

Competition Act 1998

Decision of the Office of Fair Trading

CA98/05/2013

Distribution of Mercedes-Benz commercial vehicles (trucks)

Case CE/9161-09

27 March 2013

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

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 Names have been replaced by a general descriptor of the individual's role.

COMPETITION ACT 1998

Distribution of Mercedes-Benz commercial vehicles (trucks)

Decision No. CA98/05/2013

Ciceley Commercials Limited and Ciceley Limited

Enza Motors Limited, Enza Holdings Limited and Enza Group Limited

Mercedes-Benz UK Limited, Daimler UK Limited and Daimler AG

Road Range Limited

27 March 2013

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SECTION I INTRODUCTION

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')
- Enza Motors Limited, its parent Enza Holdings Limited and its ultimate parent Enza Group Limited (together, 'Enza') and
- Road Range Limited ('Road Range')

(each, a 'Participating Dealer', together the 'Participating Dealers') and

- Mercedes-Benz UK Limited, its parent Daimler UK Limited and its ultimate parent Daimler AG (together, 'Mercedes')

(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.

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 8 December 2009 and 26 January 2010 in an agreement and/or concerted practice which had the object of preventing, restricting or distorting competition for the sale of trucks to customers based in the Participating Dealers' areas (the 'Infringement' or 'Infringement 5').

I.4 Ciceley, Enza, Road Range and Mercedes met on 8 December 2009, and entered into an agreement and/or concerted practice that each Participating Dealer would be 'reasonable with their margins' in quotations to customers in each other's areas. This agreement and/or concerted practice extended to the specific margins which should be

included in these quotations.¹

- I.5 By this Decision, the OFT is imposing financial penalties under section 36 of the Act.

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

SECTION II COMPANY PROFILES

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',² 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.

The OFT's approach to assessing liability

- II.3 The Chapter I prohibition applies to agreements or concerted practices between 'undertakings',³ 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.⁴ 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.⁵

² The Relevant Period corresponds to the duration of Infringement 5, that is, between 8 December 2009 and 26 January 2010; see paragraph VI.79 (The Conduct of the Parties and Legal Assessment).

³ See paragraph V.9 (Legal Background).

⁴ Case C-170/83 *Hydrotherm Gerätebau GmbH v Compact del Dott Ing Mario Andreoli & C Sas* [1984] ECR 2999, paragraph 11.

⁵ 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.⁶
- 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 this creates a rebuttable presumption that the parent company does, in fact, exercise a decisive influence over the conduct of its subsidiary.⁷
- 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.⁸
- 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.⁹ Such indicia have been found to include a parent being active on the same or adjacent markets to its subsidiary,¹⁰ direct instructions being given by a parent to a subsidiary¹¹ or the two entities having shared directors.¹²
- II.9 Financial penalties that are imposed both on a parent and a subsidiary may be imposed jointly and severally.¹³
- 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

⁶ *Alliance One* (fn5), paragraph 45.

⁷ Case C-97/08P *Akzo Nobel v Commission* [2009] ECR I-8237 ('*Akzo Nobel*'), paragraphs 60 to 61 and *Alliance One* (fn5), paragraphs 46 and 47.

⁸ *Akzo Nobel* (fn7), paragraphs 73 to 74.

⁹ *Durkan Holdings Limited and Others v OFT* [2011] CAT 6 ('*Durkan*'), at [22]; *Akzo Nobel* (fn7), paragraph 62 and Case C-286/98 P *Stora Kopparbergs Bergslags AB v Commission* [2000] ECR I-9925, paragraphs 28 to 29.

¹⁰ Opinion of Advocate-General Mischo in Case C-286/98 P *Stora Kopparbergs Bergslags AB v Commission* [2000] ECR I-9925, paragraph 49.

¹¹ Case T-48/69 *Imperial Chemicals Industries v Commission* [1972] ECR I-619 ('*Dyestuffs*'), paragraphs 132 to 133.

¹² *Sepia Logistics Limited v Office of Fair Trading* [2007] CAT 13, at [77] to [80].

¹³ 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.

for the infringement generally remains with its former parent company 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.¹⁴

- 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 all 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.¹⁵

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.

¹⁴ Case C-279/98 P *Cascades v Commission* [2000] ECR I-9693, paragraphs 73 to 82.

¹⁵ See paragraphs II.28 to II.29, II.44 to II.46, II.65 to II.67 and II.78.

II.16 The registered company details of Ciceley Limited¹⁶ and Ciceley Commercials Limited,¹⁷ 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.¹⁸ It operates from regional offices based in Bolton, Blackburn, Carlisle and Dumfries.¹⁹

II.18 Ciceley Commercials Limited is a wholly-owned subsidiary of Ciceley Limited.²⁰ In its Directors' Report and Financial Statements for the year ended 31 December 2011, it states that '[t]he company is controlled by

¹⁶ 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) as at 26 March 2013.

¹⁷ 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) as at 26 March 2013.

¹⁸ 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.

¹⁹ Ciceley Commercials Limited's website, OFT Document Reference 4045, pages 3 to 6.

²⁰ 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'.²¹

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.²²
- II.20 During the Relevant Period, the shares in Ciceley Limited were held by the following individuals:²³

Name	Shares held
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.²⁴ Previously, it also wholly-owned Ciceley Chrysler Limited, which ceased trading in 2009.²⁵ The OFT has no evidence that any of these subsidiaries were directly involved in the Infringement.

²¹ Ciceley Commercials Limited Report 2011, OFT Document Reference 5047, page 19.

²² Ciceley Limited Report 2011, OFT Document Reference 5048, page 3.

²³ Ciceley Limited Annual Return June 2010, OFT Document Reference 4078; Ciceley Limited Annual Return 2009, OFT Document Reference 4077.

²⁴ Ciceley Limited Report 2011, OFT Document Reference 5048, page 23.

²⁵ 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 2009 to 2011 were as follows:

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

²⁶ Ciceley Commercials Limited Report 2011, OFT Document Reference 5047, page 8. Page 10 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*'.

²⁷ Ciceley Commercials Limited Abbreviated Accounts for the year ended 31 December 2010, OFT Document Reference 3991, page 7.

²⁸ Ciceley Commercials Limited Abbreviated Accounts for the year ended 31 December 2009, OFT Document Reference 3945, page 7.

Consolidated turnover and profit/loss of Ciceley Limited

II.23 Ciceley Limited's consolidated turnover and profits for the financial years 2009 to 2011 were as follows:

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

II.24 According to its published accounts, Ciceley Limited's entire turnover during the Relevant Period arose within the UK.³²

Appointments

II.25 The directors of Ciceley Commercials Limited during the Relevant Period were as follows:³³

Name	Appointment	Position in January 2010
Russell Morgan	Prior to 2009	In post
Brian Morgan	Prior to 2009	In post
Colin Briggs	Prior to 2009	In post
Michael Lewis	01/01/2009	In post
Simon Wilson	Prior to 2009	In post

²⁹ 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'.

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

³¹ 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.

³² Ciceley Limited Report 2010, OFT Document Reference 3992, page 14 and Ciceley Limited Report 2009, OFT Document Reference 3948, page 14.

³³ Ciceley Commercials Limited FAME Report 2011, OFT Document Reference 5046.

II.26 The directors of Ciceley Limited during the Relevant Period were as follows:³⁴

Name	Appointment	Position in January 2010
Russell Morgan	Prior to 2009	In post
Brian Morgan	Prior to 2009	In post
Colin Briggs	Prior to 2009	In post
Simon Wilson	Prior to 2009	In post
Dorothy Morgan	Prior to 2009	In post
Sally Ann Morgan	Prior to 2009	In post

Liability

II.27 Ciceley did not apply for leniency.

II.28 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.29 The OFT, therefore, considers that Ciceley Limited and Ciceley Commercials Limited form part of the same economic entity. As such, 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.

Enza Motors Limited, Enza Holdings Limited and Enza Group Limited

II.30 The OFT considers that Enza Motors Limited was directly involved in the Infringement. However given that its parent company, Enza Holdings Limited, and its ultimate parent company, Enza Group Limited, can be presumed to have exercised decisive influence over Enza Motors Limited, this Decision is also addressed to Enza Holdings Limited and Enza Group

³⁴ Ciceley Limited FAME Report 2011, OFT Document Reference 5045.

Limited. The OFT considers that Enza Holdings Limited and Enza Group Limited form part of the same undertaking and therefore are jointly and severally liable with Enza Motors Limited for the Infringement.

- II.31 The registered company details of Enza Group Limited,³⁵ Enza Holdings Limited³⁶ and Enza Motors Limited,³⁷ and their corporate relationship, are outlined below:

³⁵ Enza Group Limited FAME Report containing financial accounts to year-end 31 December 2011 ('Enza Group Limited FAME Report 2011'), OFT Document Reference 5049. The company number was recorded at Companies House (www.companieshouse.gov.uk) as at 26 March 2013.

³⁶ Enza Holdings Limited FAME Report containing financial accounts to year-end 31 December 2011 ('Enza Holdings Limited FAME Report 2011'), OFT Document Reference 5050. The company number was recorded at Companies House (www.companieshouse.gov.uk) as at 26 March 2013.

³⁷ Enza Motors Limited FAME Report containing financial accounts to year-end 31 December 2011 ('Enza Motors Limited FAME Report 2011'), OFT Document Reference 5051. The company number was recorded at Companies House (www.companieshouse.gov.uk) as at 26 March 2013.



Enza Motors Limited

II.32 Enza Motors Limited's principal activity is to trade as a Mercedes-Benz commercial vehicle dealership,³⁸ with premises at Warrington, Trafford Park, East Manchester and Stoke-on-Trent.³⁹

II.33 Enza Motors Limited has three wholly-owned subsidiaries: Enza's Truck World Limited, Enza 2004 Limited and Enza 2005 Limited.⁴⁰ The OFT

³⁸ Enza Motors Limited Directors' report and financial statements for the year ended 31 December 2011 ('Enza Motors Limited Report 2011'), OFT Document Reference 5052, page 2.

³⁹ Enza Group's website, OFT Document Reference 5059.

⁴⁰ Enza Motors Limited Report 2011 page 14, OFT Document Reference 5052. Enza Motors Limited holds 100 per cent of the shares in Enza's Truck World Limited and Enza 2004 Limited.

has no evidence that any of these subsidiaries was directly involved in the Infringement.

- II.34 Enza Motors Limited is a wholly-owned subsidiary of Enza Holdings Limited.⁴¹

Enza Holdings Limited

- II.35 Enza Holdings Limited's principal activity comprises that of a holding company.⁴²
- II.36 During the Relevant Period, Enza Holdings Limited was a 75 per cent-owned subsidiary of Enza Group Limited.⁴³ The remaining 25 per cent of the shares in Enza Holdings Limited were held by the following individuals:⁴⁴

Name	Shares held
Alec Brown	25,000 ordinary shares
Nigel Barrett	12,500 ordinary shares
John Ross	25,000 ordinary shares

Enza Group Limited

- II.37 Enza Group Limited's principal activity comprises that of a holding company of a group which operates a Mercedes-Benz commercial vehicle dealership.⁴⁵

Enza 2005 Limited is a wholly-owned subsidiary of Enza 2004 Limited; see Enza 2004 Limited FAME Report containing financial accounts to year-end 31 December 2011, OFT Document Reference 5061, page 5.

⁴¹ Enza Motors Limited Annual Return 2012, OFT Document Reference 5060.

⁴² Enza Group Limited Directors' Report and Consolidated Financial Statements for the year ended 31 December 2011 ('Enza Group Limited Report 2011'), OFT Document Reference 5053, page 34.

⁴³ Enza Holdings Limited Annual Return 2011, OFT Document Reference 3919.

⁴⁴ Enza Holdings Limited Annual Return 2010, OFT Document Reference 4074.

⁴⁵ Enza Group Limited Report 2011, OFT Document Reference 5053, page 3.

II.38 The shares in Enza Group Limited during the Relevant Period were held by the following individuals:⁴⁶

Name	Shares held
Roy Reed	100,000 ordinary shares
Russell Elgar-Parsons ⁴⁷	75,000 ordinary shares
Steven Fox	75,000 ordinary shares

Turnover and profit/loss of Enza Motors Limited

II.39 Enza Motors Limited's turnover and profits for the financial years 2009 to 2011 were as follows:

Year ending	31/12/11 ⁴⁸	31/12/10 ⁴⁹	9 months to 31/12/09 ⁵⁰	31/03/09 ⁵¹
Turnover	£74,563,282	£68,690,602	£48,778,534	£66,255,025
Gross profit (loss)	£4,514,012	£4,627,814	£3,120,340	£4,405,578
Operating profit (loss)	£1,189,324	£1,568,082	£504,478	£1,145,845
Profit (loss) on ordinary activities before taxation	£955,138	£1,375,317	£289,613	£707,892
Profit (loss) for the financial year	£958,147	£986,617	£211,610	£513,117

II.40 According to its published accounts, Enza Motors Limited's turnover and profits on ordinary activities before taxation are wholly attributable to

⁴⁶ Enza Group Limited Annual Return 2010, OFT Document Reference 3920.

⁴⁷ [C].

⁴⁸ Enza Motors Limited Report 2011, OFT Document Reference 5052, page 7. Page 10 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'.

⁴⁹ Enza Motors Limited Directors' report and financial statements for the year ended 31 December 2010 ('Enza Motors Limited Report 2010'), OFT Document Reference 3994, page 7.

⁵⁰ Enza Motors Limited Report 2010, OFT Document Reference 3994, page 7 as the 9 months to 31 December 2009 were restated. Enza Holdings Limited Directors' Report and Consolidated Financial Statements for the period ended 31 December 2009, OFT Document Reference 3911, page 2 states that on 1 April 2010 Enza Motors Limited paid it a dividend of £528 per £1 ordinary share (giving a total dividend of £1,056,000) and, on the same day, Enza Holdings Limited paid a dividend of £4.04 per 10p ordinary share. The three shareholders holding 25 per cent of the issued share capital waived their entitlement to the dividend, resulting in a dividend of £756,500.

⁵¹ Enza Motors Limited Directors' Report and Financial Statements for the year ended 31 March 2009 ('Enza Motors Limited Report 2009'), OFT Document Reference 3908, page 7.

the group's principal activity. During the Relevant Period this arose entirely within the UK.⁵²

Consolidated turnover and profit/loss of Enza Group Limited

II.41 Enza Group Limited's consolidated turnover and profits for the financial years 2009 and 2011 were as follows:

Year ending	31/12/11 ⁵³	31/12/10 ⁵⁴	9 months to 31/12/09 ⁵⁵	31/03/09 ⁵⁶
Turnover	£74,563,000	£68,691,000	£48,778,000	£66,255,025
Gross profit (loss)	£4,514,000	£4,628,000	£3,120,000	£4,405,578
Operating profit (loss)	£1,189,000	£1,568,000	£505,000	£954,040
Profit (loss) on ordinary activities before taxation	£898,000	£1,192,000	£221,000	£329,336
Profit (loss) after tax	£919,000	£819,000	£160,000	£187,561
Profit (loss) for the financial year	£690,000	£614,000	£114,000	£68,796

⁵² Enza Motors Limited Report 2010, OFT Document Reference 3994, page 10 and Enza Motors Limited Report 2009, OFT Document Reference 3908, page 11.

⁵³ Enza Group Limited Report 2011, OFT Document Reference 5053, page 8. Page 14 states that '[r]evenue represents the amounts (excluding value added tax) derived from the provision of goods to third party customers during the year'. Page 14 also states that the report consolidates the results of Enza Group Limited and all of its subsidiary undertakings.

⁵⁴ Enza Group Limited Directors' Report and Consolidated Financial Statements for the year ended 31 December 2010 ('Enza Group Limited Report 2010'), OFT Document Reference 3993, page 8.

⁵⁵ Enza Group Limited Report 2010, OFT Document Reference 3993, page 8 as the 2009 figures were restated in light of the change in reporting from UK GAAP to IFRS. Enza Group Limited Directors' Report and Consolidated Financial Statements for the period ended 31 December 2009 ('Enza Group Limited Report 2009'), OFT Document Reference 3912, page 2 states that '[o]n 1 April 2010 the company paid a dividend of 87 8p per £1 ordinary share (£219,500)'.

⁵⁶ Enza Group Limited Report 2009, OFT Document Reference 3912, page 7.

Appointments

- II.42 Throughout the Relevant Period, the same directors made up the Board of Directors of Enza Motors Limited,⁵⁷ Enza Holdings Limited⁵⁸ and Enza Group Limited⁵⁹ as follows:

Name	Appointment	Position in January 2010
Russell Elgar-Parsons	22/08/2007	In post
Steven Fox	08/10/2007	In post
Nigel John Barrett	04/07/2007	In post
Roy Charles Reed	Prior to 2007	In post

Liability

- II.43 Enza did not apply for leniency.
- II.44 The OFT considers that Enza Holdings Limited, as 100 per cent owner of Enza Motors Limited, can be presumed to have exercised decisive influence over Enza Motors 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 the composition of the board of directors of both companies was exactly the same (see paragraph II.42).
- II.45 Enza Group Limited owns 75 per cent of Enza Holdings Limited and thereby can be said to indirectly own 75 per cent of Enza Motors Limited. In addition to the shareholding, as outlined in paragraph II.42 above, the composition of the board of directors of all three companies was exactly the same during the Relevant Period. Furthermore, the shares in Enza Group Limited were owned by three directors of Enza Motors Limited. The OFT did not receive any representations from Enza Group Limited on the OFT's provisional finding set out in the Statement of Objections⁶⁰ that it was jointly and severally liable for Enza Motors Limited's direct involvement in the Infringement (to the contrary, Enza Group Limited entered into the Settlement Agreement with the OFT,

⁵⁷ Enza Motors Limited FAME Report 2010, OFT Document Reference 4008.

⁵⁸ Enza Holdings Limited FAME 2010, OFT Document Reference 4007.

⁵⁹ Enza Group Limited FAME Report 2010, OFT Document Reference 4006.

⁶⁰ See paragraph III.1.

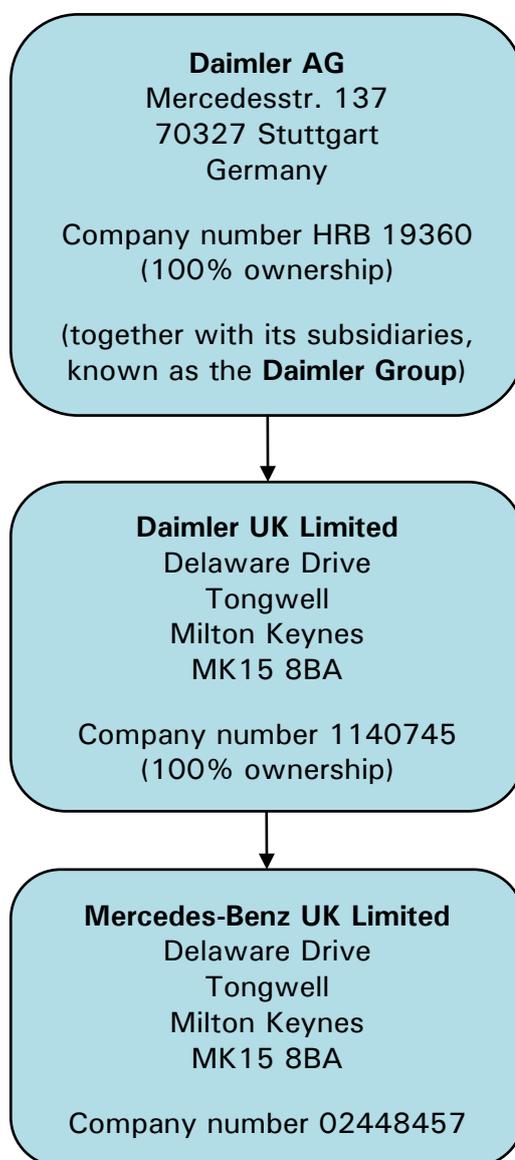
alongside Enza Motors Limited and Enza Holdings Limited). The OFT therefore presumes that Enza Group Limited to have exercised decisive influence over Enza Holdings Limited's and Enza Motors Limited's commercial policy during the Relevant Period.

- II.46 The OFT considers that Enza Group Limited, Enza Holdings Limited and Enza Motors Limited form part of the same economic entity. As such, the three companies are jointly and severally liable for Enza Motors 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 Enza Motors Limited, Enza Holdings Limited and Enza Group Limited.

Mercedes-Benz UK Limited, Daimler UK Limited and Daimler AG

- II.47 The OFT considers that Mercedes-Benz UK Limited was directly involved in the Infringement. However, given that its parent company, Daimler UK Limited, and its ultimate parent company, Daimler Aktiengesellschaft ('Daimler AG') can be presumed to have exercised decisive influence over Mercedes-Benz UK Limited, this Decision is also addressed to Daimler UK Limited and Daimler AG. The OFT considers that Daimler UK Limited and Daimler AG form part of the same undertaking and therefore are jointly and severally liable with Mercedes-Benz UK Limited for the Infringement.

II.48 The registered company details of Daimler AG,⁶¹ Daimler UK Limited⁶² and Mercedes-Benz UK Limited,⁶³ and their corporate relationship, are outlined below:



⁶¹ Daimler 2011 Annual Report ('Daimler AG Report 2011'), OFT Document Reference 4606, page 183. The management reports for Daimler AG and the Daimler Group are combined in this report.

⁶² Daimler UK Limited (formerly Daimler UK plc) Financial Statements for the year ended 31 December 2011 ('Daimler UK Limited Report 2011'), OFT Document Reference 5054, page 3. The company number was recorded at Companies House (www.companieshouse.gov.uk) as at 26 March 2013.

⁶³ Mercedes-Benz UK Limited Financial Statements for the year ended 31 December 2011 ('Mercedes-Benz UK Limited Report 2011'), OFT Document Reference 4608, page 5. The company number was recorded at Companies House (www.companieshouse.gov.uk) as at 26 March 2013.

Mercedes-Benz UK Limited

- II.49 Mercedes-Benz UK Limited's principal activities comprise the importing, storage, marketing and distribution of Mercedes-Benz and Smart products in the UK.⁶⁴
- II.50 Throughout the Relevant Period, Mercedes-Benz UK Limited has been a wholly-owned subsidiary of Daimler UK Limited.⁶⁵
- II.51 Mercedes-Benz UK Limited has a number of subsidiaries,⁶⁶ but the OFT does not have any evidence that any of these subsidiaries was directly involved in the Infringement.

Daimler UK Limited

- II.52 Daimler UK Limited's principal activities comprise those of a holding company.⁶⁷
- II.53 Daimler UK Limited was formerly named Daimler UK Public Limited Company ('Daimler UK plc'). On 6 May 2011, Daimler UK plc, a public company, was re-registered as a private company and incorporated under the name Daimler UK Limited.⁶⁸

⁶⁴ Mercedes-Benz UK Limited Report 2011, OFT Document Reference 4608, page 2.

⁶⁵ Mercedes-Benz UK Limited Annual Return 2010, OFT Document Reference 3965 and Mercedes-Benz UK Limited Annual Return 2009, OFT Document Reference 3967.

⁶⁶ Mercedes-Benz UK Limited Report 2011, OFT Document Reference 4608, page 21 states that it had seven subsidiaries: Daimler UK Trustees Limited (Trustees of company pension plan), Mercedes-Benz Retail Group UK Limited (Vehicle dealer), Legend Investments Limited (dormant), Monarch Cars (Tamworth) Limited (dormant), Mercedes-Benz Solihull Limited (dormant), Mercedes-Benz Brooklands Limited (property investment) and Brooklands Estate Management Limited (property management). Mercedes has confirmed that Mercedes-Benz Retail Group Limited did not sell commercial vehicles at the time of the Infringement (Email from Nabarro dated 9 February 2012 regarding Mercedes-Benz Retail Group UK Limited, OFT Document Reference 4033).

