You have indicated Ciceley's willingness to admit its involvement in the Settlement Infringements). You have also indicated Ciceley's willingness to agree to the streamlined procedure and to co-operate with the OFT in expediting the conclusion of its investigation as to whether the Chapter I prohibition has been infringed (the 'Investigation'). This letter (the 'Agreement') sets out the terms upon which the OFT would be prepared to resolve its Investigation. In signing and returning a signed copy of this Agreement to the OFT, Ciceley agrees to the terms of this Agreement. Ciceley enters into this Agreement voluntarily and understands fully the implications of doing so. Ciceley understands and accepts that if another party to the Investigation successfully appeals any infringement decision(s) by the OFT following the Investigation (including as to penalty) the Decision(s) will remain binding against Ciceley. Ciceley also understands and accepts that any Decision(s) may refer to this Agreement, including to Ciceley's admission as per paragraph 1 below, and may be relied on by third parties in accordance with sections 47A, 47B, 58 and 58A of the Competition Act 1998.

#### **Admission of liability**

1. Ciceley admits its liability for the Settlement Infringements, and the facts as set out in sections IV, V, VI.83 to VI.124, VI.125 to VI.188, VI.288 to VI.411 and VII of the Statement of Objections insofar as they are relevant to Ciceley's involvement in the Settlement Infringements, subject to the memorandum referred to in paragraph 3 (if any).

#### **Streamlined procedure**

2. The OFT hereby gives written notice to Ciceley of a typographical error in paragraph VII.29 of the Statement of Objections in that the duration multiplier for Settlement Infringement 3 should have been two (as opposed to one and a half). Ciceley understands and accepts that the penalty for its involvement in Settlement Infringement 3 has been calculated on the basis of the correct multiplier at Step 2, namely two.
3. With the exception of a concise memorandum (if any) indicating any material factual inaccuracies, which shall be provided to the OFT at the latest at the same time as Ciceley signed a copy of this Agreement, Ciceley agrees not to provide any written

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<sup>3</sup> See paragraphs VI.288 to VI.411 of the Statement of Objections.

representations on the Statement of Objections. Ciceley agrees to limit any written representations on any Supplementary Statement of Objections that the OFT may issue in respect of the Settlement Infringements to a concise memorandum indicating any material factual inaccuracies.

4. Ciceley agrees not to request an oral hearing in respect of the Statement of Objections, or of any Supplementary Statement of Objections.
5. Ciceley has already been provided with access to documents on the OFT's file at the time when the Statement of Objections was issued. Ciceley will not seek any further access to documents on the OFT's file except for any documents which are directly relied on and referred to in any Supplementary Statement of Objections and which have not already been provided to Ciceley.
6. Ciceley has been provided with a memorandum (attached as Annex I) setting out the calculation of the penalty for the Settlement Infringements. Ciceley accepts that in respect of the Settlement Infringements it will not also receive a Draft Penalty Statement provided for in the OFT's Procedures Guidance.<sup>4</sup> Without prejudice to the above, should the OFT decide in the exercise of its discretion to issue a Draft Penalty Statement, Ciceley agrees to limit any representations to a concise memorandum indicating any material factual inaccuracies.
7. Ciceley shall adhere to the deadlines set by the OFT for the performance of the obligations set out in this Agreement.

#### **Cooperation**

8. Ciceley agrees to cooperate fully, as set out below, throughout the remainder of the OFT's Investigation in relation to the Settlement Infringements, and until the conclusion of any action involving the OFT arising as a result of the Investigation in relation to the Settlement Infringements (this includes any actions or proceedings involving the OFT, whether before the Competition Appeal Tribunal ('CAT') or any other court or tribunal as a result of or otherwise arising from a Decision or from any other action or decision by the OFT as a result of or otherwise arising from the Investigation):
  - a. if requested by the OFT, Ciceley will provide the OFT with any information or documents in its possession or under its control which are directly or indirectly relevant to any of the Settlement Infringements;

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<sup>4</sup> OFT Guidance 1263rev, *A guide to the OFT's investigation procedures in competition cases* (October 2012).

- b. if requested by the OFT, Ciceley will use its best endeavours to secure the complete and truthful cooperation of any of its current or former directors, officers, employees or agents identified by the OFT. Cooperation that the OFT may request from these individuals may include but is not limited to:
  - i. attending such interviews as the OFT may require at such times and places as may be designated by the OFT;
  - ii. providing a complete and truthful account of all matters within their knowledge which are directly or indirectly relevant to any of the Settlement Infringements, responding completely and truthfully to all questions the OFT may ask and providing the OFT with a witness statement or statements that accurately reflect their account of those matters;
  - iii. making no attempt either falsely to protect or falsely to implicate any undertaking in any of the Settlement Infringements;
- c. if requested by the OFT, in relation to any court or tribunal proceedings arising from a Decision or from any other action or decision made by the OFT as a result of or otherwise arising from the Investigation, Ciceley will use its best endeavours to facilitate, and secure the complete and truthful cooperation, of any of its current or former directors, officers, employees or agents, even if Ciceley is not a party to those proceedings, in:
  - i. assisting the OFT or its counsel in the OFT's preparation for the proceedings;
  - ii. if requested by the OFT or its counsel, attending the proceedings; and
  - iii. speaking to their witness statements and being cross-examined on such witness statements in the proceedings.

9. Ciceley agrees not to act in a way inconsistent with its admission in paragraph 1, including through making any form of public statement that is inconsistent with that admission.

**OFT infringement decision and reduction in penalty**

10. Any Decision or Decisions adopted by the OFT will:

- a. set out the OFT's findings in substantially the terms of sections IV, V, VI.83 to VI.124, VI.125 to VI.188, VI.288 to VI.411 and VII of the Statement of Objections, subject to any amendments deemed necessary and appropriate by the OFT including as a result of (i) any representations on material factual inaccuracies in the Statement of Objections from any of the recipients of the Statement of Objections, and/or (ii) any other information, as reflected in any Supplementary Statement of Objections that the OFT may issue in respect of any of the Settlement Infringements;
- b. note Ciceley's admission of the Settlement Infringements and conclude that Ciceley has committed the Settlement Infringements;
- c. impose in combination penalties on Ciceley totalling no more than £776,088 (the 'Total Penalty'). Liability for 85 per cent of the Total Penalty (the 'Settlement Penalty') will arise on the date specified in the Decision(s). In recognition of Ciceley's ongoing adherence to the terms of this Agreement, liability for the remaining 15 per cent (the 'Settlement Discount'), will only arise in the event that this Agreement is terminated in accordance with paragraphs 13 and/or 14; and
- d. set out the OFT's approach to calculating the penalty under its 2004 Penalty Guidance<sup>5</sup> (in accordance with the transitional provisions set out in OFT's 2012 Penalty Guidance).<sup>6</sup>

11. The OFT may without notice make adjustments that have the effect of reducing Ciceley's final penalty.

#### **Time to pay**

12. Provided that Ciceley continues to comply with the terms of this Agreement, the OFT will offer Ciceley the option of paying the Settlement Penalty in instalments (with interest) over a period of three years, in accordance with the offer memorandum in Annex II.

#### **Termination**

13. This Agreement will be automatically terminated should Ciceley appeal or bring any legal challenge in relation to any Decision or any other action or decision by the OFT as a

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<sup>5</sup> OFT Guidance 423, *OFT's Guidance as to the Appropriate Amount of a Penalty* (December 2004).

<sup>6</sup> See OFT Guidance 423, *OFT's Guidance as to the Appropriate Amount of a Penalty* (September 2012), paragraph 1.11.

result of or otherwise arising from the Investigation to any court, including but not limited to the CAT.

14. The OFT may terminate this Agreement if, at any time before the conclusion of the case, including any proceedings before the CAT or any other court, it determines that any of the conditions in paragraphs 1 to 9 above has not been complied with.
15. Before terminating this Agreement in accordance with paragraph 14 the OFT shall serve written notice to Ciceley of the nature of the non-compliance and that the OFT is considering terminating the Agreement. Ciceley will be given an opportunity to respond to the notice and, where this is possible and appropriate, to remedy any breach within what the OFT considers to be a reasonable period of time from the service of the notice. If Ciceley fails to remedy the breach within that time, the OFT may terminate the Agreement.