⁶⁷ Daimler UK Limited Report 2011, OFT Document Reference 5054, page 2.

⁶⁸ Daimler UK plc Certificate of Incorporation on Re-registration of a Public Company as a Private Company, OFT Document Reference 4020. The name Daimler UK plc was registered on 25 March 2008.

II.54 Daimler UK Limited is a wholly-owned subsidiary of Daimler AG, which is its ultimate parent undertaking and controlling related party.⁶⁹ During the Relevant Period, the shares in Daimler UK Limited were held as follows:⁷⁰

Name	Shares held
Daimler AG	165,999,999 ordinary shares
Daimler Vermoegens- und Beteiligungsgesellschaft mbH	1 ordinary share

Daimler AG

II.55 The ultimate parent company of Mercedes-Benz UK Limited and Daimler UK Limited is Daimler AG. Its shares are listed on the stock exchanges in Frankfurt and Stuttgart.⁷¹

II.56 Daimler AG is the parent company of the Daimler Group. Its principal business comprises the development, production and distribution of cars, trucks and vans and the management of the Daimler Group. In addition to Daimler AG, the Daimler Group includes various subsidiaries, incorporated throughout the world, in which Daimler AG has a direct or indirect controlling interest.⁷² Daimler AG had, at the end of 2011, an 89.29 per cent controlling interest in the Mitsubishi Fuso Truck and Bus Corporation.⁷³

⁶⁹ Daimler UK Limited Financial Statements for the year ended 31 December 2011, OFT Document Reference 5054, page 14.

⁷⁰ Daimler UK plc Annual Return 2010, OFT Document Reference 3966 and Daimler UK plc Annual Return 2009, OFT Document Reference 3971.

⁷¹ Daimler website, OFT Document Reference 4047, page 1.

⁷² Daimler AG Report 2011, OFT Document Reference 4606, page 72.

⁷³ Daimler AG Statement of Investments as of 31 December 2011, OFT Document Reference 4610, page 12 and Daimler Annual Financial Report 2010 ('Daimler AG Report 2010'), OFT Document Reference 4053, page 251.

Turnover and profit/loss of Mercedes-Benz UK Limited

II.57 Mercedes-Benz UK Limited's turnover and profits for the financial years 2009 to 2011 were as follows:

Year ending	31/12/11 ⁷⁴	31/12/10 ⁷⁵	31/12/09 ⁷⁶
Turnover	£2,890,155,000	£2,548,837,000	£1,973,102,000
Gross profit (loss)	£202,660,000	£264,984,000	£177,117,000
Operating profit (loss)	£57,911,000	£113,110,000	£75,664,000
Profit (loss) on ordinary activities before taxation	£54,389,000	£104,303,000	£67,415,000
Profit (loss) for the financial year	£37,313,000	£73,082,000	£57,400,000

II.58 According to its published reports, Mercedes-Benz UK Limited makes no material sales outside of the UK.⁷⁷

⁷⁴ Mercedes-Benz UK Limited Report 2011, OFT Document Reference 4608, page 8. Page 12 states that '[t]urnover is stated net of VAT and trade discounts [...]'. Further detail regarding the breakdown of 2011 revenue for the Vehicle business division (as opposed to the after sales business division) is provided on page 2: Mercedes-Benz Cars £1,663,400,000, Mercedes-Benz Vans £472,900,000, Mercedes-Benz Trucks £367,900,000, Others £17,700,000.

⁷⁵ Mercedes-Benz UK Limited Financial Statements for the year ended 31 December 2010 ('Mercedes-Benz UK Limited Report 2010'), OFT Document Reference 3995, page 8.

⁷⁶ Mercedes-Benz UK Limited Financial Statements for the year ended 31 December 2009 ('Mercedes-Benz UK Limited Report 2009'), OFT Document Reference 3961, pages 9 to 10. Pages 2, 9 and 18 indicate that there was an exceptional item in the financial year, namely the one-time reversal of prior year write-offs in relation to the Chrysler business totalling £39,572,000, which increased the operating profit in that amount.

⁷⁷ Mercedes-Benz UK Limited Report 2011, OFT Document Reference 4608, page 15; Mercedes-Benz UK Limited Report 2010, OFT Document Reference 3995, page 16; Mercedes-Benz UK Limited Report 2009, OFT Document Reference 3961, page 18; Mercedes-Benz UK Limited Report 2008, OFT Document Reference 3962, page 14 and Mercedes-Benz UK Limited Report 2007, OFT Document Reference 3963, page 13.

Consolidated turnover and profit/loss of Daimler Group

II.59 Daimler Group's consolidated turnover and profits for the financial years 2009 to 2011 were as follows:

Year ending	31/12/11 ⁷⁸	31/12/10 ⁷⁹	31/12/09 ⁸⁰
Turnover	€106,540,000,000	€97,761,000,000	€78,924,000,000
Gross profit (loss)	€25,517,000,000	€22,773,000,000	€13,357,000,000
Earnings before interest and taxes ⁸¹	€8,755,000,000	€7,274,000,000	(€1,513,000,000)
Profit (loss) before income taxes	€8,449,000,000	€6,628,000,000	(€2,298,000,000)
Net profit (loss)	€6,029,000,000	€4,674,000,000	(€2,644,000,000)

⁷⁸ Daimler AG Report 2011, OFT Document Reference 4606, page 91. The Key Figures page states that, of total turnover, €39,387 million was attributable to Western Europe. Page 186 states that '*revenue is recognized net of sales reductions such as cash discounts and sales incentives granted*'. Page 242 states that '*the reportable segments of the Group are Mercedes-Benz Cars, Daimler Trucks, Mercedes-Benz Vans, Daimler Buses and Daimler Financial Services*'. The Key Figures Divisions page sets out that Daimler Trucks' turnover was €28,751 million and Mercedes-Benz Vans' turnover was €9,179 million. Page 183 states that the consolidated financial statements cover Daimler AG and its subsidiaries.

⁷⁹ Daimler AG Report 2010, OFT Document Reference 4053, page 80. The Key Figures page states that, of total turnover, €38,478 million was attributable to Western Europe. The Key Figures Divisions page sets out that Daimler Trucks' turnover was €24,024 million and Mercedes-Benz Vans' turnover was €7,812 million.

⁸⁰ Daimler Annual Financial Report 2009 ('Daimler AG Report 2009'), OFT Document Reference 4052, page 79. Page 70 states: 'Daimler sold a total of 1.6 million vehicles in 2009. As a result of the global financial and economic crisis and its effects on the automotive markets, this was significantly lower than the prior-year level of 2.1 million vehicles, as we had already forecasted in Annual Report 2008' and that '*commercial vehicle markets were hit particularly hard by the global financial and economic crisis. Unit sales by the Daimler Trucks division therefore fell substantially in 2009. In total, we sold [...] 45% fewer than in 2008*'. For Mercedes-Benz Vans, page 128 states that there were 165,576 unit sales, of which 128,134 were in Western Europe. Page 71 states that '*following the record year 2008, van markets slumped drastically in the year under review [...] 42% fewer than in the prior year. The falls in unit sales were particularly sharp in the key export markets of Western Europe – the United Kingdom, France, Italy, Spain and the Netherlands – with an average of 50%*'.

⁸¹ Earnings before interest and taxes are the measure of operating profit before taxes. Daimler AG Report 2010, OFT Document Reference 4053, page 257.

Appointments

II.60 The directors of Mercedes-Benz UK Limited during the Relevant Period were as follows:⁸²

Name	Appointment	Position in January 2010
Wilfried Steffen	Prior to 2009	In post
Andrew Williamson	Prior to 2009	In post
Ulrich Bastert	Prior to 2009	In post
Andreas Burkhart	01/09/2009	In post
Joachim Schmidt	12/10/2009	In post

II.61 The directors of Daimler UK Limited during the Relevant Period were as follows:⁸³

Name	Appointment	Position in January 2010
Robert Koethner	Prior to 2009	In post
Michael Muehlbayer	Prior to 2009	In post
Martina Niebuhr	Prior to 2009	In post
Kurt Schaefer	Prior to 2009	In post
Dieter Schiller	Prior to 2009	In post
Andrew Williamson	Prior to 2009	In post

⁸² Mercedes-Benz UK Limited FAME Report containing financial accounts to year-end 31 December 2011, OFT Document Reference 5056.

⁸³ Daimler UK Limited FAME Report containing financial accounts to year-end 31 December 2011, OFT Document Reference 5055.

II.62 The Board of Management of Daimler AG during the Relevant Period was as follows:⁸⁴

Name	Appointment	Position in January 2010
Dieter Zetsche	Prior to 2009	In post
Bodo Uebber	Prior to 2009	In post
Thomas Weber	Prior to 2009	In post
Andreas Renschler	Prior to 2009	In post
Wilfried Porth	08/04/2009	In post

II.63 The OFT notes that Andrew Williamson was on the Board of Directors of both Mercedes-Benz UK Limited and Daimler UK Limited during the Relevant Period.

Liability

II.64 Mercedes did not apply for leniency.

II.65 The OFT considers that Daimler UK Limited, as 100 per cent owner of Mercedes-Benz UK Limited, can be presumed to have exercised decisive influence over Mercedes-Benz UK 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 was a director in common between Daimler UK Limited and Mercedes-Benz UK Limited during the Relevant Period (see paragraph II.63).

II.66 The OFT considers that Daimler AG, as 100 per cent owner of Daimler UK Limited, can be presumed to have exercised decisive influence over Daimler UK Limited's and Mercedes-Benz UK Limited's commercial policy during the Relevant Period. The OFT notes that it has not received any representations to the contrary.

II.67 The OFT, therefore, considers that Daimler AG, Daimler UK Limited and Mercedes-Benz UK Limited form part of the same economic entity. As such, the three companies are jointly and severally liable for Mercedes-Benz UK Limited's participation in the Infringement and for payment of

⁸⁴ Daimler AG Report 2010, OFT Document Reference 4053, page 13 and Daimler AG Report 2009, OFT Document Reference 4052, pages 8 and 9.

the financial penalty being imposed by the OFT for this Infringement. This Decision is therefore addressed to Mercedes-Benz UK Limited, Daimler UK Limited and Daimler AG.

Road Range Limited

II.68 The OFT considers that Road Range was directly involved in and is therefore liable for the Infringement.

II.69 The registered company details of Road Range are outlined below:⁸⁵

Road Range Limited
151 Rathbone Road
Wavetree
Liverpool
Merseyside L13 1BA

Company number 05336774

II.70 Road Range's principal activity is the operation of the Mercedes-Benz commercial vehicle franchise in Merseyside and North Wales.⁸⁶ It has premises in Liverpool, Bootle, Deeside and Llandudno.⁸⁷

II.71 Road Range has one wholly-owned subsidiary, Premier Vehicle Rental Limited,⁸⁸ but the OFT does not have any evidence of the latter's involvement in the Infringement.

⁸⁵ 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) as at 26 March 2013.

⁸⁶ 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.

⁸⁷ Road Range Limited website, OFT Document Reference 4048, page 1.

⁸⁸ Road Range Limited Report 2011, OFT Document Reference 5058, page 13.

II.72 During the Relevant Period, the shares in Road Range were held as follows:⁸⁹

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 ⁹⁰

II.73 The entirety of the shares in Road Range was transferred to Robert Smith Group Limited⁹¹ on 22 December 2010 (after the end of the Relevant Period). Road Range is now a wholly-owned subsidiary of Robert Smith Group Limited.⁹²

II.74 Throughout the Relevant Period, the directors of Road Range considered that Robert Talbot Arthur Smith (an individual) was the controlling party of the company.⁹³

⁸⁹ Road Range Limited Annual Return 2011, OFT Document Reference 3958; Road Range Limited Annual Return 2010, OFT Document Reference 4083 and Road Range Limited Annual Return 2009, OFT Document Reference 4082.

⁹⁰ With regard to the redeemable preference shares, Road Range Limited Report and Accounts 31 December 2009 ('Road Range Limited Accounts 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 [...]'.

⁹¹ 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.

⁹² Road Range Limited Annual Return 2011, OFT Document Reference 3958, page 7.

⁹³ Road Range Limited Report 2009, OFT Document Reference 3955, page 15.

Turnover and profit/loss of Road Range Limited

II.75 Road Range's turnover and profits for the financial years 2009 to 2011 were as follows:

Year ending	31/12/11 ⁹⁴	31/12/10 ⁹⁵	31/12/09 ⁹⁶
Turnover	£27,893,757	£29,305,565	£26,679,157
Gross profit (loss)	£4,469,825	£4,528,468	£4,243,725
Operating profit (loss)	£102,964 ⁹⁷	£438,627	£162,861 ⁹⁸
Profit (loss) on ordinary activities before taxation	£47,605	£340,311	£93,196
Profit (loss) for the financial year	£29,311	£220,911	£42,023

II.76 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.⁹⁹

Liability

II.77 Road Range did not apply for leniency.

II.78 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 OFT for its participation in the Infringement. This Decision is therefore addressed to Road Range.

⁹⁴ 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'.

⁹⁵ Road Range Limited Report Directors Report and Financial Statements for year ended 31 December 2010 ('Road Range Limited Report 2010'), OFT Document Reference 3998, page 5.

⁹⁶ Road Range Limited Report 2009, OFT Document Reference 3955, page 4.

⁹⁷ 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.

⁹⁸ 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.

⁹⁹ Road Range Limited Report 2010, OFT Document Reference 3998, pages 1 and 8 and Road Range Limited Report 2009, OFT Document Reference 3955, page 8.

SECTION III THE OFT'S INVESTIGATION

Introduction

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

- H & L Garages Limited and its parent Dusted Powder Limited (together, 'H & L') 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')¹⁰⁰
- An agreement and/or concerted practice between Northside and Ciceley which had the object of preventing, restricting or distorting competition for the sale of vans between 15 January 2008 and 26 January 2010 ('Infringement 2')
- An agreement and/or concerted practice between Ciceley and Road Range which had the object of preventing, restricting or distorting competition for the sale of vans between 1 February 2008 and 26 January 2010 ('Infringement 3')
- An agreement and/or concerted practice between Northside and H & L which had the object of preventing, restricting or distorting competition for the sale of trucks between 13 June 2008 and 26 January 2010 ('Infringement 4') and

¹⁰⁰ 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 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 5 ('Decision 5').

III.4 Although the Statement was also addressed to H & L and Northside, they were not parties to Infringement 5 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.

Infringements 2 and 3 (vans)

III.5 In addition to this Infringement, Ciceley was involved in Infringement 2 and both Ciceley and Road Range were also involved in Infringement 3.

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 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 vans between 1 February 2008 and 26 January 2010. The OFT's decision concerning that infringement ('Decision 3') 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 3 and for Road Range's involvement in Infringement 3 have been taken into consideration in setting the penalties for their involvement in Infringement 5.¹⁰¹

¹⁰¹ See paragraphs VII.35 to VII.36 (The OFT's Action).

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').¹⁰²
- 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 2012.¹⁰³
- 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.

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

¹⁰² 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.

¹⁰³ Signed Northside immunity agreement, OFT Document Reference 4580.

- 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.¹⁰⁴

III.16 Ciceley¹⁰⁵ and Road Range¹⁰⁶ refused the OFT's request to interview its employees during the investigative stage of the case. The OFT interviewed staff from H & L, Enza and Mercedes in November and December 2010. Further interviews were conducted with certain customers and former employees of the Parties to the OFT's Investigation during the course of 2011 and 2012. The OFT notes that the interviewees were all informed at the start of the interview that it would be an offence knowingly or recklessly to provide the OFT with information that is false or misleading in a material particular.

III.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,

¹⁰⁴ 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.

¹⁰⁵ Email exchange between OFT and Addleshaw Goddard dated 27 September to 22 October 2010 re Ciceley - interviews, OFT Document Reference 1207.

¹⁰⁶ Letter from Brabners Chaffe Street to OFT dated 22 November 2010 re cooperation by Road Range with OFT investigation, OFT Document Reference 1423.

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.¹⁰⁷ Mercedes subsequently provided the OFT with witness statements from [Mercedes Sales Manager B]¹⁰⁸ and from [Mercedes Sales Manager A].¹⁰⁹

- 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.

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.

Issue of Statement of Objections

- III.22 As outlined in paragraph III.1, on 28 June 2012, the OFT issued the Statement, giving Ciceley, Enza, H & L, Mercedes, Northside and Road Range notice under section 31(1)(a) of the Act and rules 4 and 5 of the

¹⁰⁷ Note of a meeting between the OFT, Nabarro and Mercedes dated 23 November 2011, OFT Document Reference 4583, page 4.

¹⁰⁸ [C] Witness Statement, OFT Document Reference 5071.

¹⁰⁹ [C] Witness Statement, OFT Document Reference 5041.

OFT's procedural rules (the 'OFT's Rules')¹¹⁰ 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.¹¹¹ They were also notified of the period for making written representations and the possibility of making oral representations to the OFT on the matters referred to in the Statement.¹¹²
- 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.¹¹³ 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. In relation to Infringement 5, the OFT only received limited representations on material factual inaccuracies from Mercedes and Enza.

Settlement agreements

- III.25 When the OFT issued the Statement, it advised all the addressees¹¹⁴ that it was open to the possibility of discussing settlement.¹¹⁵

¹¹⁰ The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751).

¹¹¹ OFT's Rules (fn110), Rules 5(3) and 1(1).

¹¹² OFT's Rules (fn110), Rules 5(2)(c) and 5(4).

¹¹³ See paragraph III.28.

¹¹⁴ With the exception of Northside which was granted immunity on 11 April 2012 (see Signed Northside immunity agreement, OFT Document Reference 4580).

¹¹⁵ 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 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.

- 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 5.¹¹⁶
- 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 Party. In addition, for the Participating Dealers, the Settlement Agreements provided that the OFT would offer the Participating Dealers the option of paying the penalty in instalments (with interest) over a period of three years. A copy of each of the Settlement Agreements 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 procedure¹¹⁷ and to co-operate with the OFT in expediting the conclusion of its investigation.
- III.29 As part of settlement, only 85 per cent of the penalty determined for each Party for Infringement 5 is payable on the date specified in paragraph VII.78 (The OFT's Action).¹¹⁸

¹¹⁶ OFT Press Release '*Mercedes-Benz and three commercial vehicle dealers to pay £2.6 million for breaching competition law*', dated 21 February 2013 (www.oft.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.

¹¹⁷ See paragraph III.24.

¹¹⁸ See paragraphs VII.43 and VII.44 (The OFT's Action).

SECTION IV INDUSTRY OVERVIEW AND THE RELEVANT MARKET

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 Participating Dealers sell commercial vehicles manufactured by Mercedes through its dealership network to end customers.¹¹⁹ There are at least three categories of commercial vehicles: i) vans (also known as light commercial vehicles or 'LCVs'), ii) trucks (also known as heavy goods vehicles or 'HGVs') and iii) buses and coaches. The Infringement concerns the sale of trucks and this section therefore focuses on this category.

Trucks

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

	2010	2009	2008	2007	2006
Total truck registrations	27,015	27,202	47,383	41,396	49,454

Source: SMMT¹²⁰

¹¹⁹ 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. See paragraph II.56 (Company Profiles).

¹²⁰ 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 registrations based on the characteristics of

Mercedes' truck models

- IV.4 Mercedes has indicated that, historically in the UK, trucks have been categorised according to the following segments: light-duty (6t to 7.5t), medium-duty (7.5t to 16t) and heavy-duty (over 16t).¹²¹ The OFT notes that other manufacturers may use different classifications,¹²² and indeed Mercedes itself classifies light-duty trucks as those below 7t, rather than below 7.5t.¹²³ As a result the Atego truck, which the SMMT Databases¹²⁴ designate as starting at 7.4t, would fall outside the light-duty category based on Mercedes' own classification.
- IV.5 Mercedes has a number of different truck models that fall within the medium- and heavy-duty truck segments of the market. Mercedes does not manufacture a truck specifically designed for light-duty work, but it distributes the Fuso Canter model manufactured by Mitsubishi through the Mercedes dealership network. The Fuso Canter is available in two tonnage models (3.5t and 7.5t), and therefore can fall within both the light- and medium-duty ranges.

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

¹²¹ Mercedes Response, OFT Document Reference 1506, question 3, paragraph 3.2 and Mercedes Customer Segmentation Note, OFT Document Reference 2782, paragraph 3.1.

¹²² Mercedes Customer Segmentation Note, OFT Document Reference 2782, paragraph 3.4.

¹²³ See Table 2.

¹²⁴ See fn120.

Light-duty (below 7t)	Medium-duty (7t-16t)	Heavy-duty (above 16t)
Fuso Canter (Mitsubishi)	Atego Fuso Canter (Mitsubishi)	Axor R Axor C Actros Econic Axor CR

Source: Mercedes¹²⁵

IV.6 Mercedes notes that each of its truck models may be sold in a range of weight categories depending on customer specification (engine, number of axles, transmission systems, trailer etc).¹²⁶

IV.7 In the medium-duty truck segment, Mercedes has one model (the Atego), generally used for local distribution work.

Model	2010	2009	2008	2007	2006	2005
Atego	776	878	1,277	1,731	2,194	2,568

Source: SMMT¹²⁷

¹²⁵ Mercedes Response, OFT Document Reference 1506, question 1, paragraph 1.2.

¹²⁶ Mercedes Response, OFT Document Reference 1506, question 3, paragraph 3.2. Table 2 lists models according to the weight category of the majority of sales, which may vary from year to year. For example, the Atego is not listed as a heavy-duty truck because this is not the most popular weight band for this model, although Table 4 shows that some Atego trucks are sold with heavy-duty specifications.

¹²⁷ SMMT Databases. See email exchange between OFT and SMMT dated 16 May to 19 September 2011 regarding annual sales data for vans and trucks, OFT Document Reference 3632; SMMT Spreadsheet, OFT Document Reference 3633; Email from SMMT to OFT dated 26 September 2011 attaching 3 Axle Rigids weights data, OFT Document Reference 4358 and SMMT Spreadsheet (rigid 3 axle), OFT Document Reference 4380.

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

Model	2010	2009	2008	2007	2006	2005
Actros	972	932	1,715	1,456	1,837	2,175
Atego	991	655	1,096	1,274	1,688	1,718
Axor	1,576	940	1,552	800	1,432	1,512
Econic	456	569	627	461	493	399
Total	3,995	3,096	4,990	3,991	5,450	5,804

Source: SMMT¹²⁸

Shares of supply

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

	2010	2009	2008	2007	2006	2005
Total registrations	27,015	27,202	47,383	41,396	49,454	51,546
DAF	24%	31%	28%	28%	29%	29%
Mercedes-Benz	18%	15%	13%	14%	15%	16%
Scania	13%	11%	12%	13%	12%	11%
Volvo	12%	11%	13%	11%	11%	12%
MAN	10%	11%	12%	12%	10%	8%
Iveco	8%	9%	9%	10%	10%	12%
Renault	7%	5%	5%	4%	4%	4%
Other ¹²⁹	8%	7%	8%	8%	9%	8%

¹²⁸ SMMT Databases. See email exchange between OFT and SMMT dated 16 May to 19 September 2011 regarding annual sales data for vans and trucks, OFT Document Reference 3632; SMMT Spreadsheet, OFT Document Reference 3633; Email from SMMT to OFT dated 26 September 2011 attaching 3 Axle Rigids weights data, OFT Document Reference 4358 and SMMT Spreadsheet (rigid 3 axle), OFT Document Reference 4380.

¹²⁹ Including Mitsubishi Fuso Canter trucks distributed by Mercedes.

Table 6: Share of supply - light- and medium-duty trucks in the UK						
	2010	2009	2008	2007	2006	2005
Total registrations	6,688	7,867	12,235	12,051	14,835	15,966
DAF	35%	40%	38%	33%	34%	34%
Iveco	17%	18%	20%	21%	21%	25%
Mercedes-Benz	12%	11%	10%	14%	15%	16%
Isuzu	10%	0%	0%	0%	0%	0%
Mitsubishi	8%	4%	5%	4%	4%	3%
MAN	8%	10%	12%	14%	12%	10%
Renault	5%	4%	4%	3%	5%	4%
Other	5%	13%	11%	11%	9%	8%

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

Source: SMMT¹³⁰

¹³⁰ SMMT Databases. These data were used to estimate truck market shares according to the weights which typically correspond to light-, medium- and heavy-duty trucks. The figures in Table 5 include sales for all three segments. See Email exchange between OFT and SMMT dated 16 May to 19 September 2011 regarding annual sales data for vans and trucks, OFT Document Reference 3632; SMMT Spreadsheet, OFT Document Reference 3633; Email from SMMT to OFT dated 26 September 2011 attaching 3 Axle Rigid weights data, OFT Document Reference 4358 and SMMT Spreadsheet (rigid 3 axle), OFT Document Reference 4380.

Types of truck customers

- IV.10 There are a number of different types of commercial vehicle customers. The OFT notes that since some customers require larger volumes of vehicles than others, this can impact on an individual dealer's capacity to supply that particular customer.
- IV.11 According to the SMMT, sales made to customers operating a fleet of 25 or more vehicles should be designated as fleet sales.¹³¹
- IV.12 Mercedes indicated that nearly all trucks in the UK are operated as part of a fleet due to legal requirements related to running trucks.¹³² Truck customers can be categorised as follows:
- Direct account customers:¹³³ Mercedes has a separate fleet team which deals with a small number of direct account customers
 - National fleet customers:¹³⁴ The vast majority of these customers deal directly with dealers (except direct account customers), with varying levels of involvement by Mercedes. Mercedes stated that major national fleet customers may place business with a number of different dealers in order to service their national requirements.¹³⁵ Mercedes provides contingency support to dealers for these sales. The dealer, however, is free to choose the price¹³⁶
 - Regional fleet customers: These customers comprise the smaller fleet customers which are not among the top [C]. These are handled by the dealer with the assistance of the local Mercedes Regional Sales Manager ('RSM')¹³⁷
 - Retail: These are truck customers with either a small fleet or a single truck. They are dealt with by the dealer, occasionally with

¹³¹ Motor Industry Facts 2011, OFT Document Reference 4317, page 39.

¹³² Mercedes Fleet and Zol Submission, OFT Document Reference 2739, page 1.

¹³³ Mercedes Fleet and Zol Submission, OFT Document Reference 2739, pages 1 to 2.

¹³⁴ Mercedes Fleet and Zol Submission, OFT Document Reference 2739, pages 1 to 2 and Mercedes and Zol Submission, OFT Document Reference 2740, Annex 1.

¹³⁵ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.9.

¹³⁶ The OFT notes H & L's comment that Mercedes caps dealer margins on the vehicle and recommends a margin for all special terms implemented for larger customers served through its franchises, resulting in indirect control of the deal. This is because, in H & L's view, although the dealer is allowed to offer additional reductions, in practice this is very rare due to the fact that ordinarily the margins are already the lowest at which H & L would be willing to transact. See H & L Supplementary Response dated 9 May 2011, OFT Document Reference 2720, page 2.

¹³⁷ Mercedes Fleet and Zol Submission, OFT Document Reference 2739, page 2.

some involvement by the local RSM.¹³⁸

Supplementary products

IV.13 In addition to selling vans and trucks, the Participating Dealers are also active in the sale of after-sales services and financing options.

After-sales services

IV.14 Both Mercedes and its dealers have indicated that a significant contribution to dealer profitability is derived from after-sales services. Mercedes stated that on average over [C] per cent of a vehicle's profitability for the dealer is derived from servicing,¹³⁹ and consequently a dealer may choose to make a low margin (or even sell at a loss) if significant ongoing after-sales revenue is likely to be generated by a sale.¹⁴⁰

IV.15 The servicing arrangements required for trucks are set out in the Operating Licensing Requirements and are based on mileage and usage.¹⁴¹ Northside stated that these require servicing to be carried out every four to 12 weeks, but that in practice service intervals tend to be between six and eight weeks.¹⁴² In Northside's view, as a result of these requirements, truck customers maintain ongoing relationships with after-sales service providers and the quality of the after-sales service is therefore important to the customer.¹⁴³ Physical proximity of the dealer is also important since travel time is costly (both in terms of the fuel cost and of driver costs, given that the distances which drivers are permitted to drive are highly regulated).¹⁴⁴

IV.16 All Mercedes-Benz repair and maintenance packages sold by Mercedes dealers for trucks allow customers to use Mercedes-Benz after-sales services nationally, although Northside stated that, in the main, most Northside customers will bring virtually all of their service work to

¹³⁸ Mercedes Fleet and Zol Submission, OFT Document Reference 2739, page 2.

¹³⁹ Mercedes Response, OFT Document Reference 1506, question 5.

¹⁴⁰ Mercedes Response, OFT Document Reference 1506, question 5, paragraph 5.5(a).

¹⁴¹ These are set out in the Vehicle & Operator Services Agency's Goods Vehicle Operator Licensing - Guide for Operators, OFT Document Reference 4381.

¹⁴² Northside conference call, OFT Document Reference 2678, page 5.

¹⁴³ Northside conference call, OFT Document Reference 2678, page 5.

¹⁴⁴ Northside conference call, OFT Document Reference 2678, page 5.

Northside.¹⁴⁵ Dealers reported that service package penetration, the proportion of vehicles sold with an associated services contract with that dealer, ranged from [C] per cent to [C] per cent.¹⁴⁶

Financing

IV.17 Mercedes dealers also provide finance packages. Mercedes stated that a dealer may choose to make a low profit on a vehicle sale, but a good return on financing (either through a commission for the sale of a third party financing arrangement or through finance income from the dealer's own products).¹⁴⁷ Mercedes-Benz Financial Services, the commercial vehicle financial services arm of Daimler AG, provides a range of financing and contract hire options.¹⁴⁸

Mercedes and its Dealership Network

Selective distribution system and franchise agreements

IV.18 At the beginning of 2011, Mercedes' dealership network in the UK comprised 26 dealers for vans and 23 dealers for trucks.¹⁴⁹ In common with the majority of the Mercedes dealership network, the Participating Dealers supply both vans and trucks. All of Mercedes' dealers also provide spare parts and after sales services.¹⁵⁰ Each dealer is a separate undertaking and does not form a single economic entity with Mercedes.

IV.19 Mercedes, in common with many manufacturers of commercial vehicles, operates a selective distribution system involving franchise agreements with its dealers. According to Mercedes,¹⁵¹ its selective distribution network meets the requirements of the Motor Vehicle Block Exemption

¹⁴⁵ Northside Response, OFT Document Reference 1484, question 17 and Northside conference call, OFT Document Reference 2678, page 5. Note that this is not necessarily true for truck fleet customers. See Northside conference call, OFT Document Reference 2678, page 5.

¹⁴⁶ Northside Response, OFT Document Reference 1484, question 5; H & L Response, OFT Document Reference 1493, question 11(i); Ciceley Response, OFT Document Reference 2260, question 11(i); Road Range Response dated 21 January 2011 ('Road Range Response'), OFT Document Reference 1502, question 11(i) and Enza Response, OFT Document Reference 1499, question 11(i).

¹⁴⁷ Mercedes Response, OFT Document Reference 1506, question 5, paragraph 5.5(b).

¹⁴⁸ Mercedes Response, OFT Document Reference 1506, question 13, paragraphs 13.1 and 13.6.

¹⁴⁹ Since then H & L Garages has gone into liquidation.

¹⁵⁰ MB Margin Model paper submitted with Mercedes Letter dated 13 January 2011 ('Mercedes Margin Model Paper'), OFT Document Reference 1406, paragraph 2.2.

¹⁵¹ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.1.

Regulation.¹⁵² 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.20 Mercedes employs both quantitative and qualitative criteria in its selective distribution system. In determining and keeping under review the number of dealers in its network, the quantitative criteria employed by Mercedes include location and travel habits of existing and potential customers, required investment level of dealers,¹⁵³ 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,¹⁵⁴ and the qualitative criteria include site and location, management structure and selection, business management and controls, marketing and planning and corporate identity.¹⁵⁵

IV.21 According to the Commission's *Guidelines on Vertical Restraints*, the possible competition risks associated with selective distribution systems are a reduction in intra-brand competition and, especially in the case of cumulative effect, the foreclosure of certain types of distributors, softening of competition and facilitation of collusion between suppliers or buyers.¹⁵⁶

IV.22 The benefit of the exemption under the *Motor Vehicle Block Exemption Regulation*¹⁵⁷ does not extend to selective distribution systems where

¹⁵² 461/2010/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*').

¹⁵³ Mercedes uses the term 'partners' and 'franchise partners', see Mercedes Supplementary Response dated 29 September 2011 ('Mercedes Supplementary Response'), OFT Document Reference 3717.

¹⁵⁴ Mercedes Response dated 7 October 2011 outlining its selective distribution system criteria, OFT Document Reference 3726.

¹⁵⁵ Mercedes Supplementary Response, OFT Document Reference 3717.

¹⁵⁶ Commission Notice *Guidelines on Vertical Restraints* C (2010) 2365 ('*Guidelines on Vertical Restraints*'), paragraph 175.

¹⁵⁷ 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*').

the manufacturer restricts its distributors from making either active or passive sales.¹⁵⁸ According to Mercedes, its franchise agreements do not incorporate any restrictions either on active or passive sales.¹⁵⁹ 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*.

Zones of Influence

- IV.23 Each of Mercedes' dealers is allocated a 'Zone of Influence' ('Zol') by Mercedes. The Zol is an area surrounding the dealer's premises. At the time of the Infringement, the Zols did not overlap with one another – a customer's premises would always have fallen within the van or truck Zol of only one Mercedes dealer. This position, however, has now changed and currently a customer's premises could fall within one or more Mercedes dealer's Zol.¹⁶⁰
- IV.24 Mercedes stated that, when determining a dealer's Zol, Mercedes works on the principle that a customer is most likely to go to the nearest dealership and therefore postcodes are generally allocated to the nearest dealership (although the Zols may not strictly conform to postcode areas).¹⁶¹
- IV.25 According to Mercedes, the allocation of the Zols to dealers is 'merely a tool which assists MB [Mercedes] to benchmark the potential market opportunities available to its dealers and measure the dealer's performance'.¹⁶²
- IV.26 Mercedes stated that dealers can sell anywhere in the UK (or indeed the European Union), and that there is nothing in its system of rewards and incentives that favours sales within the Zol over those outside the Zol (or vice versa).¹⁶³ 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

¹⁵⁸ *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.

¹⁵⁹ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.4.

¹⁶⁰ Mercedes Fleet and Zol Submission, OFT Document Reference 2739, page 5.

¹⁶¹ Mercedes Fleet and Zol Submission, OFT Document Reference 2739, page 5.

¹⁶² Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.6.

¹⁶³ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 7.2.

greater in the dealer's own Zol.¹⁶⁴ 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).¹⁶⁵

IV.27 Nevertheless, Mercedes stated that '[d]ealers are commercially driven to maximise sales opportunities in and around their selling locations'.¹⁶⁶ 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 sales¹⁶⁷ because local sales are more likely to generate the more profitable after-sales business.¹⁶⁸ This seems to be particularly true for trucks.¹⁶⁹ Costs involved in visiting a potential customer and delivering the vehicles are also a consideration when dealers are quoting to customers.

IV.28 The OFT was told that customers also take into account the physical proximity to the dealer when choosing where to buy a commercial vehicle.¹⁷⁰ Customers very often prefer to buy trucks and vans locally in view of the convenience of returning to a local dealer for repair and

¹⁶⁴ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 7.3.

¹⁶⁵ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraphs 7.3 and 7.4.

¹⁶⁶ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.5.

¹⁶⁷ 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.

¹⁶⁸ 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).

¹⁶⁹ See for example [C] Witness Statement, OFT Document Reference 3869, paragraphs 7 to 8. See also [C] Witness Statement, OFT Document Reference 3868, paragraphs 20 to 22; [C] Witness Statement, OFT Document Reference 3870, paragraphs 8 to 11; [C] Witness Statement, OFT Document Reference 3867, paragraphs 3 and 5 to 7; [C] Witness Statement, OFT Document Reference 3865, paragraph 10 and [C] Interview Transcript, OFT Document Reference 4371, page 10.

¹⁷⁰ See for example [C] Witness Statement, OFT Document Reference 3869, paragraph 6.

maintenance.¹⁷¹ This is particularly the case for trucks, which are legally required to be serviced every four to 12 weeks.¹⁷²

- IV.29 However, customers do also buy commercial vehicles from dealers in a different Zol. Mercedes stated that reasons for this include:
- a. 'Customers may have historic relationships which are maintained even after they change location.
 - b. The customer may award the vehicle contract to one dealer and the aftersales contract to another (or MB itself).
 - c. There are also major national fleet customers which may place business with a number of different dealers in order to service their national requirements.
 - d. MB also negotiates directly with some major fleet customers to provide new vehicles and aftersales services'.¹⁷³

IV.30 Indeed, a sizeable proportion of each Mercedes dealer's sales are made outside its Zol. Mercedes stated: 'across the UK as a whole on average approximately [C]% of MB dealer truck sales and [C]% of van sales are to customers situated outside the dealer's Zol ...'.¹⁷⁴

Mercedes' truck pricing, commission and bonus structure

IV.31 Mercedes has a list price for its truck products which is used as a starting point to calculate prices to dealers but is not regarded as a recommended retail price. There is substantial variance in price for the same truck model due to the high level of customisation of each vehicle (for example variants based on the type of cab, engine, chassis, axle, transmission systems and body options). In addition, the list price is now based on the European List Price ('ELP') introduced in 2008 but it does not take account of discounts given by Mercedes to its dealers that have a major impact on market prices.¹⁷⁵

IV.32 For each vehicle an ELP is created based on the specification of the vehicle. This is then adjusted by providing 'declared support' (a discount) which varies by model but is standardised for all dealers. Dealers are

¹⁷¹ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.5.

¹⁷² See paragraph IV.15.

¹⁷³ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.9.

¹⁷⁴ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 2.9 and Annex 6.

¹⁷⁵ Mercedes Response, OFT Document Reference 1506, paragraphs 6.2 to 6.6.

then provided with a further discount of [C] per cent for each vehicle, and [C] in the form of a bonus paid on every vehicle sale. The dealer will then include a certain level of profit margin in order to derive the price to be offered to the customer. Dealers can also apply for 'contingency discounts', which are used to [C].¹⁷⁶ By these various means, the prices to final customers are negotiated individually at the dealership level.

IV.33 The dealer bonus scheme for truck and van sales (referred to by Mercedes as the 'margin model') rewards volume of sales and the achievement of certain qualitative targets (such as customer satisfaction, facilities, training, customer information and data management). [C].¹⁷⁷ 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.¹⁷⁸

IV.34 Mercedes' pricing for its truck products is described at paragraphs IV.31 to IV.32. Given the number of components which comprise the price to the customer, the average prices shown in the table below are purely illustrative of the relative prices of the different truck models.¹⁷⁹

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

Source: Mercedes¹⁸⁰

Key roles and individuals

IV.35 Within Mercedes-Benz dealers, the general manager is known as the Dealer Principal. Generally sales managers and financial and/or other

¹⁷⁶ Mercedes Response, OFT Document Reference 1506, paragraph 6.7.

¹⁷⁷ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraphs 3.1 to 3.7.

¹⁷⁸ Mercedes Response dated 7 October 2011 outlining its selective distribution system criteria, OFT Document Reference 3726.

¹⁷⁹ Mercedes Response, OFT Document Reference 1506, question 5, paragraphs 5.4 to 5.5.

¹⁸⁰ Adapted from data provided by Mercedes based on sales figures (total number of sales and total value of sales) submitted by its dealers on a monthly basis. See Mercedes Response, OFT Document Reference 1506, paragraph 5.2 and Annex 2, page 13.

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

Relevant Market

Introduction

IV.37 The objective of this section is to identify the relevant market affected by the Infringement in order to assess the appropriate level of the financial penalty.¹⁸¹ 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.¹⁸²

IV.38 When applying the Chapter I prohibition, the OFT is only obliged to define the relevant market where it is not possible, without such a definition, to determine whether the agreement and/or concerted practice is liable to affect trade in the UK and/or between Member States, and whether it has as its object or effect the prevention, restriction or distortion of competition.¹⁸³ 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

¹⁸¹ 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).

¹⁸² *2004 Penalty Guidance* (fn181), paragraph 2.7 and *2012 Penalty Guidance* (fn181), paragraph 2.7.

¹⁸³ 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.

distortion of competition and was by its very nature liable to affect trade and competition in the UK.¹⁸⁴

- IV.39 The Competition Appeal Tribunal ('CAT') and the Court of Appeal have accepted that it is not necessary for the OFT to set out the precise relevant market definition in order to assess the appropriate level of the penalty.¹⁸⁵ Rather, the OFT must be 'satisfied on a reasonable, and properly reasoned basis, of what is the relevant product market affected by the Infringement'.¹⁸⁶ 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'.¹⁸⁷ The OFT considers that this principle also applies when assessing the relevant geographic market.
- IV.40 The OFT is not bound by market definitions adopted in previous cases, although earlier definitions can on occasion be informative when considering the appropriate market definition. Equally, although previous cases can provide useful information, the relevant market must be identified according to the particular facts of the case in hand.
- IV.41 In the present case, the OFT has adopted a conservative (narrow) approach to market definition. The OFT considers that this approach is appropriate in this case because, bearing in mind that the OFT is identifying the relevant market solely for the purposes of determining the level of financial penalties, it considers that the financial penalties based on this narrow definition will be sufficient in this case to meet the twin objectives of the OFT's policy on financial penalties. These objectives are: (i) to impose penalties which reflect the seriousness of the infringement; and (ii) to ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices.¹⁸⁸

¹⁸⁴ 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.93 to V.96 (Legal Background).

¹⁸⁵ *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].

¹⁸⁶ *Argos, Littlewoods and JJB* (fn185), at paragraph 170.

¹⁸⁷ *Argos, Littlewoods and JJB* (fn185), at paragraphs 170 to 173 and 228.

¹⁸⁸ The OFT notes that the penalty for Mercedes was multiplied by two at Step 3 in order to achieve these objectives, see paragraphs VII.62 to VII.65 (The OFT's Action).

Product market

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

IV.43 The OFT considers that the Infringement relates to sales by the Participating Dealers, and that it does not extend to sales made directly by Mercedes.¹⁸⁹ On a conservative basis, the OFT therefore considers that the turnover associated with sales to direct account customers should not be included in the Relevant Turnover.

Segmentation by weight

IV.44 The Participating Dealers sell light-, medium- and heavy-duty trucks distributed by Mercedes. It would appear from the evidence in the OFT's possession, addressed in Section VI (The Conduct of the Parties and Legal Assessment), that the Infringement applied to trucks of all weights. Given that the Participating Dealers have turnover in light-, medium- and heavy-duty trucks, the Relevant Turnover is not affected by whether the relevant market for trucks is combined or comprises three separate segments. The OFT therefore has not concluded on whether light-, medium-, and heavy-duty trucks form part of the same relevant market or whether there are three separate relevant markets.

Geographic market

IV.45 The Infringement refers to an arrangement to restrict competition in the areas (Zols) of the Parties.¹⁹⁰

IV.46 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

¹⁸⁹ Mercedes negotiates and invoices its customers directly and stated that dealers have not been involved in negotiations with direct account customers. See Mercedes Fleet and Zol Submission, OFT Document Reference 2739, pages 2 to 3.

¹⁹⁰ See Section VI (The Conduct of the Parties and Legal Assessment). In this Decision the terms 'area' and 'Zol' have been used refer to the area allocated to each dealer by Mercedes (see paragraph IV.23).

consider whether the geographic market is wider than the Zols of the Participating Dealers (see paragraph IV.41).

Conclusion

- IV.47 In summary, for the purposes of calculating financial penalties in this case, the OFT considers that the Relevant Turnover¹⁹¹ is that achieved with the sale of new Mercedes-Benz trucks and Mitsubishi Fuso Canter trucks (except sales made to direct account customers) within the combined Zols of the Participating Dealers.
- IV.48 For Mercedes, the OFT considers that the Relevant Turnover¹⁹² comprises Mercedes' sales to the Participating Dealers of trucks that, when sold by the Participating Dealers, generated turnover that is considered to be Relevant Turnover, as defined in paragraph IV.47 above.
- IV.49 The OFT is identifying the relevant product and geographic markets in this case for the sole purpose of determining the level of the applicable financial penalty. It does so without prejudice to the OFT's discretion to adopt a different market definition in any subsequent case in light of the relevant facts and circumstances in that case, including the purpose for which the market is defined.

¹⁹¹ See paragraph IV.37.

¹⁹² See paragraph IV.37.

SECTION V LEGAL BACKGROUND

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.93 to V.96, 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,¹⁹³ and references to it will therefore be made where appropriate.¹⁹⁴

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 UK¹⁹⁵ 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.¹⁹⁶ 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.¹⁹⁷

¹⁹³ See paragraphs V.5 to V.7.

¹⁹⁴ 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.

¹⁹⁵ 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.

¹⁹⁶ Competition Act 1998 (Commencement No 5) Order 2000 SI 2000/344, Article 2 and Schedule 1.

¹⁹⁷ 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.

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'.¹⁹⁸

¹⁹⁸ 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.13 (Company Profiles).

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'.¹⁹⁹
- 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.²⁰⁰ 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'.²⁰¹
- V.12 This reasoning has been expressly cited by the European Courts and the CAT in several recent cases.²⁰² The Court of Justice in *T-Mobile Netherlands*, referring to the opinion of Advocate-General Kokott,²⁰³ 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'.²⁰⁴

¹⁹⁹ Section 2(1) of the Act and Article 101(1) of the TFEU.

²⁰⁰ *HFB Holding* (fn13), 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.

²⁰¹ *Anic* (fn200), paragraph 131; followed in *HFB Holding* (fn13), paragraph 190. See also *Argos, Littlewoods and JJB* (fn185), 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)]).

²⁰² 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* (fn200), paragraphs 108 and 130 to 131. See also *Apex Asphalt* (fn201), at [201] and [206(ii)] (followed in *Makers* (fn201), at [103(ii)]).

²⁰³ Opinion of Advocate-General Kokott in *T-Mobile Netherlands* (fn202), paragraph 38.

²⁰⁴ *T-Mobile Netherlands* (fn202), 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,²⁰⁵ 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'.²⁰⁶

V.14 This position was upheld by the Court of Appeal.²⁰⁷

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.²⁰⁸ The Chapter I prohibition is intended to catch a wide range of agreements, including oral agreements²⁰⁹ and 'gentlemen's agreements',²¹⁰ since anti-competitive agreements are, by their nature, rarely in written form.²¹¹ An agreement may be express or it may be implied from the conduct of the

²⁰⁵ 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).

²⁰⁶ *JJB/Allsports* (fn202), at [644] and *Argos/Littlewoods* (fn202), at [665].