#### **Consequences of termination**

16. Where this Agreement is terminated, all the terms of this Agreement, including the agreed Total Penalty, the Settlement Penalty and the Settlement Discount, but excluding paragraphs 16 to 19, will cease to have effect.
17. Where this Agreement is terminated before a Decision is adopted, the OFT will pursue its Investigation in accordance with its normal procedures.
18. If, following the adoption of a Decision, Ciceley brings appeal proceedings before the CAT against any Decision (including as to penalty) or any other action or decision by the OFT as a result of or otherwise arising from the Investigation, the OFT reserves the right to make an application to the CAT:
  - a. to increase the penalty imposed on Ciceley in relation to any or all of the Settlement Infringements; and
  - b. to require Ciceley to pay the OFT's full costs of the appeal regardless of the outcome of that appeal.

#### **Information and other investigations**

19. All information, documents and other evidence provided by Ciceley to the OFT under this Agreement shall remain the property of the OFT and may be used by the OFT for the purpose of the performance of its functions by or under any enactment. This includes any witness statements or replies to questions provided by any of the Ciceley's

current or former directors, officers, employees or agents. In particular, where this Agreement is terminated according to paragraphs 13 and/or 14, the OFT will still be able to rely on the admission made by Ciceley in this Agreement and all information, documents and other evidence provided by Ciceley to the OFT under the Agreement.

#### **Entire agreement**

20. This Agreement constitutes the entire settlement agreement between Ciceley and the OFT. It supersedes and extinguishes all previous drafts, agreements, arrangements and understandings between Ciceley and the OFT, whether written or oral, relating to its subject matter.
21. Ciceley accepts that in entering into this Agreement it has not placed reliance on any statements by the OFT or any of its officers save as reflected in the terms of this Agreement.

#### **Other matters**

22. Nothing in this Agreement affects any OFT action that is beyond the scope of this Investigation, including any of the OFT's separate ongoing or future investigations into possible infringements of the Competition Act 1998 and/or Articles 101 and/or 102 of the Treaty on the Functioning of the European Union or any investigations or other OFT action taken under the Enterprise Act 2002 or any other enactment.
23. Ciceley agrees to the OFT making an announcement that it has entered into this Agreement with Ciceley at any time after the Agreement becomes effective in accordance with paragraph 24. Ciceley also agrees to the publication of this Agreement by the OFT. This Agreement is however confidential until any such announcement and/or publication by the OFT and should not be disclosed by Ciceley without the express written consent of the OFT.
24. This Agreement will be executed in counterparts and shall only become effective when both Ciceley and the OFT have signed their respective counterpart. For the avoidance of doubt, this Agreement will not come into force until it is countersigned for and on behalf of the OFT; in particular, the OFT may decide not to enter into this Agreement in the event that one or more of the parties involved in the Settlement Infringements fails to enter into and return its settlement agreement to OFT within the timetable set by the OFT.

If Ciceley agrees to the terms set out in the Agreement, a duly authorised representative of Ciceley should sign the Agreement as indicated below and return by fax or email the signed copy to the OFT in addition to posting the version bearing the original signature.

Yours faithfully



Stephanie O'Neil

**Principal Case Officer  
Cartels and Criminal Enforcement Group**

**SIGNED FOR AND ON BEHALF OF CICELEY COMMERCIALS LIMITED**

Name:

Position:

Date: 13 FEB 2013

**SIGNED FOR AND ON BEHALF OF CICELEY LIMITED**

Name:

Positio

Date: 13 FEB 2013

**COUNTERSIGNED FOR AND ON BEHALF OF THE OFFICE OF FAIR TRADING**

Name: Ali Nikpay

Position: Senior Director – Cartels and Criminal Enforcement

Date: 20 12/13

## **Annex I – Penalty calculation**

### **Introduction and background**

1. The Office of Fair Trading ('OFT') proposes to adopt one or more decisions that a number of parties infringed the prohibition in section 2(1) of the Competition Act 1998 in relation to the distribution of Mercedes-Benz commercial vehicles. The OFT's proposed decision is set out in the Statement of Objections dated 28 June 2012 (the 'Statement of Objections').<sup>1</sup>
2. The undertakings listed below (the 'Settling Parties')<sup>2</sup> have indicated their wish to settle the case with the OFT:<sup>3</sup>
  - 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').
3. The proposed settlements encompass the following alleged infringements (the 'Settlement Infringements'):<sup>4</sup>
  - 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 ('Settlement

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<sup>1</sup> For the avoidance of doubt, no final decision to issue such an infringement decision or decisions has been taken by the OFT.

<sup>2</sup> Note that the Settling Parties do not include Northside Truck & Van Limited and its ultimate parent S.A.H. Limited (together, 'Northside') or H & L Garages Limited and its parent Dusted Powder Limited (together, 'H & L'). Northside is the immunity applicant and H & L Garages Limited is in liquidation.

<sup>3</sup> Pending the conclusion of formal written agreements (the 'Settlement Agreements') between each of the Settling Parties and the OFT, these indications, together with the settlement discussions, are not binding on the OFT nor on any of the Settling Parties and have been made on a confidential and without prejudice basis. The terms in which the case is settled will be set out in the Settlement Agreements between the OFT and each of the Settling Parties to which this document is an Annex.

<sup>4</sup> Note that the other Alleged Infringements detailed in the Statement of Objections (Alleged Infringements 1 and 4) are being pursued under the normal procedure. Settlement discussions with Mercedes refer to Alleged Infringement 5 only.

Infringement 2');<sup>5</sup>

- 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 ('Settlement Infringement 3');<sup>6</sup> and
- An agreement and/or concerted practice between Ciceley, Enza, Mercedes and Road Range which had the object of preventing, restricting or distorting competition for the sale of trucks between 8 December 2009 and 26 January 2010 ('Settlement Infringement 5').<sup>7</sup>

4. This document sets out the key elements in the OFT's calculation of the penalties which have been agreed in principle with the Settling Parties and which have been prepared having regard to the OFT's published guidance as to the appropriate amount of a penalty in force at the time when the Statement of Objections was issued.<sup>8</sup> These include the starting point percentage, the duration multipliers, adjustments for deterrence and proportionality, and adjustments for aggravating and mitigating factors.
5. Pending the conclusion of the Settlement Agreements, the OFT is not bound by this document nor does it represent a final decision of the OFT – it is wholly without prejudice to the contents of any final decision or decisions that the OFT may adopt should a Settlement Agreement not be concluded with any or all of the Settling Parties.
6. This document is provided to the Settling Parties in confidence and in connection with the current settlement proceedings only. The contents of this document should not therefore be made publicly available or be disclosed to any person without the prior written consent of the OFT, save that they may be disclosed to the Settling Parties' respective professional advisers for use only in connection with the settlement proceedings to which this document relates. Disclosure of any of the contents of this document to any other person or for any other purpose may constitute a criminal offence under Part 9 of the Enterprise Act 2002.

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<sup>5</sup> See paragraphs VI.83 to VI.124 of the Statement of Objections. Note that, in relation to Settlement Infringement 2, the settlement discussions involved Ciceley only. Northside benefits from an immunity agreement (see paragraph I.8 of the Statement of Objections).

<sup>6</sup> See paragraphs VI.125 to VI.188 of the Statement of Objections.

<sup>7</sup> See paragraphs VI.288 to VI.411 of the Statement of Objections.

<sup>8</sup> OFT 423, *OFT's guidance as to the appropriate amount of a penalty* (December 2004).

## **Part 1 - Common aspects of the penalties calculations**

### **Step 1 – starting point**

7. Consistent with the approach in the Statement of Objections, the OFT has used a starting point of six per cent (at the 'middle to upper end of the scale') for the behaviour engaged in by the Settling Parties in all of the Settlement Infringements.
8. This reflects the fact that the Settlement Infringements are restrictions of intra-brand competition and that Mercedes-Benz commercial vehicle dealers are to a certain extent constrained by dealers of other marques.
9. However, the starting point also reflects the fact that the Settlement Infringements are infringements of the Chapter I prohibition 'by object' and can be regarded, by their very nature, as being injurious to the proper functioning of normal competition and are, therefore, serious infringements of competition law.

### **Step 2 - duration**

10. The OFT has applied the Step 2 adjustments for duration as set out in the Statement of Objections.<sup>9</sup> For the Settlement Infringements, they are:

<b>Settlement Infringement</b>	<b>Adjustment at Step 2 for duration</b>
2	x2.25
3	x2
5	x1

### **Step 3 – adjustment for other factors**

11. When considering whether an adjustment to the penalty at Step 3 is required and, if so, the amount of any such adjustment, account was taken of the factors set out in paragraphs VII.30 to VII.36 of the Statement of Objections.

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<sup>9</sup> Note however that, as has already been notified to Ciceley and Road Range, there is a typographical error in paragraph VII.29 of the Statement of Objections in that the duration multiplier for Settlement Infringement 3 should have been two (as opposed to one and a half).

12. In particular, a cross-check was carried out by reference to relevant indicators of the company's size and financial position when considering whether the proposed level of the penalty was necessary and proportionate.<sup>10</sup>
13. This cross-check was carried out for each Settling Party by considering the same set of 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 each penalty arrived at was proportionate and achieved the objectives of the OFT's policy on financial penalties.<sup>11</sup>
14. The proposed penalty was adjusted at Step 3 where this cross-check assessment indicated that the penalty at the end of Step 2 was either disproportionate or not sufficiently deterrent. In making the Step 3 adjustments, account was also taken of evidence that the profits earned by Ciceley, Road Range and Enza represent a relatively small proportion of their turnover.

#### Step 4 – adjustment for aggravating and mitigating factors

15. Paragraph VII.38 of the Statement of Objections stated the OFT's intention to increase the penalty at Step 4 for the involvement of certain members of staff. However, following discussions with the dealers about the structure of their companies, we reassessed our definition of senior management in the particular circumstances of this case and, save where the individual in question was also a director of the relevant Settling Party, the proposed penalties for the Settlement Infringements do not include an uplift at Step 4 for the involvement of van and truck sales managers.
16. The proposed penalties include a ten per cent uplift where a director was directly involved in a Settlement Infringement, and a five per cent uplift where the director's involvement was more limited.

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<sup>10</sup> When assessing the Settling Parties' financial position, the OFT considered in particular their (i) three-year (2009, 2010 and 2011) average total turnover, average gross profits and average profits after tax, (ii) net assets in 2011 and (iii) net assets in 2011 plus two years of dividends (2010 and 2011). All the financial indicators figures were obtained from the Settling Parties' publicly available financial statements, except for Ciceley's and Road Range's 2011 accounts which were only available in draft form at the time the settlement discussions were undertaken. See also paragraph VII.35 of the Statement of Objections.

<sup>11</sup> See *Kier Group plc and others v OFT* [2011] CAT 3, paragraph 177.

17. The OFT considers that cooperation which enables the enforcement process to be concluded more effectively and speedily is a mitigating factor.<sup>12</sup> In the case of two of the Settling Parties which provided voluntary cooperation above and beyond their legal obligations, the proposed penalties include a discount at Step 4 for procedural co-operation. This is in addition to the settlement discount.

Step 5 – adjustment for statutory cap

18. None of the penalties exceed the statutory cap of ten per cent of the total worldwide turnover of the undertakings, and therefore no adjustments were necessary at Step 5.

Settlement discount

19. The proposed penalties for the Settling Parties include a settlement discount of 15 per cent, applied to the final penalties. The terms on which the OFT is prepared to offer the settlement discount are set out in the Settlement Agreements.

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<sup>12</sup> OFT 423, *OFT's guidance as to the appropriate amount of a penalty* (December 2004), paragraph 2.16.

## Part 2 - Undertaking-specific calculations and considerations

### Ciceley

	Settlement Infringement 2	Settlement Infringement 3	Settlement Infringement 5
<b>Step 1</b> - starting point	6%	6%	6%
<b>Step 2</b> - duration multiplier	x2.25	x2	x1
<b>Step 3</b> - proportionality/deterrence	-50%	-75%	-50%
-overall proportionality	-40%		
<b>Step 4</b> - aggravating factors	+ 5%	0	0
- mitigating factors	0	0	0
<b>Step 5</b> - statutory maximum	n/a	n/a	n/a
<b>Settlement discount</b>	-15%		
<b>Total settlement penalty</b>	<b>£659,675</b>		

#### Step 3 - adjustment for other factors

20. The OFT has considered the necessity and proportionality of the proposed penalties in all the circumstances of this case. In doing so, the OFT has had regard to a range of factors relating to Ciceley's financial position. The OFT has also had regard to the fact that Ciceley was involved in three Settlement Infringements.
21. For each of the three Settlement Infringements in which Ciceley is involved (Settlement Infringements 2, 3 and 5), the penalty at the end of Step 2 constituted multiples of Ciceley's average profits after tax<sup>13</sup> and a relatively high proportion of other indicators of Ciceley's financial position, such as average gross profits and average total turnover.<sup>14</sup>

<sup>13</sup> For Settlement Infringement 3, the penalty at the end of Step 2 amounted to around 420 per cent of Ciceley's average profits after tax. For Settlement Infringements 2 and 5, each of the penalties at the end of Step 2 amounted to around 200 per cent of Ciceley's average profits after tax.

<sup>14</sup> For Settlement Infringement 3, the penalty amounted to around 25 per cent of Ciceley's average gross profits and around three per cent of its average total turnover. For Settlement Infringements 2 and 5, the penalties amounted to just above ten per cent of its average gross profits and just below two per cent of its average total turnover.

The OFT therefore considered that a downwards adjustment was required and applied a reduction of 50 per cent for Settlement Infringements 2 and 5 and 75 per cent for Settlement Infringement 3.

22. In addition, and consistent with the approach taken by the CAT in *Kier*,<sup>15</sup> the OFT took a final step back and considered whether the three penalties, in sum, were necessary and proportionate in order to reflect the seriousness of Ciceley's participation in the Settlement Infringements and to deter Ciceley and other companies from further breaches of the same kind (the 'totality principle'). The OFT therefore applied a further reduction of 40 per cent. Without further adjustment, the sum of the three penalties would have amounted to over three years of Ciceley's average profits after tax and to just under 20 per cent of its average gross profits.
23. Following this further discount, whilst the sum of the three penalties constitutes around 185 per cent of Ciceley's average profits after tax, it represents between 5 and 10 per cent of Ciceley's net assets and net assets plus dividends in the last two financial years,<sup>16</sup> and just over one per cent of Ciceley's average total turnover. In view of this, and considering in particular the need to deter future anti-competitive behaviour and to reflect the seriousness of the Settlement Infringements (including two of longer duration which would have had a bigger actual or potential impact), the OFT is satisfied that, in the round, the resulting penalty is necessary and proportionate to achieve the twin policy objectives in all the circumstances of the case.

#### Step 4 – aggravating and mitigating factors

24. As set out in paragraph 15 above, the proposed penalty does not include an uplift at Step 4 for the involvement of [REDACTED] and [REDACTED] in the Settlement Infringements. The OFT has applied a five per cent uplift for the limited involvement of one director in Settlement Infringement 2.<sup>17</sup>
25. The OFT does not consider that, so far, it has received cooperation from Ciceley above and beyond its legal obligations which has enabled the process in this case to be concluded more efficiently and speedily, and which would warrant a penalty reduction at Step 4.

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<sup>15</sup> *Kier* (fn11), paragraph 180.

<sup>16</sup> The OFT notes that Ciceley's net assets are significantly higher than that of the other two settling dealers, and that it has distributed much higher dividends in the past two years.

<sup>17</sup> See Statement of Objections, paragraphs VI.87 and VI.133.

## Road Range

	Settlement Infringement 3	Settlement Infringement 5
<b>Step 1</b> - starting point	6%	6%
<b>Step 2</b> - duration multiplier	x2	x1
<b>Step 3</b> - proportionality/deterrence	-75%	-50%
- overall proportionality	-25%	
<b>Step 4</b> - aggravating factors	0	0
- mitigating factors	0	0
<b>Step 5</b> - statutory maximum	n/a	n/a
<b>Settlement discount</b>	-15%	
<b>Total settlement penalty</b>	<b>£115,774</b>	

### Step 3 - adjustment for other factors

26. The OFT has considered the necessity and proportionality of the proposed penalty in all the circumstances of this case. In doing so, the OFT has had regard to a range of factors relating to Road Range's financial position, including the fact that Road Range is, by far, the smallest of the Settling Parties in terms of net assets, turnover and profits after tax.<sup>18</sup>
27. At the end of Step 2, Road Range's penalty for Settlement Infringements 3 and 5 constituted nearly 300 per cent and nearly 120 per cent of its average profits after tax, respectively. They also represented a relatively high proportion of the other indicators of Road Range's financial position such as net assets and net assets plus dividends.<sup>19</sup> The OFT applied a downwards adjustment of 75 per cent for Settlement Infringement 3 and 50 per cent for Settlement Infringement 5.

<sup>18</sup> *Kier* (fn11), paragraph 177.