²⁰⁷ *Argos, Littlewoods and JJB* (fn185), at paragraph 21.

²⁰⁸ 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.

²⁰⁹ Case 28/77 *Tepea v Commission* [1978] ECR 1391 ('*Tepea*'), paragraph 41.

²¹⁰ Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, paragraphs 106 to 114.

²¹¹ See also OFT Guidance 401, *Agreements and concerted practices* (December 2004) (the '*Agreements and Concerted Practices Guidance*'), paragraph 2.7.

parties.²¹² It may also consist of an isolated act, a series of acts or a course of conduct.²¹³

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'.²¹⁴

V.18 The intention of the parties must be to conduct themselves on the market in a specific way,²¹⁵ 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.²¹⁶

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'.²¹⁷

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

²¹² See for example *Tepea* (fn209).

²¹³ *Anic* (fn200), paragraph 81.

²¹⁴ 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* (fn202), at [156] and [637]; *Argos/Littlewoods* (fn202), at [151] and [658] and *Argos, Littlewoods and JJB* (fn185), at paragraph 21(iv).

²¹⁵ Joined Cases 209/78 to 215/78 and 218/78 *Heintz Van Landewyck and Others v Commission* [1980] ECR 3125, paragraph 86; *Hercules Chemicals* (fn200), paragraph 256; *Limburgse Vinyl* (fn200), paragraph 715 and *Bayer* (fn214), paragraph 67. See also *JJB/Allsports* (fn202), at [156] and [637] and *Argos/Littlewoods* (fn202), at [151] and [658].

²¹⁶ 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.

²¹⁷ *Dyestuffs* (fn11), 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* (fn200), paragraph 115 and Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287 ('*Hüls*'), paragraph 158). See also *JJB/Allsports* (fn202), at [151]; *Argos/Littlewoods* (fn202), at [146]; *Argos, Littlewoods and JJB* (fn185), at paragraph 21(i) and *Apex Asphalt* (fn201), at [196] and [206(iii)] (followed in *Makers* (fn201), 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'.²¹⁸

V.21 In its judgment in *Anic*, the Court of Justice re-affirmed its earlier interpretation of the requirement of independence in *Suiker Unie*,²¹⁹ 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'.²²⁰

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

²¹⁸ *Suiker Unie* (fn217), paragraph 173; *Anic* (fn200), paragraph 116 and *Hüls* (fn217), paragraph 159. See also *Apex Asphalt* (fn201), at [198] and [206(iv)] (followed in *Makers* (fn201), at [102] and [103(iv)]).

²¹⁹ *Suiker Unie* (fn217), paragraph 174.

²²⁰ *Anic* (fn200), paragraph 117 (followed in *Hüls* (fn217), paragraphs 159 to 160 and *HFB Holding* (fn13), paragraph 212). See also *Apex Asphalt* (fn201), at [198] and [206(v)] (followed in *Makers* (fn201), 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.²²¹

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'.²²²

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'.²²³

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.²²⁴

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.²²⁵

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

²²¹ Joined Cases T-25/95 etc. *Cimenteries and Others v Commission* [2000] ECR II-491 ('*Cimenteries*'), paragraph 1852.

²²² *Cimenteries* (fn221), paragraphs 1849 and 1852. See also *Apex Asphalt* (fn201), at [206(vii)] and [206(viii)] (followed in *Makers* (fn201), at [103(vii)] and [103(viii)]).

²²³ *JJB/Allsports* (fn202), 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* (fn201), at [200]; *JJB/Allsports* (fn202), at [159] and *Argos/Littlewoods* (fn202), at [155].

²²⁴ *Hüls* (fn217), paragraph 155 and *Anic* (fn200), paragraph 96.

²²⁵ *Anic* (fn200), paragraph 118 and *Hüls* (fn217), paragraph 161. See also *Apex Asphalt* (fn201), at [206(ix)] (followed in *Makers* (fn201), 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'.²²⁶

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.²²⁷

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.²²⁸ 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.²²⁹

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.²³⁰

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

²²⁶ *Anic* (fn200), paragraph 121; *Hüls* (fn217), paragraph 162 and *Cimenteries* (fn221), paragraphs 1865 and 1910. See also *Apex Asphalt* (fn201), at [206(x)] (followed in *Makers* (fn201), at [103(x)]).

²²⁷ *T-Mobile Netherlands* (fn202), paragraphs 58 to 59.

²²⁸ *Anic* (fn200), paragraph 124. See also *Apex Asphalt* (fn201), at [206(xi)] (followed in *Makers* (fn201), at [103(xi)]).

²²⁹ *Hüls* (fn217), paragraphs 163 to 164 and *Anic* (fn200), paragraph 123. See also *Apex Asphalt* (fn201), at [206(xii)] (followed in *Makers* (fn201), at [103(xii)]).

²³⁰ *Agreements and Concerted Practices Guidance* (fn211), paragraph 2.8. See for example also *Anic* (fn200), paragraph 80; *Cimenteries* (fn221), paragraphs 1389 and 2557 and Case T-28/99 *Sigma Technologie di Rivestimento v Commission* [2002] ECR II-1845, paragraph 40.

undertaking'.²³¹ 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.²³² Even if the employees were acting contrary to instructions, this does not affect the liability of the undertaking.²³³

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.²³⁴ 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.²³⁵

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.²³⁶ 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

²³¹ *Tesco Stores Ltd, Tesco Holdings Ltd and Tesco plc v OFT* [2012] CAT 31 ('*Tesco Stores*'), at [74(a)].

²³² Joined Cases 100/80 to 103/80 *Musique Diffusion française v Commission* [1983] ECR 1825 ('*Musique Diffusion française*'), paragraph 97.

²³³ Case T-53/03 *BPB v Commission* [2008] ECR II-1333, [2008] 5 CMLR 1201, paragraphs 360 and 431.

²³⁴ Case T-141/89 *Tréfileurope Sales v Commission* [1995] ECR II-791 ('*Tréfileurope Sales*'), paragraphs 53 to 60 and 72.

²³⁵ 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* (fn205), paragraph 189.

²³⁶ *Tréfileurope Sales* (fn234), paragraph 85 (citing *Hercules Chemicals* (fn200), paragraph 232); *HFB Holding* (fn13), 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'.²³⁷

V.34 The General Court has held that 'the notion of public distancing as a means of excluding liability must be interpreted narrowly'.²³⁸ 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.²³⁹

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'.²⁴⁰

V.36 The CAT also noted that '[r]eporting what transpired to the OFT puts the matter beyond doubt'.²⁴¹

Liability

Liability of non-competitors

V.37 In *AC Treuhand*,²⁴² the General Court held that a consultancy firm shared liability for an infringement of Article 81(1) EC where it contributed

²³⁷ *Aalborg Portland* (fn236), paragraph 84.

²³⁸ Case T-303/02 *Westfalen Gassen Nederland v Commission* [2006] ECR II-4567 ('*Westfalen Gassen*'), paragraph 103.

²³⁹ *Westfalen Gassen* (fn238), paragraph 103.

²⁴⁰ *JJB/Allsports* (fn202), at [1046].

²⁴¹ *JJB/Allsports* (fn202), at [1046].

actively and intentionally to a cartel between producers which were active on a market different from that on which the consultancy firm itself operated.

V.38 The General Court held that:

'the notions of a cartel and of an undertaking which is the perpetrator of an infringement are conceptually independent of any distinction based on the sector or the market on which the undertakings concerned are active.'²⁴³

'In those circumstances, the applicant's argument that a consultancy firm cannot be regarded as a co perpetrator of an infringement - because it does not carry out an economic activity on the relevant market affected by the restriction of competition and because its contribution to the cartel is merely subordinate - cannot be upheld'.²⁴⁴

V.39 This approach was followed in *Deltafina*²⁴⁵ where the General Court, citing *AC Treuhand*, held that 'an undertaking may infringe the prohibition laid down in Article 81(1) EC where the purpose of its conduct, as coordinated with that of other undertakings, is to restrict competition on a specific relevant market within the common market, and that does not mean that the undertaking has to be active on that relevant market itself'.

V.40 In *Deltafina*, the General Court also held that:

'it is sufficient for the Commission to show that the undertaking concerned attended meetings at which anticompetitive agreements were concluded, without manifesting its opposition to such meetings, to prove to the requisite legal standard that that undertaking participated in the cartel (*AC Treuhand v Commission*, paragraph 48 above, paragraph 130) [...] where an undertaking tacitly approves an unlawful initiative, without publicly distancing itself from the content of that initiative or reporting it to the administrative authorities, the effect of its behaviour is to encourage the continuation of the infringement and to compromise its

²⁴² Case T-99/04 *AC Treuhand v Commission* [2008] ECR II-1501 ('*AC Treuhand*'), paragraph 150.

²⁴³ *AC Treuhand* (fn242), paragraph 128.

²⁴⁴ *AC Treuhand* (fn242), paragraph 136.

²⁴⁵ Case T-29/05 *Deltafina v Commission*, judgment of 8 September 2010 ('*Deltafina*'), paragraph 48.

discovery. The Court stated that such an undertaking thereby engages in a passive form of participation in the infringement which is therefore capable of rendering the undertaking liable in the context of a single agreement. The Court pointed out that those principles apply *mutatis mutandis* in respect of meetings which are attended not only by competing producers, but also by their clients'.²⁴⁶

Liability of co-perpetrators

V.41 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 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'.²⁴⁷

V.42 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'.²⁴⁸

V.43 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'.²⁴⁹ 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

²⁴⁶ *Deltafina* (fn245), paragraph 59.

²⁴⁷ *Anic* (fn200), paragraph 79.

²⁴⁸ *Anic* (fn200), paragraph 80.

²⁴⁹ *AC Treuhand* (fn242), paragraph 132.

contributed to its implementation, even in a subsidiary, accessory or passive role [...]'.²⁵⁰

V.44 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 endorse the objectives of the cartel and to support its implementation'.²⁵¹

Responsibility of holding a central position

V.45 In *Musique Diffusion française*,²⁵² the Court of Justice held that, where a particular party (in that case the subsidiary of a manufacturer responsible for importing equipment into Europe) holds a central position in relation to other parties (in that case the distributors), that party is obliged to display particular vigilance in order to prevent concerted efforts from giving rise to practices contrary to competition law, even if the manufacturer's position did not allow it to have a decisive influence on the conduct of each of the distributors.²⁵³

Prevention, restriction or distortion of competition²⁵⁴

The law on anti-competitive object

V.46 The Court of Justice has identified 'infringements by object' by reference to the fact that certain agreements or concerted practices can be

²⁵⁰ *AC Treuhand* (fn200), paragraph 133.

²⁵¹ *AC Treuhand* (fn242), paragraph 134.

²⁵² *Musique Diffusion française* (fn232).

²⁵³ *Musique Diffusion française* (fn232), paragraphs 74 to 75.

²⁵⁴ 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.

regarded 'by their very nature' as being injurious to the proper functioning of normal competition.²⁵⁵

- V.47 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.²⁵⁶ 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.²⁵⁷
- V.48 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.²⁵⁸
- V.49 However, no agreement or concerted practice is automatically restrictive by object. Instead, the objective analysis of whether an agreement or 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.²⁵⁹

²⁵⁵ 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* (fn202), paragraph 29.

²⁵⁶ Joined Cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines and Rheinzinc v Commission* [1984] ECR 1679 ('*CRAM*'), paragraphs 25 to 26.

²⁵⁷ Case C-551/03P *General Motors v Commission* [2006] ECR I-3173 ('*General Motors*'), paragraph 64.

²⁵⁸ *Cityhook v OFT* [2007] CAT 18, at [270]; *General Motors* (fn257), paragraphs 77 to 78 and *T-Mobile Netherlands* (fn202), paragraph 27.

²⁵⁹ See for example also Joined Cases 96/82 etc. *NV IAZ International Belgium v Commission* [1983] ECR 3369, paragraphs 22 to 25; *CRAM* (fn256), paragraphs 25 to 26 and Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969, paragraph 110.

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

- V.50 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.²⁶⁰
- V.51 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'.²⁶¹ 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.²⁶² 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.²⁶³
- V.52 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 the other suppliers would quote higher prices to ensure the maintenance of the existing customer relationship.²⁶⁴
- V.53 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

²⁶⁰ *Agreements and Concerted Practices Guidance* (fn211), paragraphs 2.2 to 2.3.

²⁶¹ *Agreements and Concerted Practices Guidance* (fn211), paragraph 3.10.

²⁶² *Suiker Unie* (fn217); 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.

²⁶³ 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).

²⁶⁴ 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).

be a method of market sharing by customer allocation which had the object of restricting competition.²⁶⁵

- V.54 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'.²⁶⁶ 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,²⁶⁷ or an agreement not to charge less than any other price in the market, which the Court of Justice found had the objective of restricting competition.²⁶⁸ An agreement may restrict price competition even if it does not eliminate it entirely.²⁶⁹
- V.55 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.²⁷⁰
- V.56 In its *Bananas* decision,²⁷¹ 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'.²⁷² In that case, the collusion involved communications, which took place between parties before they set their weekly quotation prices, covering price setting

²⁶⁵ 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).

²⁶⁶ *Agreements and Concerted Practices Guidance* (fn211), 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.

²⁶⁷ *Cast Iron and Steel Rolls* (fn263).

²⁶⁸ See for example Case 8/72 *Vereeniging van Cementhandelaren v Commission* [1972] ECR 877.

²⁶⁹ *Agreements and Concerted Practices Guidance* (fn211), paragraph 3.6.

²⁷⁰ *Tate & Lyle* (fn223), paragraphs 58 and 60. See also *Rhône-Poulenc* (fn223), paragraphs 122 to 123.

²⁷¹ *Bananas* (fn235).

²⁷² *Bananas* (fn235), paragraph 292.

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]'.²⁷³

- V.57 The sharing of pricing information reduces uncertainties inherent in the competitive process and facilitates the co-ordination of the parties' conduct on the market.²⁷⁴ 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'.²⁷⁵
- V.58 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.²⁷⁶
- V.59 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

²⁷³ *Bananas* (fn235), 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.

²⁷⁴ 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.

²⁷⁵ 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'.

²⁷⁶ For example *Hercules Chemicals* (fn200), paragraphs 259 to 260 (in addition to pricing information, the information exchanged included sales volume restrictions, profitability thresholds, customer identities). See also *SPO* (fn183), 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).

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'.²⁷⁷

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

- V.60 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'.²⁷⁸ The European Courts have also held that this is equally the case where the conduct in question concerns a concerted practice.²⁷⁹
- V.61 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.²⁸⁰ Under Article 101, concerted practices are therefore prohibited regardless of their effect, when they have an anti-competitive object.²⁸¹
- V.62 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.²⁸²
- V.63 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

²⁷⁷ *T-Mobile Netherlands* (fn202), paragraphs 40 to 41.

²⁷⁸ 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* (fn200), paragraph 99; *Cimenteries* (fn221), paragraphs 837, 1531 and 2589; *BIDS and Barry Brothers* (fn255), paragraph 16 and *T-Mobile Netherlands* (fn202), paragraph 29).

²⁷⁹ *Anic* (fn200), paragraph 123 and *T-Mobile Netherlands* (fn202), paragraphs 28 to 30.

²⁸⁰ *Anic* (fn200), paragraph 124; *Hüls* (fn217), 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* (fn223)). See also *Apex Asphalt* (fn201), at [206(xi)] (followed in *Makers* (fn201), at [103(xi)]).

²⁸¹ *Anic* (fn200), paragraphs 122 to 123. See also *Apex Asphalt* (fn201), at [206 (xii)] (followed in *Makers* (fn201), at [103(xii)]).

²⁸² *Argos/Littlewoods* (fn202), at [357].

competition.²⁸³ 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.²⁸⁴

Appreciable prevention, restriction or distortion of competition

V.64 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'.²⁸⁵

V.65 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*.²⁸⁶ 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 undertakings²⁸⁷ or exceed 15 per cent on any of the relevant markets affected by the agreement where the agreement is made between non-competing undertakings.²⁸⁸

V.66 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

²⁸³ *T-Mobile Netherlands* (fn202), paragraph 31.

²⁸⁴ *T-Mobile Netherlands* (fn202), paragraph 43.

²⁸⁵ Case 5-69 *Franz Völk v S.P.R.L. Ets J. Vervaecke* [1969] ECR 295 ('*Völk*'), paragraph 5/7.

²⁸⁶ 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.

²⁸⁷ Competing undertakings are undertakings which are actual or potential competitors on any of the markets concerned.

²⁸⁸ Non-competing undertakings are undertakings which are neither actual nor potential competitors on any of the markets concerned.

concerted practice which has as its object the direct or indirect fixing of prices or the allocation of markets or customers.²⁸⁹

V.67 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'.²⁹⁰

V.68 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'.²⁹¹

V.69 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.²⁹²

Effect on trade within the UK

V.70 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.71 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.²⁹³

²⁸⁹ *Notice on Agreements of Minor Importance* (fn286), paragraph 11.

²⁹⁰ *North Midland Construction v OFT* [2011] CAT 14 ('*North Midland Construction*'), at [53].

²⁹¹ C-266/11 *Expedia Inc. v Autorité de la concurrence and Others*, judgment of 13 December 2012 (not yet published), paragraph 37.

²⁹² *North Midland Construction* (fn290), at [56] to [61]. See also *Apex Asphalt* (fn201), at [251].

- V.72 By their very nature, agreements and concerted practices which are capable of appreciably restricting competition within the UK are inherently capable of affecting trade.²⁹⁴
- V.73 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.²⁹⁵

Burden and standard of proof

Burden of proof

- V.74 The burden of proving an infringement of the Chapter I prohibition lies with the OFT.²⁹⁶ 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,²⁹⁷ 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 manifestly anti-competitive purpose implies, in the absence of explanation, participation in the cartel alleged'.²⁹⁸

Standard of proof

- V.75 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.76 This was recently confirmed by the CAT in *Tesco Stores*, as follows:

²⁹³ 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.

²⁹⁴ *Agreements and Concerted Practices Guidance* (fn211), paragraph 2.25.

²⁹⁵ *Aberdeen Journals v OFT* [2003] CAT 11 ('*Aberdeen Journals*'), at [459] to [460].

²⁹⁶ *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* (fn202), at [164].

²⁹⁷ 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.

²⁹⁸ *Napp* (fn296), at [110].

'[...] 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 [...]'.²⁹⁹

Evidential weight

V.77 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.78 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 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'.³⁰⁰

²⁹⁹ *Tesco Stores* (fn231), at [88]. See also *Quarmby Construction Company and St James Securities Holdings v OFT* [2011] CAT 11 ('*Quarmby*'), at [81].

³⁰⁰ *Aalborg Portland* (fn236), 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.

- V.79 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'.³⁰¹
- V.80 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.³⁰²
- V.81 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]'.³⁰³
- V.82 Most recently, in *Quarmby*,³⁰⁴ 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

³⁰¹ Joined Cases T-109/02 etc. *Bolloré and Others v Commission* [2007] ECR II-947 ('*Bolloré*'), paragraphs 257 to 258, citing *Volkswagen* (fn183), paragraph 43 and *Limburgse Vinyl* (fn200), 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.

³⁰² *FMC Foret* (fn301), paragraph 122, citing *Cimenteries* (fn221), paragraph 1838.

³⁰³ *JJB/Allsports* (fn202), at [206].

³⁰⁴ *Quarmby* (fn299).

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).³⁰⁵

V.83 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'³⁰⁶
- Reliance may be placed, as against an undertaking, on statements made by other incriminated undertakings, including leniency applicants.³⁰⁷ 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 adequate proof as against those other undertakings unless it is supported by other evidence³⁰⁸
- 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

³⁰⁵ *Quarmby* (fn299), at [86]. See also *Durkan* (fn9), at [95] to [96].

³⁰⁶ *FMC Foret* (fn301), 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* (fn301), 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.

³⁰⁷ *FMC Foret* (fn301), paragraph 116 (citing *Limburgse Vinyl* (fn200), paragraph 512).

³⁰⁸ *FMC Foret* (fn301), paragraph 120 (citing Joined Cases T-67/00 etc. *JFE Engineering* [2004] ECR II-2501 ('*JFE Engineering*'), paragraph 219; Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407, paragraph 285; *Bolloré* (fn301), paragraph 167; *Lafarge* (fn306), 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* (fn301), paragraphs 183 to 186 and 232 and *Bolloré* (fn301), paragraphs 168 to 184).

to in a statement by a leniency applicant, that statement may **in itself** be sufficient to evidence **other** aspects of the collusion.³⁰⁹

V.84 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,³¹⁰ 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'.³¹¹

V.85 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 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'.³¹²

V.86 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

³⁰⁹ *FMC Foret* (fn301), paragraph 120 (referring to *JFE Engineering* (fn308), 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]).

³¹⁰ See, for example, *JFE Engineering* (fn308), 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* (fn306), paragraphs 87 to 89.

³¹¹ *Mitsubishi* (fn306), paragraphs 81 and 85 (citing Case T-50/00 *Dalmine v Commission* [2004] ECR II2395, paragraph 72).

³¹² *Claymore Dairies and Express Dairies v OFT* [2003] CAT 18, at [8].

declarant must in principle be regarded as particularly reliable evidence'.³¹³

- V.87 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.³¹⁴

Exclusion and exemptions

Exclusion

- V.88 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.89 Agreements and concerted practices which satisfy the criteria set out in section 9 of the Act benefit from exemption from the Chapter I prohibition. It is for the parties to demonstrate that the four conditions for exemption under section 9 of the Act are satisfied.
- V.90 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

³¹³ See *JFE Engineering* (fn308), paragraph 211.

³¹⁴ *Quarmby* (fn299), at [114]. However, as referred to in fn309, 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* (fn309), at [49]).

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.91 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 Commission³¹⁵ 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.92 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.

Article 101

- V.93 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 101.³¹⁶

Effect on trade between Member States

- V.94 For Article 101 to be engaged, the agreement or concerted practice must affect trade between EU Member States to an appreciable extent.³¹⁷ This is a jurisdictional requirement demarcating the boundary between EU competition law and national competition law.³¹⁸ Appreciability may be assessed by reference to the market position and importance of the undertakings concerned, and it will be absent where

³¹⁵ 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.

³¹⁶ 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.

³¹⁷ *Völk* (fn285), paragraph 5/7 and Case 22-71 *Béguelin Import v SAGL Import Export* [1971] ECR 949, paragraph 16.

³¹⁸ Case 22/78 *Hugin Kassaregister and Hugin Cash Registers v Commission* [1979] ECR 1869, paragraph 17. See also *Aberdeen Journals* (fn295), at [459].

the effect on the market is insignificant because of the undertakings' weak position on the market.³¹⁹

- V.95 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.³²⁰ 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.³²¹ The guidance also provides that agreements that are local in nature are in themselves not capable of appreciably affecting trade between Member States.³²²
- V.96 The Infringement was not cross-border in nature, but rather took place in a limited area within the UK. During the Relevant Period, the Participating Dealers made no sales to customers in other Member States³²³ 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.³²⁴ On the basis of the foregoing, the OFT considers that it has no grounds for action under Article 101.³²⁵

³¹⁹ *Völk* (fn285), paragraph 5/7 and Case T-77/92 *Parker Pen v Commission* [1944] ECR II-549, paragraph 40.

³²⁰ 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*').

³²¹ *Notice on the Effect on Trade* (fn320), paragraphs 89 and 92.

³²² *Notice on the Effect on Trade* (fn320), paragraph 91.

³²³ See paragraphs II.24, II.40 and II.76 (Company Profiles).

³²⁴ See paragraph IV.47 (Industry Overview and the Relevant Market).

³²⁵ 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 and that national competition agencies can only decide that there are no grounds for action on their part.