<sup>19</sup> For Settlement Infringement 3 the penalty at the end of Step 2 amounted to around 35 per cent of its net assets and net assets plus dividends and, for Settlement Infringement 5, it amounted to around 15 per cent of its net assets and net assets plus dividends.

28. In addition, and consistent with the approach taken by the CAT in *Kier*,<sup>20</sup> the OFT took a final step back and considered whether the two penalties, in sum, were necessary and proportionate in order to reflect the seriousness of Road Range's participation in the Settlement Infringements and to deter Road Range and other companies from further breaches of the same kind (the 'totality principle'). The OFT therefore applied a further reduction of 25 per cent. Without further adjustment, the sum of the two penalties would have amounted to one year and a third of Road Range's average profits after tax, and around 15 per cent of its net assets and net assets plus dividends in the last two financial years.
29. Following this further discount, the sum of the two penalties represents just over one year of Road Range's average profits after tax, as well as more than ten per cent of its net assets and net assets plus dividends in the last two years. In view of this, and considering in particular the need to deter future anti-competitive behaviour and to reflect the seriousness of the two Settlement Infringements (including one of longer duration which would have had a bigger actual or potential impact), the OFT is satisfied that, in the round, the resulting penalty is necessary and proportionate to achieve the twin policy objectives in all the circumstances of the case.

#### Step 4 – aggravating and mitigating factors

30. As set out in paragraph 15 above, the proposed penalty does not include an uplift at Step 4 for the involvement of the [REDACTED] in Settlement Infringements 3 and 5.
31. The OFT does not consider that, so far, it has received cooperation from Road Range above and beyond its legal obligations which has enabled the process in this case to be concluded more efficiently and speedily, and which would warrant a penalty reduction at Step 4.

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<sup>20</sup> *Kier* (fn11), paragraph 180.

## Enza

	<b>Settlement Infringement 5</b>
<b>Step 1</b> - starting point	6%
<b>Step 2</b> - duration multiplier	x1
<b>Step 3</b> - proportionality/deterrence	none
<b>Step 4</b> - aggravating factors	+ 10%
	-5%
- mitigating factors	
<b>Step 5</b> - statutory maximum	n/a
<b>Settlement discount</b>	-15%
<b>Settlement penalty</b>	<b>£347,198</b>

### Step 3 - adjustment for other factors

32. The OFT has considered the necessity and proportionality of the proposed penalty in all the circumstances of this case. In doing so, the OFT has had regard to a range of factors relating to Enza's financial position.
33. The OFT considered whether a Step 3 adjustment was necessary. However, the OFT concluded that no adjustment was necessary having considered Enza's financial position in the round. Whilst the penalty at the end of Step 2 amounts to around 60 per cent of Enza's average profits after tax in the last three financial years, the penalty represents over 15 per cent of Enza's net assets and just under 15 per cent of its net assets plus dividends in the last two years. It is also almost ten per cent of its average gross profits.
34. The OFT is satisfied that the resulting penalty is necessary and proportionate to achieve the twin policy objectives in all the circumstances of the case and the proposed penalty does not therefore include an adjustment at Step 3.

### Step 4 – aggravating and mitigating factors

35. The proposed penalty includes an uplift at Step 4 for senior management involvement. The OFT considers that an uplift of ten per cent is appropriate given [REDACTED] [REDACTED] was directly involved in the meeting of 8 December 2009.<sup>21</sup>
36. The proposed 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 Enza provided voluntary cooperation above and beyond its legal obligations. Specifically, Enza made key staff available for interview and provided witness statements, which enabled the enforcement process to be concluded more effectively.<sup>22</sup>

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<sup>21</sup> See Statement of Objections, paragraph VI.326.

<sup>22</sup> See, however, the OFT's conclusions at paragraphs VI.378 to VI.381 of the Statement of Objections in relation to some of that evidence.

## Mercedes<sup>23</sup>

	<b>Settlement Infringement 5</b>
<b>Step 1</b> - starting point	6%
<b>Step 2</b> - duration multiplier	x1
<b>Step 3</b> - proportionality/deterrence	x2
<b>Step 4</b> - aggravating factors - mitigating factors	0
	-5%
<b>Step 5</b> - statutory maximum	n/a
<b>Settlement discount</b>	-15%
<b>Settlement penalty</b>	<b>£1,492,646</b>

### Step 3 - adjustment for other factors

37. The OFT has considered the necessity and proportionality of the proposed penalty in all the circumstances of this case and considered that Mercedes' penalty at the end of Step 2 was insufficient to achieve deterrence in view of the company's size and financial position. The proposed penalty was therefore doubled at Step 3.

38. The OFT considered whether a bigger uplift was required for deterrence. However, although Mercedes is a multinational company, the Settlement Infringement was committed at a local level. At just over ten per cent the adjusted penalty represents a material proportion of Mercedes' turnover in the relevant market, which means that it will have a material impact on the division responsible for the products and dealers involved in Settlement Infringement 5. The OFT considers that the proposed penalty is necessary and proportionate to achieve the twin policy objectives in all the circumstances of the case.

### Step 4 – aggravating and mitigating factors

39. The proposed penalty includes a reduction of five per cent at Step 4 for procedural co-operation as a mitigating factor to reflect the fact that Mercedes provided voluntary

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<sup>23</sup> These calculations refer to Mercedes' involvement in Settlement Infringement 5 only. Alleged Infringement 1 is outside the scope of the settlement discussions.

cooperation above and beyond its legal obligations. Specifically, Mercedes made key staff available for interview, which enabled the enforcement process to be concluded more effectively.<sup>24</sup>

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<sup>24</sup> See, however, paragraph III.10 of the Statement of Objections in relation to Mercedes' rejection of the OFT's request for the interview transcripts to be signed with a declaration of truth.

## **Annex II – Payment terms<sup>1</sup>**

1. Liability for the Settlement Penalty will arise two months after Ciceley is notified of the Decision(s) (the date on which liability for the Settlement Penalty arises is the ‘Specified Date’).
2. However, the OFT will offer Ciceley the option to pay the Settlement Penalty in instalments over a period of three years which shall start from the Specified Date.
3. The instalments should be paid monthly by bank transfer. Should Ciceley accept the terms of this offer, the OFT will provide Ciceley with the details of the relevant bank account and a schedule of payments in due course.
4. The yearly interest rate applicable will be the Bank of England base rate as at the Specified Date plus 2.5 per cent. For the avoidance of doubt, interest is calculated on a simple basis (not compound) and payments received will be allocated between the penalty charge and interest charged on a straight-line basis.
5. Where two or more legal entities together form or formed a single undertaking and accordingly are being held jointly and severally liable for the penalty, the OFT may receive payment of the instalments from two different sources. However, each of the legal entities in question will continue to be jointly and severally liable for the totality of each instalment payment and the entire outstanding sum, unless otherwise specified by the OFT.
6. If any of the payments are not received on time, or any of the payments are not honoured, the entire outstanding debt will become due and payable immediately, and the OFT may commence legal proceedings immediately under section 37 of the Competition Act 1998 for the recovery of the entire financial penalty that remains outstanding, plus interest, without further notice.
7. Should Ciceley decide to settle the outstanding debt early, the OFT will recalculate the interest charge on the basis of the revised end date.

This offer is time-limited. Should Ciceley decide to accept this offer, it should notify the OFT in writing within three weeks from the date in which Ciceley is notified of the Decision(s). It will not be possible to accept this offer after that date. Acceptance of the offer must be made in writing, marked for the attention of the Finance Director, Office of Fair Trading, 2-6 Salisbury Square, London, EC4Y 8JX and received by the above deadline.

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<sup>1</sup> Unless otherwise defined herein, all capitalised terms shall have the same meaning as ascribed to them in the Agreement to which this document is attached as Annex II.

By email

Road Range Limited

c/o Jacqui Lloyd  
Brabners Chaffe Street  
Horton House  
Exchange Flags  
Liverpool  
L2 3YL

Case ref	CE/9161-09	Direct line	020 7211 8153
Date	13 February 2013	Fax	020 7211 8992
Your ref		Email	Stephanie.E.Oneil@oft.gsi.gov.uk

Dear Ms Lloyd

**Competition Act 1998 – Investigation into the distribution of Mercedes-Benz commercial vehicles**

As you are aware, the Office of Fair Trading ('OFT') proposes to adopt one or more decisions (a 'Decision'; together, the 'Decisions') that Road Range Limited ('Road Range') infringed the prohibition in section 2(1) of the Competition Act 1998 ('the Chapter I prohibition') through:

- 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 ('Settlement Infringement 3');<sup>1</sup> and
- an agreement and/or concerted practice between Ciceley, Enza, Mercedes and Road Range which had the object of preventing, restricting or distorting competition for the sale of trucks between 8 December 2009 and 26 January 2010 ('Settlement Infringement 5');<sup>2</sup>

(together, the 'Settlement Infringements').

The OFT's proposed decision is set out in the Statement of Objections – Distribution of Mercedes-Benz Commercial Vehicles - dated 28 June 2012 ('the Statement of Objections').

You have indicated Road Range's willingness to admit its involvement in the Settlement Infringements. You have also indicated Road Range's willingness to agree to the streamlined

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<sup>1</sup> See paragraphs VI.125 to VI.188 of the Statement of Objections.

<sup>2</sup> See paragraphs VI.288 to VI.411 of the Statement of Objections.

procedure and to co-operate with the OFT in expediting the conclusion of its investigation as to whether the Chapter I prohibition has been infringed (the 'Investigation'). This letter (the 'Agreement') sets out the terms upon which the OFT would be prepared to resolve its Investigation. In signing and returning a signed copy of this Agreement to the OFT, Road Range agrees to the terms of this Agreement. Road Range enters into this Agreement voluntarily and understands fully the implications of doing so. Road Range understands and accepts that if another party to the Investigation successfully appeals any infringement decision(s) by the OFT following the Investigation (including as to penalty) the Decision(s) will remain binding against Road Range. Road Range also understands and accepts that any Decision(s) may refer to this Agreement, including to Road Range's admission as per paragraph 1 below, and may be relied on by third parties in accordance with sections 47A, 47B, 58 and 58A of the Competition Act 1998.

#### **Admission of liability**

1. Road Range admits its liability for the Settlement Infringements, and the facts as set out in sections IV, V, VI.125 to VI.188, VI.288 to VI.411 and VII of the Statement of Objections insofar as they are relevant to Road Range's involvement in the Settlement Infringements, subject to the memorandum referred to in paragraph 3 (if any).

#### **Streamlined procedure**

2. The OFT hereby gives written notice to Road Range of a typographical error in paragraph VII.29 of the Statement of Objections in that the duration multiplier for Settlement Infringement 3 should have been two (as opposed to one and a half). Road Range understands and accepts that the penalty for its involvement in Settlement Infringement 3 has been calculated on the basis of the correct multiplier at Step 2, namely two.
3. With the exception of a concise memorandum (if any) indicating any material factual inaccuracies, which shall be provided to the OFT at the latest at the same time as Road Range signed a copy of this Agreement, Road Range agrees not to provide any written representations on the Statement of Objections. Road Range agrees to limit any written representations on any Supplementary Statement of Objections that the OFT may issue in respect of the Settlement Infringements to a concise memorandum indicating any material factual inaccuracies.
4. Road Range agrees not to request an oral hearing in respect of the Statement of Objections, or of any Supplementary Statement of Objections.

5. Road Range has already been provided with access to documents on the OFT's file at the time when the Statement of Objections was issued. Road Range will not seek any further access to documents on the OFT's file except for any documents which are directly relied on and referred to in any Supplementary Statement of Objections and which have not already been provided to Road Range.
6. Road Range has been provided with a memorandum (attached as Annex I) setting out the calculation of the penalty for the Settlement Infringements. Road Range accepts that in respect of the Settlement Infringements it will not also receive a Draft Penalty Statement provided for in the OFT's Procedures Guidance.<sup>3</sup> Without prejudice to the above, should the OFT decide in the exercise of its discretion to issue a Draft Penalty Statement, Road Range agrees to limit any representations to a concise memorandum indicating any material factual inaccuracies.
7. Road Range shall adhere to the deadlines set by the OFT for the performance of the obligations set out in this Agreement.

#### **Cooperation**

8. Road Range agrees to cooperate fully, as set out below, throughout the remainder of the OFT's Investigation in relation to the Settlement Infringements, and until the conclusion of any action involving the OFT arising as a result of the Investigation in relation to the Settlement Infringements (this includes any actions or proceedings involving the OFT, whether before the Competition Appeal Tribunal ('CAT') or any other court or tribunal as a result of or otherwise arising from a Decision or from any other action or decision by the OFT as a result of or otherwise arising from the Investigation):
  - a. if requested by the OFT, Road Range will provide the OFT with any information or documents in its possession or under its control which are directly or indirectly relevant to any of the Settlement Infringements;
  - b. if requested by the OFT, Road Range will use its best endeavours to secure the complete and truthful cooperation of any of its current or former directors, officers, employees or agents identified by the OFT. Cooperation that the OFT may request from these individuals may include but is not limited to:
    - i. attending such interviews as the OFT may require at such times and places as may be designated by the OFT;

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<sup>3</sup> OFT Guidance 1263rev, *A guide to the OFT's investigation procedures in competition cases* (October 2012).

- ii. providing a complete and truthful account of all matters within their knowledge which are directly or indirectly relevant to any of the Settlement Infringements, responding completely and truthfully to all questions the OFT may ask and providing the OFT with a witness statement or statements that accurately reflect their account of those matters;
    - iii. making no attempt either falsely to protect or falsely to implicate any undertaking in any of the Settlement Infringements;
  - c. if requested by the OFT, in relation to any court or tribunal proceedings arising from a Decision or from any other action or decision made by the OFT as a result of or otherwise arising from the Investigation, Road Range will use its best endeavours to facilitate, and secure the complete and truthful cooperation, of any of its current or former directors, officers, employees or agents, even if Road Range is not a party to those proceedings, in:
    - i. assisting the OFT or its counsel in the OFT's preparation for the proceedings;
    - ii. if requested by the OFT or its counsel, attending the proceedings; and
    - iii. speaking to their witness statements and being cross-examined on such witness statements in the proceedings.
- 9. Road Range agrees not to act in a way inconsistent with its admission in paragraph 1, including through making any form of public statement that is inconsistent with that admission.

**OFT infringement decision and reduction in penalty**

- 10. Any Decision or Decisions adopted by the OFT will:
  - a. set out the OFT's findings in substantially the terms of sections IV, V, VI.125 to VI.188, VI.288 to VI.411 and VII of the Statement of Objections, subject to any amendments deemed necessary and appropriate by the OFT including as a result of (i) any representations on material factual inaccuracies in the Statement of Objections from any of the recipients of the Statement of Objections, and/or (ii) any other information, as reflected in any Supplementary Statement of Objections that the OFT may issue in respect of any of the Settlement Infringements;

- b. note Road Range's admission of the Settlement Infringements and conclude that Road Range has committed the Settlement Infringements;
- c. impose in combination penalties on Road Range totalling no more than £136,204 (the 'Total Penalty'). Liability for 85 per cent of the Total Penalty (the 'Settlement Penalty') will arise on the date specified in the Decision(s). In recognition of Road Range's ongoing adherence to the terms of this Agreement, liability for the remaining 15 per cent (the 'Settlement Discount'), will only arise in the event that this Agreement is terminated in accordance with paragraphs 13 and/or 14; and
- d. set out the OFT's approach to calculating the penalty under its 2004 Penalty Guidance<sup>4</sup> (in accordance with the transitional provisions set out in OFT's 2012 Penalty Guidance).<sup>5</sup>

11. The OFT may without notice make adjustments that have the effect of reducing Road Range's final penalty.

#### **Time to pay**

12. Provided that Road Range continues to comply with the terms of this Agreement, the OFT will offer Road Range the option of paying the Settlement Penalty in instalments (with interest) over a period of three years, in accordance with the offer memorandum in Annex II.

#### **Termination**

13. This Agreement will be automatically terminated should Road Range appeal or bring any legal challenge in relation to any Decision or any other action or decision by the OFT as a result of or otherwise arising from the Investigation to any court, including but not limited to the CAT.

14. The OFT may terminate this Agreement if, at any time before the conclusion of the case, including any proceedings before the CAT or any other court, it determines that any of the conditions in paragraphs 1 to 9 above has not been complied with.

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<sup>4</sup> OFT Guidance 423, *OFT's Guidance as to the Appropriate Amount of a Penalty* (December 2004).

<sup>5</sup> See OFT Guidance 423, *OFT's Guidance as to the Appropriate Amount of a Penalty* (September 2012), paragraph 1.11.