SECTION VI THE CONDUCT OF THE PARTIES AND LEGAL ASSESSMENT

Conduct of the Parties

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,³²⁶ but the OFT's conclusions are reached in light of the totality of the evidence.
- VI.2 At a meeting on 8 December 2009, Ciceley, Enza, Road Range and Mercedes entered into an agreement and/or concerted practice which had as its object the dampening of price competition for the sale of trucks to customers based in the Participating Dealers' areas. The Infringement, at its narrowest, took the form of an agreement and/or concerted practice that each Participating Dealer would be 'reasonable with their margins' in quotations to customers in each other's areas.³²⁷ The OFT also considers, however, that the agreement and/or concerted practice extended to the specific margins which should be included by the Participating Dealers in quotations to customers in each other's areas.³²⁸ It would appear from the available evidence that these arrangements were initially proposed at the meeting by [Ciceley Manager C].³²⁹
- VI.3 This finding is primarily based on contemporaneous documentary evidence from Ciceley and on the witness evidence of [Mercedes Sales Manager C], [Enza Director A],³³⁰ [Enza Sales Executive A] and [Northside Manager B].³³¹
- VI.4 The documentary evidence takes the form of slides presented by Ciceley to its sales staff in the week after the meeting of 8 December 2009 (the 'Slides'). These reflect the understanding of Ciceley's management that an agreement and/or concerted practice had been reached. Specifically,

³²⁶ References to the 'Conduct Section' are to paragraphs VI.1 to VI.79.

³²⁷ See paragraphs VI.55 to VI.58.

³²⁸ See paragraphs VI.59 to VI.65.

³²⁹ See paragraph VI.55.

³³⁰ The OFT notes that, of the four Parties involved in this Infringement, only Mercedes and Enza made their employees available to be interviewed by the OFT.

³³¹ Northside is not involved in this Infringement.

Ciceley's sales executives were instructed to behave in a manner consistent with the agreement and/or concerted practice. These instructions were to add certain minimum margins to quotations to out-of-area customers and to inform Ciceley's management if they believed that a customer in Ciceley's area might accept a competitive quotation from one of the other Participating Dealers, so that Ciceley's management could advise the other Participating Dealers to comply with the terms of the arrangement.

- VI.5 The witness evidence takes the form of statements made in interviews and/or witness statements by participants at the meeting on 8 December 2009 and, in some instances, their colleagues. Ciceley and Road Range refused the OFT's request to interview their employees during the investigative stage of the case.³³²
- VI.6 [Enza Director A] stated that, at the meeting of 8 December 2009, he and [Road Range Manager] agreed to [Ciceley Manager C]'s suggestion that dealers should be reasonable with their margins in quotations to out-of-area customers going forward.³³³ As noted, Ciceley and Road Range refused the OFT's request to interview their employees during the investigative stage of the case and therefore the OFT was unable to obtain [Ciceley Manager C]'s and [Road Range Manager]'s version of events.
- VI.7 Both [Mercedes Sales Manager C] and [Enza Director A] stated that all dealers would have left the meeting with the impression that an agreement had been reached.³³⁴ Both [Enza Director A] and [Mercedes Sales Manager C] subsequently expressed concern about the appropriateness of the discussions which took place during the 8 December 2009 meeting but did not expressly distance themselves from the arrangement, either at the meeting or subsequently.³³⁵

³³² Email exchange between OFT and Addleshaw Goddard dated 27 September to 22 October 2010 re Ciceley - interviews, OFT Document Reference 1207 and Letter from Brabners Chaffe Street to OFT dated 22 November 2010 re cooperation by Road Range with OFT investigation, OFT Document Reference 1423. Following the issue of the Statement, the Parties have all 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 and Road Range to provide the OFT with access to any witnesses.

³³³ [C] Witness Statement, OFT Document Reference 3865, paragraph 23.

³³⁴ See paragraphs VI.38 to VI.39.

³³⁵ See paragraphs VI.38 to VI.39 and VI.41.

- VI.8 In terms of specific margins, the Slides,³³⁶ as well as the witness evidence of [Enza Sales Executive A]³³⁷ and [Northside Manager B],³³⁸ all refer to a margin of £[C] to be added to quotations to out-of-area customers.³³⁹ In addition, [Enza Director A]'s witness evidence is that [Ciceley Manager C] suggested margins of £[C] to £[C] and proposed that the dealers should contact each other when an out-of-area customer requested a quotation.³⁴⁰ No one present at the meeting expressly rejected [Ciceley Manager C]'s proposals.³⁴¹ [Enza Director A] denies having agreed to these proposals regarding the specific margin. However, this is contradicted by the witness evidence of [Enza Sales Executive A], who stated that, when [Enza Director A] returned to Enza's offices after the 8 December 2009 meeting, he reported having 'done a deal' with the other Participating Dealers to the effect that a margin of £[C] would be added to truck quotations.³⁴² [Enza Director A]'s denial is also contradicted by the Slides.
- VI.9 The OFT's finding is also supported by the context in which the Infringement took place, which is relevant to the Parties' incentives and willingness to enter into this anti-competitive arrangement.³⁴³
- VI.10 The contemporaneous documentary evidence from Ciceley, as well as supporting the existence of the agreement and/ or concerted practice, also shows that Ciceley took steps to implement it by instructing its sales team at a meeting on 18 December 2009 to conduct themselves in a manner consistent with the arrangement. [Mercedes Sales Manager C] was present at this internal meeting at Ciceley³⁴⁴ and was therefore made aware of the actions taken by Ciceley to implement the arrangement reached at the meeting of 8 December 2009.

³³⁶ See paragraph VI.50.

³³⁷ See paragraphs VI.47 and VI.74. Note that [Enza Sales Executive A]'s recollection is that [Enza Director A] had agreed that a margin of £[C] would be added to quotations to all customers to whom the Participating Dealers quoted when knowingly in competition with one another (rather than that this margin would only be added to out-of-area deals).

³³⁸ See paragraph VI.48.

³³⁹ [Mercedes Sales Manager C]'s account, however, differs on this aspect. See paragraph VI.38.

³⁴⁰ See paragraph VI.39.

³⁴¹ The OFT notes [Enza Director A]'s statement regarding his own intention in relation to this proposal (see in particular paragraph VI.39). See however paragraphs VI.73 and VI.101 to VI.105.

³⁴² See paragraph VI.47.

³⁴³ See paragraphs VI.12 to VI.34.

³⁴⁴ See paragraph VI.49.

VI.11 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.³⁴⁵

Background and context in which the Infringement took place

VI.12 There are three aspects of the context in which this Infringement took place which the OFT considers are particularly relevant to the Parties' incentives and willingness to enter into this anti-competitive arrangement:

- At the time of the 8 December 2009 meeting, the Participating Dealers were holding excess stock.³⁴⁶ This may have intensified competition amongst them and led to regular complaints to [Mercedes Sales Manager C] (who was involved in that meeting) from dealers losing customers to other Mercedes dealers and having to adjust their profit margins downwards. She described the complaints as 'very frustrating'.³⁴⁷
- [Mercedes Sales Manager C]'s email on 20 October 2009 about the conditions attached to the use of additional contingency support for the sale of 2008 stock may have resulted in a perception among the Participating Dealers that additional contingency support would only be available to in-area sales. This may have, at least to some extent, discouraged out-of-area sales, as well as given the Participating Dealers the impression that Mercedes would want them to focus on in-area sales.³⁴⁸
- Approximately a month before the 8 December 2009 meeting, [Ciceley Manager C] (the Ciceley representative present at that meeting) ordered his sales staff to concentrate on selling in-area and imposed a new process through which he would have to be consulted before any quotations were provided to out-of-area customers.³⁴⁹ This seems to have been at least in part driven by the fact that Ciceley had recently been involved in an episode of

³⁴⁵ See paragraphs III.25 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. Only Mercedes and Enza made such representations.

³⁴⁶ See paragraphs VI.13 and VI.15.

³⁴⁷ See paragraph VI.16.

³⁴⁸ See paragraphs VI.17 to VI.28.

³⁴⁹ See paragraphs VI.29 and VI.30.

secondary wholesaling. According to [Enza Director A] and [Mercedes Sales Manager C], Ciceley had previously pursued out-of-area sales vigorously.³⁵⁰ The OFT considers that this evidence about [Ciceley Manager C]'s intention to focus on in-area sales is consistent with the proposals he put forward at the 8 December 2009 meeting.³⁵¹

Excess stock and competition amongst the Participating Dealers

VI.13 [Mercedes Sales Manager C] stated:

'Ciceley had a lot of spare stock vehicles during 2009 for which there was very little market, so they sold these anywhere they could, often at low or even negative margins. Enza also had a high level of pump-outs although their figures were distorted by the fact that over half of their registrations were to one customer called [C]. On average Ciceley sold more vehicles based in Enza's area of influence than the other way around, often at very low margins. Road Range, because of its comparatively smaller size, did not tend to sell as many vehicles out of area. Generally, because of the large population centres and dealers in close proximity, the north-west is a very concentrated area'.³⁵²

VI.14 In relation to the level of competition amongst the Participating Dealers generally, [Enza Director A] stated:

'[In addition to other makes of trucks] [w]e also compete with other Mercedes dealers, of which our main and nearest rival is Ciceley which is mainly located north-west of us, covering Lancashire and up to Carlisle. We also face competition from the other local Mercedes dealership Road Range, based in Merseyside. We probably compete more fiercely against the other Mercedes dealers than we do the other truck manufacturers. We are selling an identical product to the other dealers and therefore it often leads to a price war'.³⁵³

VI.15 In relation to the competitive situation at the time of the 8 December 2009 meeting specifically, [Enza Director A] stated:

³⁵⁰ See paragraphs VI.13 to VI.15.

³⁵¹ See paragraphs VI.38 and VI.39.

³⁵² [C] Witness Statement, OFT Document Reference 3749, paragraph 12.

³⁵³ [C] Witness Statement, OFT Document Reference 3865, paragraph 3.

'[t]he background to this meeting [the meeting of 8 December 2009] was that we were all facing very difficult circumstances because of the trading conditions caused by the recession and a general excess of stock vehicles. It was an unusual situation, in that there was a lot of pressure at the time on dealers to dispose of excess stock and Ciceley in particular had an awful lot of vehicles around its neck'.³⁵⁴

VI.16 Out-of-area sales led to regular, repeated complaints by the dealers to [Mercedes Sales Manager C]. [Mercedes Sales Manager C] stated:

'[o]ne of the consequences of cross-border selling [that is, sales outside each dealer's ZoI] by dealers was that dealers moaned to me about it on a regular basis. They were unhappy that the customer had shopped around and gone to another dealer. They were also unhappy that they had to adjust their profit margins downwards to try and achieve the sale. I would often receive complaints about other dealers with words to the effect of 'Why are they selling it so cheaply, where's the benefit in that? We can't compete with them'.

'I couldn't do anything in response to these complaints – the customer had the right to shop around and all I could do was offer a level of price support to the dealer and check that the same level of terms had been granted to competing dealers. I found the constant moaning very frustrating. It was common knowledge amongst my colleagues that my area was well known for fighting over customers – it was referred to as 'bandit country''.³⁵⁵

Contingency support to sales of 2008 stock

VI.17 On 20 October 2009, [Mercedes Sales Manager C] sent an email headed '2008 Stock Discounts' to [Ciceley Manager C], [Enza Director A] and [Road Range Manager], stating:

'[j]ust for clarification [...] the caveats to which [Mercedes Sales Manager B] refers to [in the forwarded email regarding discounts to 2008 stock] are that we (me!) should still be advised of every deal and that where ever possible it should have an R&M, RVG or funding

³⁵⁴ [C] Witness Statement, OFT Document Reference 3865, paragraph 16.

³⁵⁵ [C] Witness Statement, OFT Document Reference 3749, paragraphs 15 and 16.

opportunity to qualify. Also support will not be given to deals which have been prospected out of territory'.³⁵⁶

VI.18 On the same day [Ciceley Manager C] replied to [Mercedes Sales Manager C], stating: 'the 'out-of-area' bit may be a concern, surely there is some justification for selling out of patch where relationships exist & we clear it with MBUK?'.³⁵⁷

VI.19 [Mercedes Sales Manager C] replied:

'[t]here are bound to be exceptions because of relationships [...] [Mercedes Sales Manager B]'s point is that he doesn't want salesman actively looking for sales opps which are out of area. If you can justify the reason for quoting out of area and the in area dealer isn't quoting then my view would be to help you to sell the trucks [...] though ultimately, the decision wouldn't lie with me. In every instance, I would need as much information as possible to justify the request to [Mercedes Sales Manager B]'.³⁵⁸

VI.20 Referring to these emails, [Mercedes Sales Manager C] stated that at the time of this email exchange:

'[...] there was a lot of excess stock held by dealers and [Mercedes Sales Manager B] told a group of us, I think in a sales meeting, that we should try to make sure that dealers did not use their discount vouchers to sell their excess stock vehicles to customers all over the country under the nose of other dealers who also had excess stock. Enza and Road Range didn't really have much stock at this time but I knew that Ciceley had 26 unsold vehicles which were mainly cement mixers, and I didn't want Ciceley to go all over the shop undercutting local dealers using their discount vouchers. [...]

'I replied [to [Ciceley Manager C]'s email referred to in paragraph VI.18] by saying that [Mercedes Sales Manager B] did not want salesmen

³⁵⁶ Email exchange between various inc. [Mercedes Sales Manager B], [Mercedes Sales Manager C] and [Ciceley Manager C] dated 19 to 20 October 2009 re 2008 Stock Discounts, OFT Document Reference 2865.

³⁵⁷ Email exchange between various inc. [Mercedes Sales Manager B], [Mercedes Sales Manager C] and [Ciceley Manager C] dated 19 to 20 October 2009 re 2008 Stock Discounts, OFT Document Reference 2865.

³⁵⁸ Email exchange between various inc. [Mercedes Sales Manager B], [Mercedes Sales Manager C] and [Ciceley Manager C] dated 19 to 20 October 2009 re 2008 Stock Discounts, OFT Document Reference 2865.

actively looking for sales opportunities out of area. I wouldn't have said this if [Mercedes Sales Manager B] had not said it to me previously'.³⁵⁹

VI.21 [Mercedes Sales Manager B] said that he could not understand why [Mercedes Sales Manager C] had included in her email a stipulation that support would not be given to deals prospected out-of-area. He believed that it was due to a previous episode of secondary wholesaling at Ciceley, and that the caveats were 'originally from the original campaign that my predecessor had launched' but stated that 'you could get the discounts regardless of where you were wanting to trade', and that 'the entire network can sell them anywhere he wants'. He also stated: 'I think that comment was aimed, she may have sent it to three people there but I believe the comment was aimed at one person, or one dealership in particular [...] Ciceley'.³⁶⁰

VI.22 Mercedes informed the OFT that the caveats described by [Mercedes Sales Manager C] in her email did not reflect Mercedes' policy:

'[t]he MB [Mercedes] terms relating to the special 2009 promotional prices and deals regarding unsold 2008 stock of MB [Mercedes] trucks [...] were sent to the dealerships, and categorically did not restrict the territory where the vehicles on promotion could be sold. It is not clear why [Mercedes Sales Manager C] believed that the discount would not be available on products marketed outside of the ZoI. Her statement in this email does not reflect the terms of the programme. In any event, as [Mercedes Sales Manager C] indicates, stock discount was indeed applied to a number of vehicles which Ciceley had sold outside its ZoI'.³⁶¹

VI.23 However, the OFT has not been provided with any evidence that the inconsistency between what Participating Dealers were told by [Mercedes Sales Manager C] and the company's stated policy was clarified to the dealers.³⁶² As a consequence, the OFT considers that, in the absence of a clear communication from Mercedes to the Participating Dealers prior to the meeting of 8 December 2009 contradicting [Mercedes Sales Manager C]'s email of 20 October 2009, the

³⁵⁹ [C] Witness Statement, OFT Document Reference 3749, paragraphs 17 and 18.

³⁶⁰ [C] Interview Transcript, OFT Document Reference 2450, pages 42 to 47.

³⁶¹ Mercedes comments on Interview Transcripts, OFT Document Reference 2641, pages 2 to 3.

³⁶² Even if, as noted by Mercedes, this restriction was not part of the terms of the scheme (see paragraph VI.22), dealers would still be guided by the instructions they received from the Regional Sales Manager.

Participating Dealers were left to understand that they would not benefit from support from Mercedes for sales of 2008 stock prospected outside their respective Zols.

VI.24 Indeed, in interview [Enza Director A] said that his lasting impression in relation to [Mercedes Sales Manager C]'s email referred to in paragraph VI.17 was that 'support will not be given to deals, which had been prospected out of territory'.³⁶³ He stated:

'[a]t the time, there were several aged stock vehicles which had been sitting around for a long time to the point that they were becoming a problem to dealers. I believe that Mercedes was offering very generous discounts to reduce the excess stock but also wanted to ensure that those dealers with excess stock sold them with a repair and maintenance package and didn't just sell them anywhere around the network at silly prices. Otherwise, all the benefit of the campaign would be to those dealers with excess stock to the detriment of other dealers'.³⁶⁴

VI.25 In interview, [Enza Director A] said:

'Mercedes-Benz did put a number of caveats on [the available discounts] [...] to prevent silly dealing. Because the situation really, is that the dealers that have ended up with these vehicles, are the ones that had maybe, well some of them are genuinely had cancellations. But some of them had maybe been a little bit creative with their ordering initially [...] Now when the job was booming that meant that they got the chassis before [...] other people. When it all went sour, they were the ones that ended up with all the dealers, with all the chassis. So what Mercedes-Benz was trying, you know was making sure they do, is that they were given, they actually give them an awful lot of money, the strongest money I've ever seen I think [...] to be fair on these vehicles. So they were insisting that each vehicle had a repair maintenance package, an RVG is a residual value guarantee, and funding, opportunity to qualify. And then they also said, that support will not be given to deals, which had been prospected out of territory. I think the reason they gave that detail, is because otherwise the dealers that have got all these vehicles, with all this extra stock on, would then just launch them to the dealer

³⁶³ [C] Interview Transcript of 24 November 2010, OFT Document Reference 2439, page 147.

³⁶⁴ [C] Witness Statement, OFT Document Reference 3865, paragraph 18.

network. And undo all the workings that the local dealer had, had been doing, you know if they were working on a vehicle'.³⁶⁵

VI.26 The perception among Participating Dealers that contingency support would only be available to in-area sales is also apparent from [Ciceley Manager C]'s email quoted in paragraph VI.18, in which he complained to [Mercedes Sales Manager C] about the policy stated in her email. In her response, [Mercedes Sales Manager C] did not clarify what Mercedes submits was its stated policy (see paragraph VI.22), but rather implied that any approval for support to out-of-area sales of 2008 stock would be exceptional.

VI.27 That perception can also be inferred from a notebook belonging to [Ciceley Sales Executive D]. The notebook starts 12 October 2009, and there is a handwritten entry shortly after a page headed '30th October' (10 days after [Mercedes Sales Manager C]'s email referred to in paragraph VI.17), which reads:

'R&M on 8x4 / Finance has to be IN-PATCH.

'Update on stock support levels

'[Mercedes Sales Manager C] to be aware of support request even though MB offers'.³⁶⁶

VI.28 The OFT understands the reference to 'Finance has to be IN-PATCH' to mean that support would only be available to in-area sales.

Ciceley's out-of-area sales

VI.29 On 5 November 2009, [Ciceley Manager C] ordered his sales staff to concentrate on selling in-area and imposed a new process through which he would have to be consulted before any quotations were provided to out-of-area customers. This seems to have been at least in part driven by the fact that Ciceley had recently been involved in an episode of secondary wholesaling.³⁶⁷

³⁶⁵ [C] First Interview Transcript, OFT Document Reference 2439, pages 146 to 147.

³⁶⁶ Notebook of [Ciceley Sales Executive D], OFT Document Reference 1008, page 23. As explained in fn406, Ciceley refused the OFT's request to interview its employees during the investigative stage of the case and therefore the OFT could not ask [Ciceley Sales Executive D] for an explanation for these notes.

³⁶⁷ Secondary wholesaling refers to the practice of selling to a non-authorized dealer rather than to a customer. This is contrary to the terms of its franchise agreement with Mercedes (see

VI.30 On 5 November 2009, [Ciceley Manager C] sent an email headed '*Out of territory sales*' to his sales team, copying in [Ciceley Director] and [Ciceley Sales Executive D], in which he wrote:

'As you know, we have been 'under the microscope' from MBUK after our recent indiscretion involving the sale of an Atego into Scotland.

'We do not condone Secondary Wholesaling at all & we need to be sure that we are not involved in this practice in any way – whether it is by design or we are inadvertently drawn into it.'³⁶⁸

'In future, I need to be advised of the full circumstances BEFORE any quotes are sent to operators outside Ciceley's designated postcodes so that I can keep [Ciceley Director] fully informed.

'You will be informed by email whether you are to quote or not.

'Concentrating your sales to within our postcodes makes extra sense when you consider your objective of selling an R & M package with every truck sold.

'Please do not compromise your position'.³⁶⁹

VI.31 On 5 November 2009, [Ciceley Director] reported to Mercedes the measures Ciceley had been taking to prevent secondary wholesaling by forwarding the email quoted at paragraph VI.30 to [Mercedes Sales Manager B]. In the email he said:

'[p]lease see the note from [Ciceley Manager C] [...] To make sure this [secondary wholesaling] won't happen again I have asked [Ciceley Manager C] and [Ciceley Sales Executive D] to let me know personally even if we intend to quote out-of-area, never mind sell'.

VI.32 On 7 November 2009, [Mercedes Sales Manager B] replied:

clause 2.2.1(a) of the Franchise Agreement, Mercedes Margin Model Paper, OFT Document Reference 1406, Annex 1).

³⁶⁸ The incident alluded to in the email is described in more detail by [Mercedes Sales Manager B] as follows. Ciceley asked Mercedes for a discount to sell a truck in Scotland but it subsequently transpired that they had in fact sold the truck to a Mercedes van dealer not franchised to sell trucks, in breach of their franchise agreement. [C] Interview Transcript, OFT Document Reference 2450, pages 49 to 50.

³⁶⁹ Email exchange between various inc. [Ciceley Manager C], [Ciceley Director] and [Mercedes Sales Manager B] dated 5 to 7 November 2009 re Out of territory sales, OFT Document Reference 2851.

'[t]hank you for looking into this for me. It's really appreciated [...] look forward to seeing you this week'.

VI.33 [Mercedes Sales Manager B] also forwarded [Ciceley Manager C] and [Ciceley Director]'s two emails to [Mercedes Sales Manager C] and [another Mercedes colleague] on 7 November 2009, with the heading 'For info'.³⁷⁰

VI.34 The following email from [Mercedes Sales Manager C] to [Mercedes Sales Manager B] on 10 November 2009, headed 'Ciceley Review', indicates that Mercedes was monitoring Ciceley's out-of-area sales:

'Issues/concerns:- [...]

'Out of area sales [...]'.³⁷¹

Meeting of 8 December 2009

Preparation for and attendance at meeting of 8 December 2009

VI.35 A number of emails, calendars and diaries record the planning and occurrence of the meeting of the Parties on 8 December 2009 (as well as of a subsequent meeting which took place between Ciceley and Mercedes on 9 December 2009).³⁷² Present at the meeting were [Ciceley Manager C], [Ciceley Sales Executive D], [Road Range Manager], [Enza Director A] and [Mercedes Sales Manager C].³⁷³ Of these, only [Mercedes Sales Manager C] and [Enza Director A] agreed to be interviewed by the OFT.

³⁷⁰ Email exchange between various inc. [Ciceley Manager C], [Ciceley Director] and [Mercedes Sales Manager B] dated 5 to 7 November 2009 re Out of territory sales, OFT Document Reference 2851.

³⁷¹ Email from [Mercedes Sales Manager C] to [Mercedes Sales Manager B] dated 10 November 2009 re Ciceley Review, OFT Document Reference 2753.

³⁷² See for example entries in the electronic calendar of [Mercedes Sales Manager C] for '*Area Sales Managers Meeting at Ciceley Bolton*' on 8 December 2009 from 01:00 pm to 03:00 pm and for '*Meeting with [Ciceley Director] at Ciceley Blackburn*' on 9 December 2009 from 10:00 am to 12:00 pm ([Mercedes Sales Manager C] electronic calendar, OFT Document Reference 2793, pages 2 to 3); [Mercedes Sales Manager C] mileage form dated December 2009, OFT Document Reference 2767; entries in the diary of [Ciceley Director] for 8 December 2009 at 01:00 pm, noting the names [Enza Director A] and [Road Range Manager], and for 9 December 2009 at 10:00 am, noting the name [Mercedes Sales Manager C] (Diary of [Ciceley Director] dated 2009, OFT Document Reference 1004); [C] Witness Statement, OFT Document Reference 3865, paragraphs 15 to 33; [C] Witness Statement, OFT Document Reference 3749, paragraphs 20 to 36; [C] Witness Statement, OFT Document Reference 3748, paragraph 7 and [C] Witness Statement, OFT Document Reference 4384.

³⁷³ [C] Witness Statement, OFT Document Reference 3865, paragraph 20.

VI.36 [Mercedes Sales Manager C] gave the following account of the immediate background to the meeting:

'[t]owards the end of November 2009 I was asked by [Ciceley Manager C] to fix up a meeting with the other two sales managers from Enza and Road Range. I cannot recall the exact words used by [Ciceley Manager C] but the aim was to sit down and share best practice between dealers and achieve some common ground. In other areas of the country I believe there were business clubs or best practice meetings set up but in the north-west the three dealers have traditionally hated each other's guts and so it had never happened.

'As far as I was concerned, Ciceley were the worst offenders in selling out-of-area and causing problems so I welcomed [Ciceley Manager C]'s idea of getting the three dealers together, not for the purpose of coming to an agreement on sales but for better working relationships [...]

'[Enza Director A] was [C] and [Road Range Manager] was [C]. It seemed to me like the ideal time for the three dealers to put the past angst behind them and I thought that it would be a good idea for the three of them to sit down and share best practice and ideas on such issues as marketing, administration and customer service standards. I was also hoping that Enza and Ciceley in particular would be more civil and professional with each other.

'At about the end of November 2009, I contacted [Road Range Manager] and [Enza Director A] and arranged that the three dealers should meet at Ciceley's Bolton premises on 8 December. [Road Range Manager] was very open to the idea of a meeting and had attended regular meetings previously on vans, whilst [Enza Director A] is keen to get on with people and open to the idea of change. I always felt that the antagonism between Ciceley and Enza was mainly on Ciceley's side, despite the fact that Ciceley tended to sell more into Enza's area. I sent an email to [Ciceley Manager C], [Enza Director A] and [Road Range Manager] the day before the meeting to confirm that it was going ahead the next day'.³⁷⁴

VI.37 [Enza Director A] gave the following account:

³⁷⁴ [C] Witness Statement, OFT Document Reference 3749, paragraphs 20 to 24.

'I remember that a few weeks later [after receiving the email from [Mercedes Sales Manager C] referred to in paragraph VI.17]. I received a telephone call from [Mercedes Sales Manager C] who asked me to attend to discuss the problems that the Mercedes network were having with excess stock vehicles. She told me that [Ciceley Manager C] had requested the meeting to discuss a more sensible approach in the market place. By this I understood from [Mercedes Sales Manager C] that [Ciceley Manager C] wanted a meeting to stop each other cutting each other's throats by disposing of stock at cost price and doing daft deals. I don't recall [Mercedes Sales Manager C] using these exact words but this was my understanding of what [Ciceley Manager C] wanted to talk about. I had crossed swords so many times with [Ciceley Manager C] over customers that it seemed foolish for me not to attend'.³⁷⁵

Events at meeting of 8 December 2009

VI.38 [Mercedes Sales Manager C]'s account of what occurred at the meeting is as follows:

'[u]nfortunately, the meeting itself took on a bizarre turn for the worst and ended up with the three dealers agreeing that they should be more reasonable with their margins going forward when quoting for out-of-area customers.

'The meeting was arranged for 1pm on 8 December 2009 and was attended by [Ciceley Manager C], [Ciceley Sales Executive D], [Road Range Manager], [Enza Director A] and myself. A sandwich lunch was provided and I believe the actual core of the meeting lasted about 45 minutes but started late [...]

'There was no agenda for the 1 o'clock meeting and I don't recall anyone taking notes because it was informal and it was the first time we had got together as a group. [Road Range Manager] had asked for an agenda but [Ciceley Manager C] told me that he didn't think it was a good idea as it would be too formal for a first get together. I recall that the start of the meeting with the three dealers was delayed because of an accident on the motorway and there was some talk about the traffic. The atmosphere amongst the attendees was cordial and I believe that there was some general chat about how difficult trading conditions were

³⁷⁵ [C] Witness Statement, OFT Document Reference 3865, paragraph 19.

at the time and the amount of excess vehicles in stock. There was probably some talk about how things were going to turn out in 2010.

'To my recollection, the conversation about how tough business was, led to a lengthy moan from [Enza Director A] about a deal for one of Enza's long-standing customers [...], based in Enza's area that had been won by Ciceley a few weeks previously. [Enza Director A] made it clear that he wasn't happy about being undercut by Ciceley on a customer who had bought from Enza for some years. I can't remember exactly what [Ciceley Manager C] said in reply but I'm sure he explained why the customer had chosen Ciceley over Enza. I estimate that this discussion lasted about 10 minutes.

'[Ciceley Manager C] suggested that going forward, if an out-of-area customer approached one of the three dealerships for a quote, they should put in a reasonable and sensible margin in that quote. I don't recall him suggesting specific figures or minimum margins. If anyone had put forward a figure for a minimum margin of £[C], for example, I would have fallen off my chair laughing. I cannot recall exactly what [Enza Director A] said in reply, however, he definitely acknowledged agreement to [Ciceley Manager C]'s suggestion. I remember [Road Range Manager] saying that if the local dealer had not been properly onto a local customer it was their loss but she did not raise any objections to the suggestion from [Ciceley Manager C]. No one raised any objections. I estimate that this discussion surrounding [Ciceley Manager C]'s suggestion lasted about 15 minutes and the meeting closed. As far as I was concerned the three dealers left the meeting in agreement and they would take this approach to out-of-area customers going forward.

'I didn't raise any objections myself but privately I remember having concerns about what was being discussed especially as I had only recently received competition law training from Mercedes. I remember sarcastically thinking to myself 'this is good isn't it?' It certainly wasn't the outcome I was expecting and I would never knowingly had been party to something like this had I known what was going to happen'.³⁷⁶

VI.39 According to [Enza Director A]'s account:

'The meeting took place in the afternoon at the top of the spiral staircase above Ciceley's Bolton's showroom and lasted approximately

³⁷⁶ [C] Witness Statement, OFT Document Reference 3749, paragraphs 25 to 30.

two hours, including a sandwich lunch. Present at the meeting were [Ciceley Manager C] and [Ciceley Sales Executive D], [Road Range Manager] and [Mercedes Sales Manager C]. I did not speak to the other participants in advance of the meeting and I don't recall speaking to [Enza Director B] in advance about it either.

'There was no formal agenda for the meeting and I didn't take any notes and can't remember if anyone else did either. It was not chaired by anyone and was very informal. I recall that I had a bit of whinge about deals that Enza had worked hard on only to lose out to our local dealers, particularly Ciceley. I recall that I was cheesed off with Ciceley who were very aggressive and quoting against Enza in our area and in some cases winning business against us. [...]

'The background to my complaint was that there had been a Mercedes price increase at the time and Enza had quoted the increased price to [...] without knowing that there were vehicles available in stock at the old price. We were undercut by Ciceley because they had access to an old chassis which I didn't know was available – the availability of chassis at that time was unclear and constantly changing. I felt that we hadn't been dealt an even hand by Mercedes and moaned to [Mercedes Sales Manager C] and Ciceley about it at the meeting [...]. I remember letting off steam because I had only just been on the receiving end from [an Enza Sales Executive], at the time about the lost [...] deal. Despite my whinge, the meeting was relatively friendly and we decided to move on.

'After this we had a general discussion about out-of-area deals and I agreed with [Ciceley Manager C] and [Road Range Manager] that we should be fair and reasonable and not cut each other to the bone if we were in competition against each other outside our area of influence. This discussion related to not doing deals outside our area of influence with hardly any margin or at a loss.

'[Ciceley Manager C] then suggested that if we were competing against each other, we should put in a minimum dealer margin of [C] pounds per vehicle for a sale outside our area. I thought this figure was too high because we never make that level of margin, even with a customer on our doorstep. However, I did not openly disagree with the suggestion and rather than being involved in the discussions as previously, I chose to say nothing in response to [Ciceley Manager C]'s suggestion. I gave

no indication that I agreed and instead kept quiet. Privately I had no intention of sticking to such minimum margins. My view was that [Ciceley Manager C] was not entirely trustworthy and if I had put a margin of £[C] on a quotation and [Ciceley Manager C] had got wind of it, he would have immediately undercut me to say, £[C]. Any agreement on margins would therefore have been totally meaningless and I had no intention of reaching any such agreement or understanding or indicating that I had done so.

'I was surprised at the figures mentioned and felt uncomfortable about the way the meeting had progressed and I felt it was wrong. [Ciceley Manager C] also suggested that he, [Road Range Manager] and I should contact each other if our customers approached each other for quotations. I recall [Ciceley Manager C] saying that this would not apply to our existing customers because he wanted to carry on dealing with those customers. [Ciceley Manager C] in particular has many customers in the Manchester area and throughout the UK. I kept quiet about the suggestion to contact each other because I felt uncomfortable about it, but again I did not say anything.

'[Road Range Manager] is [C] and at some stage during the discussion on out-of-area sales, [Road Range Manager] mentioned that she already had some sort of understanding with Ciceley 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.

'I got the impression from [Road Range Manager] that she was happy at [Ciceley Manager C]'s suggestion about being fair and reasonable on out-of-area sales and that we had agreed not to step on each other's toes in that respect. This impression was based on her admission about her existing relationship with Ciceley on vans and that she was bubbly and friendly at the meeting and I don't recall her making any negative comments. For the same reasons, I believe [Ciceley Manager C] would have gone away from the meeting with the impression that [Road Range Manager] and therefore Road Range agreed with his suggestion on out-of-area sales going forward. However I don't recall [Road Range

Manager] saying anything in response to [Ciceley Manager C]'s suggestion of particular minimum margins.

'I cannot recall specifically what [Mercedes Sales Manager C] said in the meeting but I believe that she was probably pleased that her dealers were at least talking to each other but she didn't summarise the meeting or take notes herself. I don't recall [Ciceley Sales Executive D] saying anything at the meeting. Neither of them made any comments against [Ciceley Manager C]'s suggestions.

'I guess that [Ciceley Manager C] may have come away from the meeting thinking that at least the other dealers would be a little more sensible about deals in the future rather than doing them for sheer bloody mindedness.

'As far as I was concerned, there was simply an agreement about us being more sensible on deals going forward but I said nothing in response to the suggestion on levels of minimum margins or contacting each other on deals and there was nothing which I said or did that could have been interpreted as any form of approval of that. Enza carried on competing hard exactly as before. I am certain that I had no contact with Ciceley or Road Range in the days and weeks following our meeting - it certainly made no difference to the way we did business'.³⁷⁷

VI.40 [Enza Director A] also stated:

'I do not discuss customers with these dealers because basically I don't trust them and they would use that information to go after the same customers. I have regular contact with Mercedes [C], which was [Mercedes Sales Manager C] from 2008 to 2010 and prior to that [Mercedes Sales Manager B]. Again I have no personal or social relationships with anyone from Mercedes'.³⁷⁸

[Mercedes Sales Manager C]'s reaction to meeting of 8 December 2009

VI.41 [Mercedes Sales Manager C] gave the following account of her reaction to the meeting:

'I don't think the impact of what had been agreed between the three dealers really hit me until after the meeting had finished, when the

³⁷⁷ [C] Witness Statement, OFT Document Reference 3865, paragraphs 20 to 30.

³⁷⁸ [C] Witness Statement, OFT Document Reference 3865, paragraph 5.

others had left and I returned alone to the office I would use when visiting Ciceley's Bolton site. I felt a bit shell-shocked and knew what had happened was wrong. To my regret, I did not report the content of the meeting to anyone at Mercedes but I thought I would just keep my eye on the situation and see what prices were quoted by the dealers in the subsequent few days, weeks and months. I rationalised to myself that if I saw actual evidence of price-fixing between the dealers I would then take action. [...]

'I recall having a subsequent meeting with [Enza Director A] soon after the 8 December meeting where he told me that he had been uncomfortable with what had happened at the meeting.

'Soon after the 8 December meeting I also recall having a face to face conversation with [Road Range Manager] who commented that Home & Bargains had just started using a demonstrator trailer unit provided by [Ciceley Sales Executive D]. Home & Bargains was an old customer of [Ciceley Sales Executive D] when he used to work for Volvo. So immediately after the 8 December 2009 meeting, despite what had been agreed, Ciceley had demonstrated a vehicle under [Road Range Manager]'s nose. [Road Range Manager] was annoyed and her attitude was 'I'm not having any of it and they can forget about it' implying that the agreement was dead and buried'.³⁷⁹

Enza's reaction to meeting of 8 December 2009

VI.42 [Enza Director A]'s account of his reaction to the meeting was as follows:

'I mentioned the meeting to [Enza Director B] on my return to the office and probably mentioned [Ciceley Manager C]'s suggested margins but told him that we would not be working to those. I cannot recall what he said to me in reply. I also mentioned it to [Enza Director C] whilst I was in [Enza Director C]'s office at some point in the days following the meeting. [Enza Sales Executive A] was also there at the time. I cannot recall exactly what I said, but I mentioned that at the meeting [Ciceley

³⁷⁹ [C] Witness Statement, OFT Document Reference 3749, paragraphs 31 and 33 to 34. Note however that [Enza Director A] stated that he does not recall speaking to [Mercedes Sales Manager C] about the meeting afterwards ([C] Witness Statement, OFT Document Reference 3865, paragraph 32). The OFT also notes that there is no evidence that [Road Range Manager] communicated her view that the *'agreement was dead and buried'* to any Parties other than Mercedes.

Manager C] had discussed Enza's out-of-area sales and had asked Enza to be a bit more sensible about those out-of-area sales in the future.

'I believe that I may have mentioned that [Ciceley Manager C] had proposed a minimum dealer margin for out-of-area sales but that it was ridiculous. I did not give any instructions to the sales staff or anyone else about dealing differently with out-of-area sales, such as minimum margins on out-of-area sales [...]

'Because I did not put anything into practice (and never had any intention of doing so) and did not roll out new instructions to my sales staff on out-of-area sales I felt that I had done nothing wrong. It was not mentioned in any of the following sales meetings'.³⁸⁰

VI.43 The OFT also interviewed and obtained statements from a number of [Enza Director A]'s colleagues at Enza. The OFT notes that the statements of [Enza Director B], [Enza Director D] and [Enza Director C] confirm their understanding that an anti-competitive proposal was made at the meeting of 8 December 2009.³⁸¹

VI.44 [Enza Director B] stated that his understanding was that the other dealers present at the meeting wanted Enza to be more reasonable in its sales. He stated:

'[f]rom speaking to [Enza Director A], I understood that the other two dealers were looking for Enza to be a bit more reasonable in its sales activities but the meeting did not come up with any agreements or solutions as far as I knew and has not changed the way we have done business since. I cannot recall being told anything by [Enza Director A] about suggested profit margins on out of area sales'.³⁸²

³⁸⁰ [C] Witness Statement, OFT Document Reference 3865, paragraphs 31 to 33.

³⁸¹ See paragraph V.25 (Legal Background) in relation to the legal consequences of participating in a meeting of a manifestly anti-competitive nature and failing to indicate opposition to an anti-competitive arrangement to the other participants.

³⁸² [C] Witness Statement, OFT Document Reference 3774, paragraph 38. The OFT notes that [Enza Director B] stated that, from speaking to [Enza Director A], he understood that 'the meeting did not come up with any agreements or solutions'. However, [Enza Director B] was not present at the meeting of 8 December 2009 and [Enza Director A] himself confirmed that an understanding (the nature of which is such that, in the OFT's view, it amounts to an agreement and/or concerted practice within the meaning of the Chapter I prohibition) had been reached. As indicated in paragraph VI.43, the OFT notes that the statements of [Enza Director B], [Enza Director D] and [Enza Director C] confirmed that an anti-competitive proposal was made at the meeting of 8 December 2009. See also [C] Witness Statement, OFT Document Reference 3777, paragraph 15.

VI.45 [Enza Director D] said that [Enza Director A] reported that the meeting had turned into an inappropriate discussion about out-of-area sales. He stated:

'[Enza Director A] told me that the conversation ventured into some inappropriate areas at some point in the meeting in relation to selling trucks out of dealers' areas of influence [...]

'I cannot recall [Enza Director A] telling me anything about margins being discussed at this meeting. I am not aware that there are any understandings or agreement between Enza and other dealers about how to deal with sales'.³⁸³

VI.46 [Enza Director C], said that [Enza Director A] reported that the other dealers present at the meeting wanted the Participating Dealers to work closely together. He stated:

'I remember a brief conversation with [Enza Director A] on his return to the office after he attended that meeting at Ciceley. I was in my office which I shared with [Enza Sales Executive A] at the time. I asked him how the meeting had gone, saying words to the effect of 'I bet that was a waste of time' and asked him quite cynically whether he had enjoyed it. He said that he wished he hadn't gone and that the other dealers 'wanted us to work closer together'. He said that he had been told at the meeting that Road Range and Ciceley work well together on both vans and trucks.'³⁸⁴

'[Enza Director A] said that the meeting had been a waste of time. I said that I was glad I hadn't gone and told him words to the effect of 'I wouldn't trust any of them and you're better off keeping away from them and not getting involved'. [Enza Director A] agreed with my views and said that he didn't trust them either and had no intention of working with them. [...]

'I cannot recall [Enza Director A] telling me anything about margins being discussed at the meeting at Ciceley'.³⁸⁵

VI.47 [Enza Sales Executive A] stated:

³⁸³ [C] Witness Statement, OFT Document Reference 3777, paragraph 14.

³⁸⁴ The OFT notes the evidence of collusion in the sale of vans between Ciceley and Road Range discussed in Infringement 3, see paragraph III.7 (The OFT's Investigation).

³⁸⁵ [C] Witness Statement, OFT Document Reference 3748, paragraphs 8 to 9 and 12.

'At Enza I shared an office with [Enza Director C]. The office was just outside the toilet and so on occasions [Enza Director A] would stick his head round the door to our office and talk to us about various matters.

'I recall that on one occasion a couple of months before I left Enza [Enza Director A] stuck his head into our office. He came into our office and closed the door. [Enza Director A] told [Enza Director C] and me that he had had a meeting with Ciceley and Road Range, and [Mercedes Sales Manager C]. I assumed that the meeting had been with [Road Range Manager] and [C] [the OFT takes this to be a reference to [Ciceley Sales Executive D]] who sold trucks at Ciceley but was new at the time. I believe the meeting was held at Ciceley and probably arranged by [Mercedes Sales Manager C].

'[Enza Director A] said to us, 'We've done a deal'. I said, 'What do you mean you've done a deal?' [Enza Director A] said that he had done a deal with Ciceley and Road Range that if we were up against either or both of them in the same deal, we should put £[C] margin in the deal. This applied wherever the deal was being done, but only when we knew we were up against Road Range or Ciceley. I had the impression that [Enza Director A] had instigated the deal because of the way he came across to me and [Enza Director C]. Also [Ciceley Sales Executive D] [C] and [Road Range Manager] couldn't have done anything without speaking to [Road Range Director]. [Mercedes Sales Manager C] had to have been there to agree it because she was the link between the three dealers.

'[Enza Director A] told [Enza Director C] and me that the deal was that whenever we knew we were up against Ciceley or Road Range in a quotation for a customer, we should include a £[C] profit margin. Ciceley and Road Range would do the same so that all of the dealers were singing off the same hymn sheet. The customer could then choose where to buy the vehicle from. [Enza Director A] thought that by having this deal in place and everyone agreeing to put on £[C], the customer would probably come and buy off us'.³⁸⁶

³⁸⁶ [C] Witness Statement, OFT Document Reference 4384, paragraphs 9 to 12. The OFT notes that [Enza Sales Executive A] had previously told the OFT in interview that he had no knowledge of dealer meetings (see Note of conversation between [Enza Sales Executive A] and OFT on 29 March 2011, OFT Document Reference 4079). However, when the OFT contacted [Enza Sales Executive A] in relation to confidentiality representations in connection with his first interview, [Enza Sales Executive A] indicated that he held information relevant to the case which he had

Evidence from Northside regarding meeting of 8 December 2009

VI.48 Although Northside was not a party to this Infringement, the OFT considers that the following statement by [Northside Manager B] is relevant to its assessment of the evidence in respect of this Infringement:

'[Ciceley Manager C] told me that Road Range (the Mercedes dealership in Merseyside), Enza and Ciceley had a meeting where they agreed amongst themselves that if there was a customer that approached them from a neighbouring territory, they would quote without contingency (a discount from Mercedes) and would put £[C] margin into the quote. I cannot remember the exact timing of this conversation although I believe it may have been in September 2009. I asked [Ciceley Manager C] if he did it (meaning send your salesmen into other dealers areas) with other dealers and he stated that he did not because he had come to the agreement with other dealers. I did not suggest we have a similar agreement but I did say that it made sense. This may have given [Ciceley Manager C] the impression that we should have been doing a similar thing'.³⁸⁷

Ciceley's actions following meeting of 8 December 2009

VI.49 On 18 December 2009 Ciceley held a truck sales meeting for its staff, which was also attended by [Mercedes Sales Manager C]. The OFT notes that [Mercedes Sales Manager C] stated that she could not recollect the meeting. However, contemporaneous documentary evidence indicates that she had indeed attended the meeting. Ciceley also confirmed her attendance.³⁸⁸

VI.50 Some slides were prepared for a presentation, which included the following:

not disclosed to the OFT when he was first contacted. The OFT understands that [Enza Sales Executive A] received competition law training in the intervening period.

³⁸⁷ [C] Witness Statement, OFT Document Reference 3870, paragraph 64.

³⁸⁸ The meeting was attended by [Ciceley Manager C], [Ciceley Sales Executive D], [and other Ciceley employees] and by [Mercedes Sales Manager C]. The meeting may also have been attended by [another Ciceley employee]. Ciceley Supplementary Response dated 22 July 2011, OFT Document Reference 2786. See also [Mercedes Sales Manager C] mileage form dated December 2009, OFT Document Reference 2767 and [Mercedes Sales Manager C] expenses report dated December 2009, OFT Document Reference 2768. [Mercedes Sales Manager C], despite having been shown the presentation which was given at the sales meeting on that day, stated that she could not recollect the meeting (see [C] Witness Statement, OFT Document Reference 3749, paragraph 32).

'Agenda

[...]