15. Before terminating this Agreement in accordance with paragraph 14 the OFT shall serve written notice to Road Range of the nature of the non-compliance and that the OFT is considering terminating the Agreement. Road Range will be given an opportunity to respond to the notice and, where this is possible and appropriate, to remedy any breach within what the OFT considers to be a reasonable period of time from the service of the notice. If Road Range fails to remedy the breach within that time, the OFT may terminate the Agreement.

#### **Consequences of termination**

16. Where this Agreement is terminated, all the terms of this Agreement, including the agreed Total Penalty, the Settlement Penalty and the Settlement Discount, but excluding paragraphs 16 to 19, will cease to have effect.
17. Where this Agreement is terminated before a Decision is adopted, the OFT will pursue its Investigation in accordance with its normal procedures.
18. If, following the adoption of a Decision, Road Range brings appeal proceedings before the CAT against any Decision (including as to penalty) or any other action or decision by the OFT as a result of or otherwise arising from the Investigation, the OFT reserves the right to make an application to the CAT:
  - a. to increase the penalty imposed on Road Range in relation to any or all of the Settlement Infringements; and
  - b. to require Road Range to pay the OFT's full costs of the appeal regardless of the outcome of that appeal.

#### **Information and other investigations**

19. All information, documents and other evidence provided by Road Range to the OFT under this Agreement shall remain the property of the OFT and may be used by the OFT for the purpose of the performance of its functions by or under any enactment. This includes any witness statements or replies to questions provided by any of the Road Range's current or former directors, officers, employees or agents. In particular, where this Agreement is terminated according to paragraphs 13 and/or 14, the OFT will still be able to rely on the admission made by Road Range in this Agreement and all information, documents and other evidence provided by Road Range to the OFT under the Agreement.

#### **Entire agreement**

20. This Agreement constitutes the entire settlement agreement between Road Range and the OFT. It supersedes and extinguishes all previous drafts, agreements, arrangements and understandings between Road Range and the OFT, whether written or oral, relating to its subject matter.
21. Road Range accepts that in entering into this Agreement it has not placed reliance on any statements by the OFT or any of its officers save as reflected in the terms of this Agreement.

**Other matters**

22. Nothing in this Agreement affects any OFT action that is beyond the scope of this Investigation, including any of the OFT's separate ongoing or future investigations into possible infringements of the Competition Act 1998 and/or Articles 101 and/or 102 of the Treaty on the Functioning of the European Union or any investigations or other OFT action taken under the Enterprise Act 2002 or any other enactment.
23. Road Range agrees to the OFT making an announcement that it has entered into this Agreement with Road Range at any time after the Agreement becomes effective in accordance with paragraph 24. Road Range also agrees to the publication of this Agreement by the OFT. This Agreement is however confidential until any such announcement and/or publication by the OFT and should not be disclosed by Road Range without the express written consent of the OFT.
24. This Agreement will be executed in counterparts and shall only become effective when both Road Range and the OFT have signed their respective counterpart. For the avoidance of doubt, this Agreement will not come into force until it is countersigned for and on behalf of the OFT; in particular, the OFT may decide not to enter into this Agreement in the event that one or more of the parties involved in the Settlement Infringements fails to enter into and return its settlement agreement to OFT within the timetable set by the OFT.

If Road Range agrees to the terms set out in the Agreement, a duly authorised representative of Road Range should sign the Agreement as indicated below and return by fax or email the signed copy to the OFT in addition to posting the version bearing the original signature.

Yours faithfully

A handwritten signature in black ink, appearing to be a stylized name or set of initials, located at the bottom left of the page.

Stephanie O'Neil  
Principal Case Officer  
Cartels and Criminal Enforcement Group

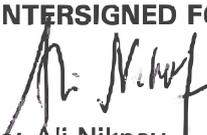
**SIGNED FOR AND ON BEHALF OF ROAD RANGE LIMITED**

Name:

Position:

Date: 15<sup>TH</sup> JANUARY 2013.

**COUNTERSIGNED FOR AND ON BEHALF OF THE OFFICE OF FAIR TRADING**

  
Name: Ali Nikpay

Position: Senior Director – Cartels and Criminal Enforcement

Date: 20/12/13

## **Annex I – Penalty calculation**

### **Introduction and background**

1. The Office of Fair Trading ('OFT') proposes to adopt one or more decisions that a number of parties infringed the prohibition in section 2(1) of the Competition Act 1998 in relation to the distribution of Mercedes-Benz commercial vehicles. The OFT's proposed decision is set out in the Statement of Objections dated 28 June 2012 (the 'Statement of Objections').<sup>1</sup>
2. The undertakings listed below (the 'Settling Parties')<sup>2</sup> have indicated their wish to settle the case with the OFT:<sup>3</sup>
  - 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').
3. The proposed settlements encompass the following alleged infringements (the 'Settlement Infringements'):<sup>4</sup>
  - 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 ('Settlement

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<sup>1</sup> For the avoidance of doubt, no final decision to issue such an infringement decision or decisions has been taken by the OFT.

<sup>2</sup> Note that the Settling Parties do not include Northside Truck & Van Limited and its ultimate parent S.A.H. Limited (together, 'Northside') or H & L Garages Limited and its parent Dusted Powder Limited (together, 'H & L'). Northside is the immunity applicant and H & L Garages Limited is in liquidation.

<sup>3</sup> Pending the conclusion of formal written agreements (the 'Settlement Agreements') between each of the Settling Parties and the OFT, these indications, together with the settlement discussions, are not binding on the OFT nor on any of the Settling Parties and have been made on a confidential and without prejudice basis. The terms in which the case is settled will be set out in the Settlement Agreements between the OFT and each of the Settling Parties to which this document is an Annex.

<sup>4</sup> Note that the other Alleged Infringements detailed in the Statement of Objections (Alleged Infringements 1 and 4) are being pursued under the normal procedure. Settlement discussions with Mercedes refer to Alleged Infringement 5 only.

Infringement 2');<sup>5</sup>

- 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 ('Settlement Infringement 3');<sup>6</sup> and
- An agreement and/or concerted practice between Ciceley, Enza, Mercedes and Road Range which had the object of preventing, restricting or distorting competition for the sale of trucks between 8 December 2009 and 26 January 2010 ('Settlement Infringement 5').<sup>7</sup>

4. This document sets out the key elements in the OFT's calculation of the penalties which have been agreed in principle with the Settling Parties and which have been prepared having regard to the OFT's published guidance as to the appropriate amount of a penalty in force at the time when the Statement of Objections was issued.<sup>8</sup> These include the starting point percentage, the duration multipliers, adjustments for deterrence and proportionality, and adjustments for aggravating and mitigating factors.
5. Pending the conclusion of the Settlement Agreements, the OFT is not bound by this document nor does it represent a final decision of the OFT – it is wholly without prejudice to the contents of any final decision or decisions that the OFT may adopt should a Settlement Agreement not be concluded with any or all of the Settling Parties.
6. This document is provided to the Settling Parties in confidence and in connection with the current settlement proceedings only. The contents of this document should not therefore be made publicly available or be disclosed to any person without the prior written consent of the OFT, save that they may be disclosed to the Settling Parties' respective professional advisers for use only in connection with the settlement proceedings to which this document relates. Disclosure of any of the contents of this document to any other person or for any other purpose may constitute a criminal offence under Part 9 of the Enterprise Act 2002.

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<sup>5</sup> See paragraphs VI.83 to VI.124 of the Statement of Objections. Note that, in relation to Settlement Infringement 2, the settlement discussions involved Ciceley only. Northside benefits from an immunity agreement (see paragraph I.8 of the Statement of Objections).

<sup>6</sup> See paragraphs VI.125 to VI.188 of the Statement of Objections.

<sup>7</sup> See paragraphs VI.288 to VI.411 of the Statement of Objections.

<sup>8</sup> OFT 423, *OFT's guidance as to the appropriate amount of a penalty* (December 2004).

## Part 1 - Common aspects of the penalties calculations

### Step 1 – starting point

7. Consistent with the approach in the Statement of Objections, the OFT has used a starting point of six per cent (at the 'middle to upper end of the scale') for the behaviour engaged in by the Settling Parties in all of the Settlement Infringements.
8. This reflects the fact that the Settlement Infringements are restrictions of intra-brand competition and that Mercedes-Benz commercial vehicle dealers are to a certain extent constrained by dealers of other marques.
9. However, the starting point also reflects the fact that the Settlement Infringements are infringements of the Chapter I prohibition 'by object' and can be regarded, by their very nature, as being injurious to the proper functioning of normal competition and are, therefore, serious infringements of competition law.

### Step 2 - duration

10. The OFT has applied the Step 2 adjustments for duration as set out in the Statement of Objections.<sup>9</sup> For the Settlement Infringements, they are:

<b>Settlement Infringement</b>	<b>Adjustment at Step 2 for duration</b>
2	x2.25
3	x2
5	x1

### Step 3 – adjustment for other factors

11. When considering whether an adjustment to the penalty at Step 3 is required and, if so, the amount of any such adjustment, account was taken of the factors set out in paragraphs VII.30 to VII.36 of the Statement of Objections.

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<sup>9</sup> Note however that, as has already been notified to Ciceley and Road Range, there is a typographical error in paragraph VII.29 of the Statement of Objections in that the duration multiplier for Settlement Infringement 3 should have been two (as opposed to one and a half).

12. In particular, a cross-check was carried out by reference to relevant indicators of the company's size and financial position when considering whether the proposed level of the penalty was necessary and proportionate.<sup>10</sup>
13. This cross-check was carried out for each Settling Party by considering the same set of 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 each penalty arrived at was proportionate and achieved the objectives of the OFT's policy on financial penalties.<sup>11</sup>
14. The proposed penalty was adjusted at Step 3 where this cross-check assessment indicated that the penalty at the end of Step 2 was either disproportionate or not sufficiently deterrent. In making the Step 3 adjustments, account was also taken of evidence that the profits earned by Ciceley, Road Range and Enza represent a relatively small proportion of their turnover.

#### Step 4 – adjustment for aggravating and mitigating factors

15. Paragraph VII.38 of the Statement of Objections stated the OFT's intention to increase the penalty at Step 4 for the involvement of certain members of staff. However, following discussions with the dealers about the structure of their companies, we reassessed our definition of senior management in the particular circumstances of this case and, save where the individual in question was also a director of the relevant Settling Party, the proposed penalties for the Settlement Infringements do not include an uplift at Step 4 for the involvement of van and truck sales managers.
16. The proposed penalties include a ten per cent uplift where a director was directly involved in a Settlement Infringement, and a five per cent uplift where the director's involvement was more limited.

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<sup>10</sup> When assessing the Settling Parties' financial position, the OFT considered in particular their (i) three-year (2009, 2010 and 2011) average total turnover, average gross profits and average profits after tax, (ii) net assets in 2011 and (iii) net assets in 2011 plus two years of dividends (2010 and 2011). All the financial indicators figures were obtained from the Settling Parties' publicly available financial statements, except for Ciceley's and Road Range's 2011 accounts which were only available in draft form at the time the settlement discussions were undertaken. See also paragraph VII.35 of the Statement of Objections.

<sup>11</sup> See *Kier Group plc and others v OFT* [2011] CAT 3, paragraph 177.

17. The OFT considers that cooperation which enables the enforcement process to be concluded more effectively and speedily is a mitigating factor.<sup>12</sup> In the case of two of the Settling Parties which provided voluntary cooperation above and beyond their legal obligations, the proposed penalties include a discount at Step 4 for procedural co-operation. This is in addition to the settlement discount.

#### Step 5 – adjustment for statutory cap

18. None of the penalties exceed the statutory cap of ten per cent of the total worldwide turnover of the undertakings, and therefore no adjustments were necessary at Step 5.

#### Settlement discount

19. The proposed penalties for the Settling Parties include a settlement discount of 15 per cent, applied to the final penalties. The terms on which the OFT is prepared to offer the settlement discount are set out in the Settlement Agreements.

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<sup>12</sup> OFT 423, *OFT's guidance as to the appropriate amount of a penalty* (December 2004), paragraph 2.16.

## Part 2 - Undertaking-specific calculations and considerations

### Ciceley

		<b>Settlement Infringement 2</b>	<b>Settlement Infringement 3</b>	<b>Settlement Infringement 5</b>
<b>Step 1</b>	- starting point	6%	6%	6%
<b>Step 2</b>	- duration multiplier	x2.25	x2	x1
<b>Step 3</b>	- proportionality/deterrence	-50%	-75%	-50%
	- overall proportionality	-40%		
<b>Step 4</b>	- aggravating factors	+ 5%	0	0
	- mitigating factors	0	0	0
<b>Step 5</b>	- statutory maximum	n/a	n/a	n/a
<b>Settlement discount</b>		-15%		
<b>Total settlement penalty</b>		<b>£659,675</b>		

### Step 3 - adjustment for other factors

20. The OFT has considered the necessity and proportionality of the proposed penalties in all the circumstances of this case. In doing so, the OFT has had regard to a range of factors relating to Ciceley's financial position. The OFT has also had regard to the fact that Ciceley was involved in three Settlement Infringements.
21. For each of the three Settlement Infringements in which Ciceley is involved (Settlement Infringements 2, 3 and 5), the penalty at the end of Step 2 constituted multiples of Ciceley's average profits after tax<sup>13</sup> and a relatively high proportion of other indicators of Ciceley's financial position, such as average gross profits and average total turnover.<sup>14</sup>

<sup>13</sup> For Settlement Infringement 3, the penalty at the end of Step 2 amounted to around 420 per cent of Ciceley's average profits after tax. For Settlement Infringements 2 and 5, each of the penalties at the end of Step 2 amounted to around 200 per cent of Ciceley's average profits after tax.

<sup>14</sup> For Settlement Infringement 3, the penalty amounted to around 25 per cent of Ciceley's average gross profits and around three per cent of its average total turnover. For Settlement Infringements 2 and 5, the penalties amounted to just above ten per cent of its average gross profits and just below two per cent of its average total turnover.

The OFT therefore considered that a downwards adjustment was required and applied a reduction of 50 per cent for Settlement Infringements 2 and 5 and 75 per cent for Settlement Infringement 3.

22. In addition, and consistent with the approach taken by the CAT in *Kier*,<sup>15</sup> the OFT took a final step back and considered whether the three penalties, in sum, were necessary and proportionate in order to reflect the seriousness of Ciceley's participation in the Settlement Infringements and to deter Ciceley and other companies from further breaches of the same kind (the 'totality principle'). The OFT therefore applied a further reduction of 40 per cent. Without further adjustment, the sum of the three penalties would have amounted to over three years of Ciceley's average profits after tax and to just under 20 per cent of its average gross profits.
23. Following this further discount, whilst the sum of the three penalties constitutes around 185 per cent of Ciceley's average profits after tax, it represents between 5 and 10 per cent of Ciceley's net assets and net assets plus dividends in the last two financial years,<sup>16</sup> and just over one per cent of Ciceley's average total turnover. In view of this, and considering in particular the need to deter future anti-competitive behaviour and to reflect the seriousness of the Settlement Infringements (including two of longer duration which would have had a bigger actual or potential impact), the OFT is satisfied that, in the round, the resulting penalty is necessary and proportionate to achieve the twin policy objectives in all the circumstances of the case.

#### Step 4 – aggravating and mitigating factors

24. As set out in paragraph 15 above, the proposed penalty does not include an uplift at Step 4 for the involvement of [REDACTED] and [REDACTED] in the Settlement Infringements. The OFT has applied a five per cent uplift for the limited involvement of one director in Settlement Infringement 2.<sup>17</sup>
25. The OFT does not consider that, so far, it has received cooperation from Ciceley above and beyond its legal obligations which has enabled the process in this case to be concluded more efficiently and speedily, and which would warrant a penalty reduction at Step 4.

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<sup>15</sup> *Kier* (fn11), paragraph 180.

<sup>16</sup> The OFT notes that Ciceley's net assets are significantly higher than that of the other two settling dealers, and that it has distributed much higher dividends in the past two years.

<sup>17</sup> See Statement of Objections, paragraphs VI.87 and VI.133.

## Road Range

		<b>Settlement Infringement 3</b>	<b>Settlement Infringement 5</b>
<b>Step 1</b>	- starting point	6%	6%
<b>Step 2</b>	- duration multiplier	x2	x1
<b>Step 3</b>	- proportionality/deterrence	-75%	-50%
	- overall proportionality	-25%	
<b>Step 4</b>	- aggravating factors	0	0
	- mitigating factors	0	0
<b>Step 5</b>	- statutory maximum	n/a	n/a
<b>Settlement discount</b>		-15%	
<b>Total settlement penalty</b>		<b>£115,774</b>	

### Step 3 - adjustment for other factors

26. The OFT has considered the necessity and proportionality of the proposed penalty in all the circumstances of this case. In doing so, the OFT has had regard to a range of factors relating to Road Range's financial position, including the fact that Road Range is, by far, the smallest of the Settling Parties in terms of net assets, turnover and profits after tax.<sup>18</sup>
27. At the end of Step 2, Road Range's penalty for Settlement Infringements 3 and 5 constituted nearly 300 per cent and nearly 120 per cent of its average profits after tax, respectively. They also represented a relatively high proportion of the other indicators of Road Range's financial position such as net assets and net assets plus dividends.<sup>19</sup> The OFT applied a downwards adjustment of 75 per cent for Settlement Infringement 3 and 50 per cent for Settlement Infringement 5.