- Out of area sales – [Ciceley Manager C]

[...]

Out of area sales

- Out of postcode sales:
- Existing customers 'OK'.
- New enquiries/recommendations – no support - £[C] minimum margin.
- Don't be fooled by operators who say – 'I won't deal with XX Motors again 'cos they are crap!' or 'XX Motors won't let me increase my credit limit so I'll deal with you'.
- You are probably being used just to reduce XX Motors price/profit.
- In-area customers who you believe may go for competitive quote – let us know & we will advise competitor to comply'.³⁸⁹

The OFT's assessment of the evidence

Preparation and agenda for and attendance at meeting of 8 December 2009

VI.51 The evidence before the OFT shows that the meeting was arranged by [Mercedes Sales Manager C] at [Ciceley Manager C]'s request.³⁹⁰

VI.52 [Enza Director A]'s statement indicates that, from his conversation with [Mercedes Sales Manager C], he had understood that the purpose of the meeting was at least in part to discuss the issues caused by excess stock in the network, namely sales being made for very low margins, and to minimise competition among the dealers.³⁹¹

³⁸⁹ Ciceley presentation slides for Truck Sales Meeting – December 18th 2009 ('Slides'), OFT Document Reference 3133.

³⁹⁰ Email from [Ciceley Manager C] to [Mercedes Sales Manager C] cc: [Ciceley Sales Executive D] and [Ciceley Director] dated 30 November 2009 re Meetings Dec 8th & 9th, OFT Document Reference 2859 and Email from [Mercedes Sales Manager C] to [Ciceley Manager C], [Enza Director A] and [Road Range Manager] dated 7 December 2009 re Area 2 Meeting, OFT Document Reference 3350, as well as [C] Witness Statement, OFT Document Reference 3749, paragraphs 20 and 24.

³⁹¹ See paragraph VI.37.

- VI.53 Mercedes told the OFT that [Mercedes Sales Manager C] had no reason to believe that the meeting involved anything other than consideration of 'best practice' initiatives, for example in promotion and marketing.³⁹² [Mercedes Sales Manager C] stated that the aim of the meeting was to 'share best practice between dealers and achieve some common ground'.³⁹³ According to her statement she was concerned at the time of the 8 December 2009 meeting about issues relating to out-of-area deals and about the relationship between dealers.³⁹⁴ There is an internal email from [Mercedes Sales Manager C] prior to the meeting of 8 December 2009, which states: '[Ciceley Manager C] has requested that I arrange a meeting between Ciceley, Road Range and Enza to discuss the areas and how to move forward in a way that considers their best interests'.³⁹⁵
- VI.54 The OFT considers that it would appear from the wording of this contemporaneous internal email (which pre-dates the meeting) that [Mercedes Sales Manager C] intended to discuss areas at the meeting and to explore a means of resolving, in the best interests of the parties involved, the difficulties they faced. The OFT presumes that these difficulties were at least partially related and caused by the excess stock in the network at the time of the meeting.

Agreement and/or concerted practice to be reasonable on margins

- VI.55 It would appear from the evidence before the OFT that the arrangement whereby each Participating Dealer would be 'reasonable with their margins' when quoting to customers based in each other's areas was initially proposed by [Ciceley Manager C] at a meeting on 8 December 2009.³⁹⁶
- VI.56 [Mercedes Sales Manager C]'s witness evidence is that, at the meeting of 8 December 2009, the Participating Dealers reached an agreement that they would be more reasonable in setting margins for out-of-area customers. She stated that: (i) [Ciceley Manager C] made that proposal, (ii) [Enza Director A] 'definitively acknowledged agreement' to [Ciceley Manager C]'s suggestion and (iii) no one raised any objections so that, in

³⁹² Mercedes Comments, OFT Document Reference 2641, page 2.

³⁹³ See paragraph VI.36.

³⁹⁴ See paragraph VI.36.

³⁹⁵ Mercedes Comments, OFT Document Reference 2641, page 2.

³⁹⁶ See paragraphs VI.38 to VI.39.

her understanding, the three Participating Dealers had reached an agreement and would take that approach going forward.³⁹⁷

VI.57 Having started his participation at the meeting with a lengthy complaint about having recently been undercut by Ciceley,³⁹⁸ [Enza Director A] also stated that he and [Road Range Manager] signalled agreement to [Ciceley Manager C]'s suggestion that dealers should be reasonable with their margins in quotations to out-of-area customers going forward. Similarly to [Mercedes Sales Manager C], [Enza Director A] stated that all dealers would have left the meeting with the impression that an agreement had been reached.³⁹⁹

VI.58 Finally, the OFT considers that the finding that there was an agreement and/or concerted practice to be 'reasonable on margins' is further supported by the Slides⁴⁰⁰ (see further paragraphs VI.59 to VI.65).

Agreement and/or concerted practice as to specific margin (£[C])

VI.59 There are some inconsistencies in the witness evidence about whether the agreement and/or concerted practice extended to the specific margin to be included by the Participating Dealers in quotations to customers in each other's areas. Specifically, [Mercedes Sales Manager C] said that she did not recall any proposals or agreements regarding specific margins⁴⁰¹ and [Enza Director A] stated that, although [Ciceley Manager C] did make those proposals, [Enza Director A] had not given any indication that he had agreed with them and that he could not recall [Road Range Manager] saying anything in response to those proposals.⁴⁰²

VI.60 Notwithstanding this, the OFT considers that, viewed as a whole, the evidence supports its finding that the agreement and/or concerted practice did extend to the specific margin which was to be included by the Participating Dealers in quotations to customers in each other's areas.⁴⁰³

³⁹⁷ See paragraph VI.38.

³⁹⁸ See paragraphs VI.38 to VI.39.

³⁹⁹ See paragraph VI.39.

⁴⁰⁰ See paragraph VI.49.

⁴⁰¹ See paragraph VI.38.

⁴⁰² See paragraph VI.39.

⁴⁰³ See paragraphs VI.38 to VI.39.

VI.61 The Slides⁴⁰⁴ show that, the week after the meeting on 8 December 2009, Ciceley instructed its sales executives to provide quotations to new out-of-area customers with a minimum margin of £[C]. Ciceley's sales executives were also instructed to inform their management of any in-area quotations where they suspected that the customer might accept an alternative quotation from a neighbouring dealer, so that the Ciceley management could 'advise competitor to comply'. The OFT interprets this as being a reference to complying with the agreement and/or concerted practice concluded at the meeting of 8 December 2009.

VI.62 At the very least, the Slides indicate that, following the meeting of 8 December 2009, Ciceley's management believed that such an agreement had been reached and that they acted accordingly. The OFT also notes that the minimum margins indicated in the Slides match precisely the figures suggested by [Ciceley Manager C] at the meeting of 8 December 2009 and that the Slides likewise coincide with [Enza Director A]'s recollection that the arrangements only applied to new customers.⁴⁰⁵ Ciceley refused the OFT's request to interview its employees during the investigative stage of the case and therefore the OFT was unable to obtain [Ciceley Manager C] and [Ciceley Sales Executive D]'s version of the events.⁴⁰⁶

VI.63 The witness evidence from [Enza Sales Executive A]⁴⁰⁷ and [Northside Manager B],⁴⁰⁸ as well as the contemporaneous documentary evidence

⁴⁰⁴ See paragraph VI.49.

⁴⁰⁵ See paragraph VI.39.

⁴⁰⁶ 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, all of the 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.

⁴⁰⁷ See paragraphs VI.47 and VI.74. The OFT notes that [Enza Sales Executive A]'s understanding seems to be that [Enza Director A] had agreed that a margin of £[C] was to be added to all quotations to customers to whom the Participating Dealers were simultaneously quoting (that is, not only to customers based in other Participating Dealers' areas). This may have been a misunderstanding on [Enza Sales Executive A]'s part, which the OFT does not consider undermines his recollection of [Enza Director A]'s report that there had been a 'deal', and that the margin to be added to quotations for trucks was £[C]. However, the OFT cannot rule out that his recollection is a true reflection of the nature of the arrangement between the Parties. The OFT also notes that [Enza Sales Executive A] could not recollect the precise timing of this incident. He believes that the meeting he referred to must have taken place at some point between Christmas 2009 and February or March 2010 ([C] Interview Transcript, OFT Document Reference 4385, pages 15 to 16 and 20). The OFT has not been informed of any other meetings

from Ciceley,⁴⁰⁹ all refer to a margin of £[C] to be included in quotations to out-of-area customers.⁴¹⁰ The OFT considers [Enza Sales Executive A]'s and [Northside Manager B]'s statements to be credible because, unprompted, they stated that the agreement related to the precise margins which [Enza Director A] stated that [Ciceley Manager C] had suggested at the meeting of 8 December 2009, and which appear in Ciceley's Slides. The OFT considers that this confirms that the terms of the agreement and/or concerted practice were indeed discussed between [Enza Director A] and [Enza Sales Executive A], and [Ciceley Manager C] and [Northside Manager B] respectively.

VI.64 [Enza Director A] denies having agreed with [Ciceley Manager C]'s proposed margin of £[C] (or £[C] to £[C], according to [Enza Director A]). However, any opposition which [Enza Director A] may have felt towards the proposal was not communicated either to [Ciceley Manager C] or to the other Parties, neither at the meeting nor subsequently. [Enza Director A] stated that no one present at the meeting overtly reacted against [Ciceley Manager C]'s proposals (and the OFT has not received any evidence that anyone did so). Indeed, as discussed in paragraph VI.61, Ciceley's Slides evidence that, at the very least, Ciceley's management believed that the other participants consented to [Ciceley Manager C]'s proposal.

VI.65 Finally, [Enza Director A]'s denial that he had reached an agreement is contradicted by the witness evidence of [Enza Sales Executive A], who stated that, when [Enza Director A] returned to Enza's offices after the 8 December 2009 meeting, he reported having 'done a deal' with the other Participating Dealers whereby a margin of £[C] would be added to quotations for trucks.⁴¹¹

Evidence further corroborating the findings of an agreement and/or concerted practice

VI.66 Both [Enza Director A] and [Mercedes Sales Manager C] subsequently expressed concern about the appropriateness of the discussions which

between the Parties during that period and therefore considers it reasonable to assume that his recollection refers to the meeting of 8 December 2009.

⁴⁰⁸ See paragraph VI.48.

⁴⁰⁹ See paragraph VI.49.

⁴¹⁰ [Mercedes Sales Manager C]'s account, however, differs on this aspect. See paragraph VI.38.

⁴¹¹ See paragraph VI.47.

took place during the 8 December 2009 meeting (although they did not expressly distance themselves from the arrangement).⁴¹²

VI.67 The OFT considers that [Mercedes Sales Manager C]'s statement regarding her reaction to the meeting and her account of [Enza Director A]'s reaction, described in paragraph VI.41, evidence the fact that inappropriate discussions took place at the meeting of 8 December 2009 and, as such, lend support to the OFT's finding that an anti-competitive arrangement was concluded.

VI.68 In addition, [Mercedes Sales Manager C]'s account of a conversation she had with [Road Range Manager] shortly after the 8 December 2009 meeting lends further support to the OFT's finding. According to [Mercedes Sales Manager C], [Road Range Manager] was angry that Ciceley had approached a customer in Road Range's area, which [Road Range Manager] took to mean that Ciceley was not fully adhering to the anti-competitive arrangement. The OFT considers this incident is illustrative of [Road Range Manager]'s expectation regarding Ciceley's behaviour following the meeting, and corroborates the finding that an anti-competitive arrangement had been concluded.⁴¹³

OFT's assessment of the evidence regarding Mercedes' participation in the agreement and/or concerted practice

VI.69 After her first interview with the OFT [Mercedes Sales Manager C] was dismissed by Mercedes. According to Mercedes, it would expect its employees to disclose a meeting of the nature of that which occurred on 8 December 2009, and [Mercedes Sales Manager C]'s failure to do so was a breach of Mercedes' compliance policy. Mercedes noted, however, that 'it is apparent from [Mercedes Sales Manager C]'s evidence that she was not involved in assisting, facilitating or promoting the discussions which apparently took place between these dealers'.⁴¹⁴

VI.70 The OFT does not accept Mercedes' argument that [Mercedes Sales Manager C] was not involved in assisting, facilitating or promoting the discussion among the Participating Dealers. [Mercedes Sales Manager C] helped to arrange the meeting (see paragraphs VI.51 to VI.53) and refrained from intervening to stop the discussion. She did not expressly

⁴¹² See paragraphs VI.38 to VI.39 and VI.41.

⁴¹³ See paragraph VI.41.

⁴¹⁴ Mercedes Comments, OFT Document Reference 2641, page 2.

declare at the meeting that Mercedes would not be a party to the agreement, or that Mercedes did not condone the agreement, and she did not leave the meeting early. Instead, she stated that she planned to observe the situation and look for 'actual evidence of price-fixing'.⁴¹⁵ Furthermore, she attended a subsequent meeting at Ciceley, where the sales team was being instructed to comply with the terms of the agreement and/or concerted practice.⁴¹⁶

VI.71 [Mercedes Sales Manager B] said that he was not aware of the meeting having taken place until a one-to-one meeting with [Mercedes Sales Manager C] a few weeks prior to the OFT's interviews in November/December 2010.⁴¹⁷ This is despite the email update she sent to [Mercedes Sales Manager B] three days after the 8 December 2009 meeting, describing it as a good meeting.⁴¹⁸ Referring to the one-to-one meeting, he stated that 'she actually said 'This meeting that occurred isn't sitting well with me''.⁴¹⁹ [Mercedes Sales Manager B] also said that '[t]he meeting should have been closed down. She should have left the meeting'.⁴²⁰ The OFT considers that [Mercedes Sales Manager B]'s statements further corroborate [Mercedes Sales Manager C]'s account that there had been inappropriate discussions at the meeting of 8 December 2009.

VI.72 The OFT also considers that, by attending the meeting at Ciceley's premises (see paragraph VI.49) when Ciceley instructed its sales executives regarding the provision to new customers of quotations for out-of-area sales, [Mercedes Sales Manager C] continued to give at least tacit approval to Ciceley's actions to implement the agreement and/or concerted practice.⁴²¹ The OFT notes that, having been a party to the meeting where the anti-competitive arrangement was concluded the preceding week, and having privately reflected on the impropriety of the arrangement in the immediate aftermath of the meeting,⁴²² [Mercedes Sales Manager C] could not have failed to understand that [Ciceley

⁴¹⁵ See paragraph VI.41.

⁴¹⁶ See paragraph VI.72.

⁴¹⁷ [C] Interview Transcript, OFT Document Reference 2450, page 64.

⁴¹⁸ Email from [Mercedes Sales Manager C] to [Mercedes Sales Manager B] dated 11 December 2009 re Five at 5.00, OFT Document Reference 2752.

⁴¹⁹ [C] Interview Transcript, OFT Document Reference 2450, pages 64 to 65.

⁴²⁰ [C] Interview Transcript, OFT Document Reference 2450, pages 65 to 66.

⁴²¹ Note however that [Mercedes Sales Manager C] has no recollection of this meeting ([C] Witness Statement, OFT Document Reference 3749, paragraph 32).

⁴²² See paragraph VI.41.

Manager C]'s instructions to the sales team were pursuant to the same agreement and/or concerted practice.

Enza's awareness of the agreement and/or concerted practice and intention to implement it

- VI.73 The OFT notes that, although [Enza Director C] and [Enza Director B] cannot recall [Enza Director A] telling them anything about margins having been discussed at the meeting of 8 December 2009, [Enza Director A] stated that he believes he may have mentioned to [Enza Director C] and [Enza Sales Executive A], and to [Enza Director B] separately, that [Ciceley Manager C] had proposed a minimum margin for out-of-area sales.⁴²³
- VI.74 Indeed, [Enza Sales Executive A]'s recollection confirms [Enza Director A]'s statement that he did mention a specific margin of £[C] to his colleagues at Enza. [Enza Sales Executive A] recalled an incident where, returning from a meeting at Ciceley which [Enza Sales Executive A] believes was attended by Ciceley, Road Range and [Mercedes Sales Manager C], [Enza Director A] stepped into the office [Enza Sales Executive A] shared with [Enza Director C].⁴²⁴ According to [Enza Sales Executive A], [Enza Director A] then told him and [Enza Director C] that he had 'set a deal up between Ciceley and Road Range'.⁴²⁵
- VI.75 It has been put to the OFT by [Enza Director A] that Enza did not intend to implement the arrangement.⁴²⁶ The only evidence provided to support this assertion consists of statements by Enza employees and directors and is contradicted by the statement of [Enza Sales Executive A]. Even if accepted, however, this is not determinative of whether or not an agreement and/or concerted practice was concluded. The OFT considers that the fact that [Enza Director A] at the very least tacitly concurred with [Ciceley Manager C]'s proposal that margins should be more sensible going forward was sufficient to give rise to an agreement and/or concerted practice for the purposes of the Act and, as it is, did in fact

⁴²³ See paragraph VI.42.

⁴²⁴ The OFT notes that [Enza Sales Executive A]'s recollection of the circumstances surrounding when [Enza Director A] informed him and [Enza Director C] of the meeting at Ciceley are consistent with [Enza Director C]'s statement (see [C] Witness Statement, OFT Document Reference 3748, paragraph 8).

⁴²⁵ See paragraph VI.47.

⁴²⁶ See paragraph VI.42.

give at least one Participating Dealer, Ciceley, sufficient comfort to act on it (see paragraph VI.49).

VI.76 Furthermore, even if Enza did not intend to act in accordance with the terms of the agreement and/or concerted practice, it could not have failed to take into account the discussions which took place at the meeting of 8 December 2009 and the future pricing information disclosed at that meeting when determining its commercial behaviour in the market.⁴²⁷ Having learned about Ciceley's intentions regarding its future commercial strategy⁴²⁸ Enza could not have failed to take this information into account, for example, when quoting to customers which would previously have been likely also to receive a quote from Ciceley.⁴²⁹ The OFT considers that [Mercedes Sales Manager C]'s presence at the meeting may have given Enza additional comfort in relation to Ciceley's future commercial behaviour.

Implementation by Ciceley

VI.77 In the case of Ciceley, there is direct evidence that it took steps to implement the agreement and/or concerted practice concluded at the meeting of 8 December 2009, as evidenced by the Slides.

Evidence relating to termination of the Infringement

VI.78 The OFT has no evidence of the termination of this Infringement. The OFT similarly has no evidence of any of the Parties distancing themselves from it at any time.

VI.79 The Parties involved in the Infringement were only inspected by the OFT in September 2010. However, the OFT considers it likely in the circumstances and, in particular, given the channels of communication which existed among Mercedes dealers (both directly and through Mercedes) that, following the site inspections at Northside and H & L, the Parties would have become aware of the OFT's investigation and ceased participation in the Infringement.⁴³⁰ In light of this, the OFT

⁴²⁷ See paragraph VI.103.

⁴²⁸ See paragraphs VI.38 to VI.39.

⁴²⁹ Naturally, the same analysis applies to Road Range.

⁴³⁰ 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.

assumes in the Parties' favour that the Infringement ended with the inspections at Northside and H & L on 26 January 2010.

Legal Assessment

Introduction

- VI.80 From the evidence presented in the Conduct Section, viewed in the context of the background to the Infringement described in paragraphs VI.12 to VI.34, 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.
- VI.81 In assessing the evidence in this case, the OFT has applied the requisite standard of proof as described in paragraphs V.75 to V.87 (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.

Agreement and/or concerted practice

- VI.82 The OFT has concluded that the Parties infringed the Chapter I prohibition by engaging in an agreement and/or concerted practice which had the object of preventing, restricting or distorting competition.
- VI.83 The Infringement was an agreement and/or concerted practice among the Participating Dealers to dampen price competition for the sale of trucks to customers based in their areas. The agreement and/or concerted practice was that each Participating Dealer would be 'reasonable with their margins' when providing quotations to customers in each other's areas and that they would add a specific margin to deals to customers based in other Participating Dealers' areas.
- VI.84 For the avoidance of doubt, whether the agreement and/or concerted practice extended to setting specific margin to be quoted to out-of-area customers, or solely constituted being 'reasonable with their margins', the OFT finds that the agreement and/or concerted practice to dampen price competition for customers based in other Participating Dealers' areas constitutes an infringement by object of the Chapter I prohibition.

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

- VI.85 The OFT has concluded, on the basis of the evidence set out and referred to in the Conduct Section, that the Parties engaged in an agreement and/or a concerted practice within the meaning of the Chapter I prohibition.⁴³¹
- VI.86 The existence of an agreement between the Parties is evidenced by contemporaneous documentary evidence from Ciceley.⁴³² The finding that there was an agreement is also supported by evidence that, in a meeting between the Parties on 8 December 2009, [Ciceley Manager C] explicitly proposed that the Participating Dealers should include a 'reasonable'⁴³³ margin in quotations to out-of-area customers, that the margin should be of £[C] (or £[C] to £[C]), and that the other Parties present at least implicitly agreed to this proposal.
- VI.87 The evidence of two witnesses present at the meeting is that the Parties left the meeting with the impression that [Ciceley Manager C]'s proposal, whereby quotations to out-of-area customers should include a reasonable margin, had been accepted. The OFT considers that this was sufficient to give rise to a concurrence of wills among the Parties. [Mercedes Sales Manager C] commented that 'as far as I was concerned the three dealers left the meeting in agreement and they would take this approach to out-of-area customers going forward'.⁴³⁴ [Enza Director A] said that he had 'agreed with [Ciceley Manager C] and [Road Range Manager] that we should be fair and reasonable and not cut each other to the bone if we were in competition against each other outside our area of influence'.⁴³⁵ [Enza Director A] also commented that he 'got the impression from [Road Range Manager] she was happy at [Ciceley

⁴³¹ The evidence includes both witness evidence and contemporaneous documentary evidence, both of which are set out in the Conduct Section. In particular, see witness statements provided by [Mercedes Sales Manager C] and [Enza Director A], who attended the meeting, and Slides, OFT Document Reference 3133.

⁴³² See paragraph VI.49.

⁴³³ The term '*reasonable*' is being used for consistency and covers all characterisations of the proposal referred to in witness evidence for '*reasonable and sensible*', '*fair and reasonable*', '*more sensible*' and '*more reasonable*' margins. See paragraphs VI.38 to VI.39 and VI.43 .

⁴³⁴ See paragraph VI.38.

⁴³⁵ See paragraph VI.39.

Manager C]'s suggestion about being fair and reasonable on out-of-area sales'.⁴³⁶

- VI.88 The OFT further considers that the evidence summarised in paragraph VI.8 supports the finding that the agreement extended to the specific margin to be included in out-of-area deals.
- VI.89 The perception among the Parties that an agreement had been reached is further corroborated by secondary witness evidence from [Enza Sales Executive A]⁴³⁷ and [Northside Manager B]⁴³⁸ and by the reaction of [Enza Director A] and [Mercedes Sales Manager C] following the meeting.⁴³⁹
- VI.90 The OFT also notes that it does not appear from the evidence available that any of the other Parties present at the meeting indicated their opposition to the anti-competitive arrangement proposed by [Ciceley Manager C], nor that any of them left the meeting.⁴⁴⁰
- VI.91 The OFT considers that the common understanding among the Parties constituted at the very least a concerted practice. The OFT notes that reciprocal contacts are established where one competitor discloses its intentions or future conduct in the market and the other requests or at least accepts the information.⁴⁴¹ [Ciceley Manager C]'s clear and strong statement of intent is particularly significant in view of the context in which this Infringement took place.⁴⁴²
- VI.92 In addition to the evidence discussed at paragraphs VI.85 to VI.89, the OFT considers that [Ciceley Manager C]'s proposals (both that margins should be 'reasonable' and regarding the suggested level of those margins) had the object or effect of influencing the commercial conduct of the other Participating Dealers. It also amounted to a disclosure of Ciceley's future commercial intentions, reducing uncertainty in the market.⁴⁴³

⁴³⁶ See paragraph VI.39.