<sup>18</sup> *Kier* (fn11), paragraph 177.

<sup>19</sup> For Settlement Infringement 3 the penalty at the end of Step 2 amounted to around 35 per cent of its net assets and net assets plus dividends and, for Settlement Infringement 5, it amounted to around 15 per cent of its net assets and net assets plus dividends.

28. In addition, and consistent with the approach taken by the CAT in *Kier*,<sup>20</sup> the OFT took a final step back and considered whether the two penalties, in sum, were necessary and proportionate in order to reflect the seriousness of Road Range's participation in the Settlement Infringements and to deter Road Range and other companies from further breaches of the same kind (the 'totality principle'). The OFT therefore applied a further reduction of 25 per cent. Without further adjustment, the sum of the two penalties would have amounted to one year and a third of Road Range's average profits after tax, and around 15 per cent of its net assets and net assets plus dividends in the last two financial years.
29. Following this further discount, the sum of the two penalties represents just over one year of Road Range's average profits after tax, as well as more than ten per cent of its net assets and net assets plus dividends in the last two years. In view of this, and considering in particular the need to deter future anti-competitive behaviour and to reflect the seriousness of the two Settlement Infringements (including one of longer duration which would have had a bigger actual or potential impact), the OFT is satisfied that, in the round, the resulting penalty is necessary and proportionate to achieve the twin policy objectives in all the circumstances of the case.

#### Step 4 – aggravating and mitigating factors

30. As set out in paragraph 15 above, the proposed penalty does not include an uplift at Step 4 for the involvement of the [REDACTED] in Settlement Infringements 3 and 5.
31. The OFT does not consider that, so far, it has received cooperation from Road Range above and beyond its legal obligations which has enabled the process in this case to be concluded more efficiently and speedily, and which would warrant a penalty reduction at Step 4.

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<sup>20</sup> *Kier* (fn11), paragraph 180.

## Enza

		<b>Settlement Infringement 5</b>
<b>Step 1</b>	- starting point	6%
<b>Step 2</b>	- duration multiplier	x1
<b>Step 3</b>	- proportionality/deterrence	none
<b>Step 4</b>	- aggravating factors	+ 10%
	- mitigating factors	-5%
<b>Step 5</b>	- statutory maximum	n/a
<b>Settlement discount</b>		-15%
<b>Settlement penalty</b>		<b>£347,198</b>

### Step 3 - adjustment for other factors

32. The OFT has considered the necessity and proportionality of the proposed penalty in all the circumstances of this case. In doing so, the OFT has had regard to a range of factors relating to Enza's financial position.
33. The OFT considered whether a Step 3 adjustment was necessary. However, the OFT concluded that no adjustment was necessary having considered Enza's financial position in the round. Whilst the penalty at the end of Step 2 amounts to around 60 per cent of Enza's average profits after tax in the last three financial years, the penalty represents over 15 per cent of Enza's net assets and just under 15 per cent of its net assets plus dividends in the last two years. It is also almost ten per cent of its average gross profits.
34. The OFT is satisfied that the resulting penalty is necessary and proportionate to achieve the twin policy objectives in all the circumstances of the case and the proposed penalty does not therefore include an adjustment at Step 3.

### Step 4 – aggravating and mitigating factors

35. The proposed penalty includes an uplift at Step 4 for senior management involvement. The OFT considers that an uplift of ten per cent is appropriate given [REDACTED] [REDACTED] was directly involved in the meeting of 8 December 2009.<sup>21</sup>
36. The proposed 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 Enza provided voluntary cooperation above and beyond its legal obligations. Specifically, Enza made key staff available for interview and provided witness statements, which enabled the enforcement process to be concluded more effectively.<sup>22</sup>

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<sup>21</sup> See Statement of Objections, paragraph VI.326.

<sup>22</sup> See, however, the OFT's conclusions at paragraphs VI.378 to VI.381 of the Statement of Objections in relation to some of that evidence.

## Mercedes<sup>23</sup>

		<b>Settlement Infringement 5</b>
<b>Step 1</b>	- starting point	6%
<b>Step 2</b>	- duration multiplier	x1
<b>Step 3</b>	- proportionality/deterrence	x2
<b>Step 4</b>	- aggravating factors	0
	- mitigating factors	-5%
<b>Step 5</b>	- statutory maximum	n/a
<b>Settlement discount</b>		-15%
<b>Settlement penalty</b>		<b>£1,492,646</b>

### Step 3 - adjustment for other factors

37. The OFT has considered the necessity and proportionality of the proposed penalty in all the circumstances of this case and considered that Mercedes' penalty at the end of Step 2 was insufficient to achieve deterrence in view of the company's size and financial position. The proposed penalty was therefore doubled at Step 3.
38. The OFT considered whether a bigger uplift was required for deterrence. However, although Mercedes is a multinational company, the Settlement Infringement was committed at a local level. At just over ten per cent the adjusted penalty represents a material proportion of Mercedes' turnover in the relevant market, which means that it will have a material impact on the division responsible for the products and dealers involved in Settlement Infringement 5. The OFT considers that the proposed penalty is necessary and proportionate to achieve the twin policy objectives in all the circumstances of the case.

### Step 4 – aggravating and mitigating factors

39. The proposed penalty includes a reduction of five per cent at Step 4 for procedural co-operation as a mitigating factor to reflect the fact that Mercedes provided voluntary

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<sup>23</sup> These calculations refer to Mercedes' involvement in Settlement Infringement 5 only. Alleged Infringement 1 is outside the scope of the settlement discussions.

cooperation above and beyond its legal obligations. Specifically, Mercedes made key staff available for interview, which enabled the enforcement process to be concluded more effectively.<sup>24</sup>

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<sup>24</sup> See, however, paragraph III.10 of the Statement of Objections in relation to Mercedes' rejection of the OFT's request for the interview transcripts to be signed with a declaration of truth.

## **Annex II – Payment terms<sup>1</sup>**

1. Liability for the Settlement Penalty will arise two months after Road Range is notified of the Decision(s) (the date on which liability for the Settlement Penalty arises is the 'Specified Date').
2. However, the OFT will offer Road Range the option to pay the Settlement Penalty in instalments over a period of three years which shall start from the Specified Date.
3. The instalments should be paid monthly by bank transfer. Should Road Range accept the terms of this offer, the OFT will provide Road Range with the details of the relevant bank account and a schedule of payments in due course.
4. The yearly interest rate applicable will be the Bank of England base rate as at the Specified Date plus 2.5 per cent. For the avoidance of doubt, interest is calculated on a simple basis (not compound) and payments received will be allocated between the penalty charge and interest charged on a straight-line basis.
5. Where two or more legal entities together form or formed a single undertaking and accordingly are being held jointly and severally liable for the penalty, the OFT may receive payment of the instalments from two different sources. However, each of the legal entities in question will continue to be jointly and severally liable for the totality of each instalment payment and the entire outstanding sum, unless otherwise specified by the OFT.
6. If any of the payments are not received on time, or any of the payments are not honoured, the entire outstanding debt will become due and payable immediately, and the OFT may commence legal proceedings immediately under section 37 of the Competition Act 1998 for the recovery of the entire financial penalty that remains outstanding, plus interest, without further notice.
7. Should Road Range decide to settle the outstanding debt early, the OFT will recalculate the interest charge on the basis of the revised end date.

This offer is time-limited. Should Road Range decide to accept this offer, it should notify the OFT in writing within three weeks from the date in which Road Range is notified of the Decision(s). It will not be possible to accept this offer after that date. Acceptance of the offer must be made in writing, marked for the attention of the Finance Director, Office of Fair Trading, 2-6 Salisbury Square, London, EC4Y 8JX and received by the above deadline.

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<sup>1</sup> Unless otherwise defined herein, all capitalised terms shall have the same meaning as ascribed to them in the Agreement to which this document is attached as Annex II.