⁴³⁷ See paragraphs VI.47 and VI.74.

⁴³⁸ See paragraph VI.48.

⁴³⁹ See paragraphs VI.41 to VI.42 and VI.66 to VI.68.

⁴⁴⁰ See paragraph V.25 (Legal Background).

⁴⁴¹ See paragraph V.23 (Legal Background).

⁴⁴² See paragraphs VI.12 to VI.34.

⁴⁴³ See paragraph V.22 (Legal Background).

VI.93 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.⁴⁴⁴

Inconsistency of evidence in relation to an agreement and/or concerted practice on the specific margins

VI.94 The OFT notes that there are some inconsistencies in the evidence as to whether the anti-competitive arrangement extended to the specific margins to be included in out-of-area deals. While [Enza Director A]'s evidence is that [Ciceley Manager C] proposed that the margin to be included in out-of-area deals should be between £[C] and £[C], [Enza Director A] and [Mercedes Sales Manager C] denied that the meeting resulted in an agreement to that proposal. In fact, [Mercedes Sales Manager C]'s evidence specifically rejects the notion that a minimum figure was mentioned at the meeting.⁴⁴⁵ Finally, [Enza Director C] denied that [Enza Director A] stated that he had entered into an agreement with the other Parties and that there had been a discussion about specific margins.

VI.95 However, the OFT considers that there is sufficient evidence that the anti-competitive arrangement did extend to the specific margin to be added to quotations to out-of-area customers. First, contemporaneous documentary evidence indicates that Ciceley at least believed that an agreement had been reached on a margin of £[C] and instructed its sales executives to act accordingly.⁴⁴⁶ Second, [Enza Sales Executive A] stated that, when [Enza Director A] returned from the meeting of 8 December 2009, he reported having made a 'deal' with Ciceley and Road Range, and that the deal concerned a margin of £[C].⁴⁴⁷ Third, a witness from Northside stated that he was told by [Ciceley Manager C] that, at a meeting with Enza and Road Range, they had agreed to include a margin of £[C] in quotations to customers from a neighbouring territory.⁴⁴⁸ The OFT notes that all three pieces of evidence are

⁴⁴⁴ See paragraphs V.10 to V.15 (Legal Background).

⁴⁴⁵ See [C] Witness Statement, OFT Document Reference 3749, paragraph 29.

⁴⁴⁶ See paragraphs VI.49 and VI.77.

⁴⁴⁷ See paragraphs VI.47 and VI.74.

⁴⁴⁸ See paragraph VI.48.

consistent as to the precise margin to be added to out-of-area deals (£[C]).⁴⁴⁹

- VI.96 On the basis of the available evidence, the OFT considers that these three pieces of evidence are, in combination, more persuasive than the accounts of [Enza Director A] and [Mercedes Sales Manager C] that the arrangement did not extend to specific margins. Enza and Mercedes are defendants in this Infringement and do not benefit from leniency. As such, the incentive of their witnesses to cooperate with the OFT's investigation is limited.⁴⁵⁰ The evidence put forward by them, which points towards limiting the scope of their involvement or the scope of the infringement, is unsupported by corroborating evidence, and is contradicted by other available evidence, including contemporaneous documentary evidence,⁴⁵¹ as well as witness evidence.⁴⁵²
- VI.97 The OFT notes that evidence of cartel activity is usually very sparse and fragmentary, and that in most cartel cases the existence of an anti-competitive arrangement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of a plausible alternative explanation, constitute evidence of an infringement of competition law.⁴⁵³ In this case, the OFT considers that, assessing the body of evidence as a whole, the evidence supports the finding that the Parties did conclude an agreement and/or concerted practice as to the specific margin to be included in quotations.⁴⁵⁴
- VI.98 However, the OFT does not consider that its assessment of the witness evidence provided by [Mercedes Sales Manager C] and [Enza Director A] as to whether the agreement extended to a specific margin of £[C] for out-of-area sales undermines the credibility of their evidence as to the existence of an anti-competitive agreement and/or concerted practice. The OFT notes that their admissions in relation to the existence of an anti-competitive agreement and/or concerted practice are contrary to the interests of the witnesses' employers⁴⁵⁵ and as such inherently carry a

⁴⁴⁹ Although [Enza Director A] stated that [Ciceley Manager C]'s proposal was for a margin of between £[C] and £[C] (see paragraph VI.39).

⁴⁵⁰ [Mercedes Sales Manager C] was still an employee of Mercedes at the time when she was first interviewed by the OFT.

⁴⁵¹ See paragraph VI.49.

⁴⁵² See paragraphs VI.47 to VI.48.

⁴⁵³ See paragraph V.78 (Legal Background).

⁴⁵⁴ See paragraph V.79 (Legal Background).

⁴⁵⁵ The OFT notes that [Mercedes Sales Manager C] was still employed by Mercedes when she was first interviewed by the OFT.

higher probative value.⁴⁵⁶ In addition, the OFT considers that the body of evidence, when examined as a whole, is persuasive and sufficient to support the OFT's conclusions.

Participation in the agreement and/ or concerted practice

VI.99 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.⁴⁵⁷ The OFT has not received any evidence that any of the Parties present at the meeting on 8 December 2009 manifested their opposition to the proposals put forward by [Ciceley Manager C].

VI.100 In addition, while the OFT notes that some of the Parties may subsequently have expressed concern regarding the discussion which took place at the meeting of 8 December 2009,⁴⁵⁸ there is no evidence that any of the Parties made clear to the others that they did not wish to take part in the agreement and/or concerted practice, nor has the OFT received any evidence that, following the meeting, the Parties took active steps to clearly distance themselves before the other Parties from the anti-competitive arrangement.

Implementation

VI.101 [Mercedes Sales Manager C] informed the OFT that, through separate conversations with Enza and Ciceley, she had been reassured that what had been agreed on 8 December 2009 would not actually come into effect.⁴⁵⁹ However, the fact that an agreement and/or concerted practice may not have been implemented does not preclude a finding that an infringement has taken place.⁴⁶⁰ In addition, the mere fact that a party does not fully abide by an agreement and/or concerted practice which is manifestly anti-competitive does not relieve the party of responsibility for it.⁴⁶¹

⁴⁵⁶ See paragraph V.86 (Legal Background).

⁴⁵⁷ See paragraph V.25 (Legal Background).

⁴⁵⁸ See paragraphs VI.41 and VI.45.

⁴⁵⁹ [C] Witness Statement, OFT Document Reference 3749, paragraph 35. See also Enza's position in this respect, discussed at paragraphs VI.42 to VI.47.

⁴⁶⁰ See paragraph V.32 (Legal Background).

⁴⁶¹ See paragraph V.32 (Legal Background).

VI.102 In this case, the OFT has evidence that at least one of the Parties, Ciceley, did take positive steps to implement the agreement.⁴⁶² The OFT considers that, even if Enza and Road Range did not intend to act in accordance with the anti-competitive arrangement, their agreement, or at the very least failure to object, to [Ciceley Manager C]'s proposals at the meeting of 8 December 2009 was interpreted by Ciceley and by the other Parties present as concurrence with those proposals. Through the Slides, Ciceley instructed its sales executives to provide quotations to new customers for out-of-area sales in accordance with [Ciceley Manager C]'s proposal at the meeting of 8 December 2009 and informed them that [Ciceley Manager C] would contact the other dealers if necessary to ensure that they complied with the arrangement, further supporting the conclusion that Ciceley left the meeting with the impression that the other dealers had agreed to the proposal.⁴⁶³

VI.103 Throughout the Relevant Period, Ciceley, Enza and Road Range were actively involved in the sale of trucks distributed by Mercedes. The OFT considers that the Parties, when determining their commercial behaviour in the market, could not have failed to take into account the discussions carried out at the meeting of 8 December 2009. Having learned about Ciceley's intentions regarding its future commercial strategy, Enza and Road Range could not have failed to take this information into account when providing quotations to customers. 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 for the duration of this Infringement, they would have taken account of the discussion and, in particular, the pricing information disclosed by Ciceley, when determining their conduct on the market.⁴⁶⁴

VI.104 The OFT notes that including a higher 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.⁴⁶⁵ However, the law prohibits contacts which have the object or effect of influencing the conduct of a competitor in the market or of disclosing an intended course of conduct, where such contact has the object or effect of distorting normal market conditions. As is evident from the Conduct Section, this Infringement did

⁴⁶² See paragraph VI.77.

⁴⁶³ See paragraph VI.49.

⁴⁶⁴ See paragraph V.27 (Legal Background).

⁴⁶⁵ See paragraph V.21 (Legal Background).

not concern unilateral behaviour but rather conduct which was the result of discussions among the Participating Dealers regarding their respective commercial strategies and by subsequent contacts among them.⁴⁶⁶

VI.105 It is also established by case law that a presumption of a causal connection between a concerted practice and the parties' conduct in the market applies, even if it was the result of a meeting held on a single occasion.⁴⁶⁷

Mercedes' participation

VI.106 It is established case law that an undertaking does not have to be active on the same market where an infringement took place in order for it to be found to have infringed the Chapter I prohibition where the purpose of its conduct, as coordinated with that of other undertakings, is to restrict competition.⁴⁶⁸ In this case, the fact that Mercedes was a supplier (and franchisor) to the Participating Dealers and had limited direct sales on the relevant market (or none at all) does not exclude the attribution of liability to Mercedes for its participation in the Infringement.

VI.107 In this Infringement, Mercedes had a direct involvement in the meeting where the agreement and/or concerted practice was concluded through [Mercedes Sales Manager C]'s attendance and involvement in organising the meeting.⁴⁶⁹ This is also supported by contemporaneous documentary evidence.⁴⁷⁰ The OFT therefore considers that Mercedes contributed to the agreement and/or concerted practice among the Participating Dealers.⁴⁷¹

VI.108 In addition, at the meeting of 8 December 2009, [Mercedes Sales Manager C] did not oppose [Ciceley Manager C]'s proposal or the arrangement reached by the Parties outlined in paragraphs VI.86 to VI.92. There is no evidence that she sought publicly to distance Mercedes from that arrangement, nor did she report it to the authorities. To the contrary, [Enza Director A]'s belief was that [Mercedes Sales

⁴⁶⁶ See paragraph V.21 (Legal Background).

⁴⁶⁷ See paragraph V.28 (Legal Background). The OFT also notes the Parties' admission of liability for the Infringement.

⁴⁶⁸ See paragraphs V.37 to V.40 (Legal Background).

⁴⁶⁹ See paragraph VI.36.

⁴⁷⁰ See paragraph VI.35.

⁴⁷¹ See paragraph V.43 (Legal Background).

Manager C] was pleased with the result of the meeting,⁴⁷² and [Mercedes Sales Manager C] described the meeting to [Mercedes Sales Manager B] as a 'good meeting'.⁴⁷³ The OFT considers that [Mercedes Sales Manager C]'s behaviour at the 8 December 2009 meeting is consistent with the difficulties that out-of-area sales and complaints by the Participating Dealers caused to her (see paragraph VI.16).

VI.109 The OFT further considers that [Mercedes Sales Manager C]'s presence at the 8 December 2009 meeting would have given the Participating Dealers the impression that Mercedes approved of the agreement and/or concerted practice reached at that meeting. [Mercedes Sales Manager C] also gave her tacit approval to the arrangement through her attendance at Ciceley's Truck Sales meeting on 18 December 2009, when Ciceley instructed its sales executives regarding the provision to new customers of quotations for out-of-area sales (see paragraph VI.72).

VI.110 The OFT notes that the fact that [Mercedes Sales Manager C] did not immediately disclose details about the meeting to her superiors at Mercedes does not exempt Mercedes from liability. An agreement and/or concerted practice among undertakings 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.⁴⁷⁴

VI.111 Furthermore, where a particular party holds a central position in relation to the other parties, the former is obliged to display particular vigilance in order to prevent concerted efforts from giving rise to practices contrary to competition law.⁴⁷⁵ Mercedes holds a central position vis-à-vis its network of dealers, and Mercedes RSMs incentivise neighbouring dealers to meet and share best practice (both at meetings organised by Mercedes and at bilateral meetings). The OFT considers that, in this context, by helping the Participating Dealers in reaching and adhering to the agreement and/or concerted practice, Mercedes has failed to fulfil its responsibility to display particular vigilance.

VI.112 The OFT's finding is, therefore, that Mercedes' participation in this Infringement was such as to make it liable as a co-perpetrator together with the Participating Dealers.

⁴⁷² See paragraph VI.39.

⁴⁷³ See paragraph VI.71.

⁴⁷⁴ See paragraph V.31 (Legal Background).

⁴⁷⁵ See paragraph V.45 (Legal Background).

Conclusion

VI.113 It follows that the Parties engaged in an agreement and/or concerted practice within the meaning of the Chapter I prohibition.

Anti-competitive object

VI.114 As discussed in paragraphs VI.59 to VI.65, the OFT finds that the agreement and/or concerted practice extended to setting the specific margin which should be included in out-of-area deals (£[C]).

VI.115 Even if the agreement and/or concerted practice did not extend to the specific margin quoted to out-of-area customers, the OFT considers that an agreement and/or concerted practice to dampen price competition for customers based in another Participating Dealer's area by including 'reasonable' margins in quotations to customers falling outside specific geographic limits is conduct which can be regarded by its very nature as being injurious to the proper functioning of normal competition.⁴⁷⁶ 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,⁴⁷⁷ so that the principal cost associated with the sale of trucks (the cost of buying the vehicle from Mercedes) was the same for the Participating Dealers. The OFT therefore considers that, in the commercial context in which the Infringement took place, 'reasonable' margins constituted a sufficiently clear focal point for collusion between the Participating Dealers.⁴⁷⁸

VI.116 The OFT also considers that, by revealing to the others present at the meeting the margins to be added in quotations in order to achieve the goal of competing less aggressively, [Ciceley Manager C] disclosed Ciceley's pricing policy with regards to out-of-area customers and the conduct which it intended to adopt in the market in relation to those customers. By doing so, competitive uncertainty among the Participating Dealers was reduced. The OFT considers that such disclosure of future pricing strategy is likewise by its very nature restrictive of competition.⁴⁷⁹

⁴⁷⁶ See paragraphs V.46 to V.49 (Legal Background).

⁴⁷⁷ Mercedes Margin Model Paper, OFT Document Reference 1406, paragraph 7.4.

⁴⁷⁸ See paragraph V.46 (Legal Background).

⁴⁷⁹ See paragraphs V.55 to V.59 (Legal Background).

VI.117 In view of the foregoing, the OFT, has concluded that the agreement and/or concerted practice had as its object the prevention, restriction or distortion of competition for customers based in the Participating Dealer's 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.⁴⁸⁰

Appreciability

VI.118 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.119 An agreement and/or concerted practice will not meet the appreciability criterion if it has only an insignificant impact on the market.⁴⁸¹

VI.120 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*.⁴⁸² 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 pricing information, which are 'hardcore' restrictions of competition. Therefore, even if the market shares of the Parties are below the threshold set out in the *Notice on Agreements of Minor Importance*, the approach set out in the *Notice on Agreements of Minor Importance* would not apply to the Infringement.

VI.121 The OFT has had regard to the approach to the appreciability test in object cases set out by the CAT in *North Midland Construction*.⁴⁸³ 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.122 The agreement and/or concerted practice concerned the sale of trucks distributed by a major manufacturer, Mercedes, which holds a sizeable share of the total sale of trucks in the UK.⁴⁸⁴ Moreover, to the extent (if

⁴⁸⁰ See paragraph V.63 (Legal Background).

⁴⁸¹ See paragraphs V.64 and V.67 (Legal Background).

⁴⁸² See paragraphs V.65 to V.66 (Legal Background).

⁴⁸³ See paragraphs V.67 and V.69 (Legal Background).

⁴⁸⁴ See paragraph IV.9 (Industry Overview and the Relevant Market).

at all) that competition between Mercedes dealers is limited by the selective distribution system, the OFT considers that firms should not engage in conduct which will further limit the residual scope for competition.⁴⁸⁵

VI.123 The agreement and/or concerted practice potentially deprived customers of the benefits of obtaining competitive quotations from the Participating Dealers and of playing them off against each other. As such, the arrangement had at least the potential for enabling the Participating Dealers 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.⁴⁸⁶

VI.124 In addition, the Participating Dealers could potentially be giving customers the impression that they were competing by providing quotations which contained higher but credible margins, which could dissuade customers from seeking further alternative quotations.

VI.125 The anti-competitive arrangement among the Participating Dealers also had the potential for opening, reinforcing or maintaining the channels of communication between them, which could facilitate collusive conduct on other markets where the Participating Dealers are active (such as vans).

VI.126 Finally, the OFT notes that there could potentially be an impact on the wider trucks market to the extent that the Infringement enabled Mercedes dealers to raise prices, thereby reducing the competitive constraint on dealers of other brands.

VI.127 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.

Effect on trade within the UK

VI.128 As set out in paragraphs V.70 to V.73 (Legal Background), the OFT considers that it is very unlikely that an agreement and/or concerted

⁴⁸⁵ Commission Decision 82/506/EEC of 15 July 1982 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.525 and IV/30.000 – SS/1) (OJ 1982 L 232/1) ('*Stichting Sigarettenindustrie Agreements*'), paragraph 100(d).

⁴⁸⁶ See paragraph IV.14 (Industry Overview and the Relevant Market).

practice which appreciably restricts competition within the UK does not also affect trade within the UK.

VI.129 The agreement and/or concerted practice appreciably restricted competition,⁴⁸⁷ 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.130 The requirement of an effect on trade within the UK is therefore satisfied in respect of the Infringement.

Conclusion on the application of the Chapter I prohibition

VI.131 In view of the foregoing, the OFT has decided that the Parties infringed the Chapter I prohibition by participating between 8 December 2009 and 26 January 2010 in an agreement and/or concerted practice with the object of preventing, restricting or distorting competition for the sale of trucks to customers based in Participating Dealers' areas.

⁴⁸⁷ See paragraphs VI.118 to VI.127.

SECTION VII THE OFT'S ACTION

Introduction

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

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, Enza, Mercedes and Road Range infringed the Chapter I prohibition by participating between 8 December 2009 and 26 January 2010 in an agreement and/or concerted practice which had the object of preventing, restricting or distorting competition for the sale of trucks to customers based in the Participating Dealers areas.

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.

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.⁴⁸⁸

- 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.⁴⁸⁹ Rather, the OFT makes its assessment on a case-by-case basis⁴⁹⁰ 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.⁴⁹¹
- 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.⁴⁹²

⁴⁸⁸ *2012 Penalty Guidance* (fn181), paragraph 1.11.

⁴⁸⁹ For example, *Eden Brown and Others v OFT* [2011] CAT 8 ('*Eden Brown*'), at [78].

⁴⁹⁰ 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* (fn489), 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*'.

⁴⁹¹ *Argos/Littlewoods* (fn202), at [168] and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, at [102].

⁴⁹² *Musique Diffusion française* (fn232), paragraphs 101 to 110 and *Dansk Rørindustri* (fn13), 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.⁴⁹³ This is considered further at paragraphs VII.40 to VII.42.

Small agreements

VII.11 Section 39(3) of the Act provides that a party to a 'small agreement'⁴⁹⁴ 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, none 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.⁴⁹⁵ 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'.⁴⁹⁶

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

⁴⁹³ Section 36(8) of the Act.

⁴⁹⁴ '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.

⁴⁹⁵ Section 36(3) of the Act.

⁴⁹⁶ *Napp* (fn296), 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)⁴⁹⁷.

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.

Calculation of penalties

Turnover

VII.15 For the purpose of penalty calculation, the OFT considers that the Relevant Turnover⁴⁹⁸ or total turnover applicable is the turnover of the undertaking which comprises the relevant single economic entity, as defined in paragraphs II.29, II.46, II.67 and II.78 (Company Profiles).

VII.16 In this case, the OFT considers that the following companies have joint and several liability and the calculation of penalties by reference to their consolidated turnover is, therefore, a result of their direct responsibility for the Infringement:

- Ciceley Limited (ultimate parent of Ciceley Commercials Limited)
- Enza Group Limited (ultimate parent of Enza Motors Limited) and
- Daimler AG (ultimate parent of Mercedes-Benz UK Limited).

VII.17 At the time of the Infringement Road Range was not part of a corporate group. Its turnover has, therefore, been used for the basis of the penalty calculation.⁴⁹⁹

Step 1 – calculation of the starting point

VII.18 The starting point for determining the level of penalty for the

⁴⁹⁷ Case C-280/08 P *Deutsche Telekom v Commission* (OJ 2010 C 346/4), paragraph 124.

⁴⁹⁸ As defined in paragraphs IV.47 and IV.48 (Industry Overview and the Relevant Market).

⁴⁹⁹ As described in paragraph II.73 (Company Profiles), Road Range Limited became a wholly-owned subsidiary of Robert Smith Group Limited on 22 December 2010 (after the end of the Relevant Period).

Infringement is calculated having regard to the seriousness of the infringement and the Relevant Turnover of the undertaking.⁵⁰⁰

Relevant Turnover

VII.19 As set out in paragraph IV.37 (Industry Overview and the Relevant Market), the Relevant Turnover is the turnover of the undertaking in the market affected by the Infringement in the last business year. The 'last business year' is the undertaking's business year preceding the date when the infringement ended.⁵⁰¹

VII.20 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 2010.⁵⁰²

Seriousness of the infringement

VII.21 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.⁵⁰³

VII.22 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.⁵⁰⁴ 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.⁵⁰⁵

VII.23 In assessing the seriousness of the Infringement, as indicated in paragraph IV.42 (Industry Overview and the Relevant Market), the OFT notes that it is a restriction of intra-brand competition and that the Participating Dealers are therefore to a certain extent constrained by

⁵⁰⁰ *2004 Penalty Guidance* (fn181), paragraphs 2.3 to 2.5.

⁵⁰¹ This approach follows the CAT's decision in *Kier* (fn490), at paragraph 137.

⁵⁰² As set on in paragraph VI.79 (The Conduct of the Parties and Legal Assessment), the OFT considers that the end date for the Infringement is the OFT's visit to Northside on 26 January 2010.

⁵⁰³ *2004 Penalty Guidance* (fn181), paragraph 2.8.

⁵⁰⁴ *2004 Penalty Guidance* (fn181), paragraph 2.4.

⁵⁰⁵ *2004 Penalty Guidance* (fn181), paragraph 2.5.

dealers of other marques.

VII.24 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.⁵⁰⁶ 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.⁵⁰⁷

VII.25 Taking these factors in the round, the OFT has decided that a starting point of six per cent is appropriate.

Step 2 – adjustment for duration

VII.26 The starting point under Step 1 may be adjusted to take into account the duration of the Infringement.⁵⁰⁸ 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'.⁵⁰⁹

VII.27 The OFT has concluded that the Infringement lasted less than a year. The OFT has therefore not applied a multiplier to the penalty at this step in the calculation. The OFT does not consider it appropriate to make any downward adjustment in the penalty imposed for this Infringement.⁵¹⁰

Step 3 – adjustment for other factors

VII.28 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.

⁵⁰⁶ *2004 Penalty Guidance* (fn181), paragraphs 2.3 and 2.4 and paragraph VI.117 (The Conduct of the Parties and Legal Assessment).

⁵⁰⁷ *Francis/Barrett and Others v Office of Fair Trading*, [2011] CAT 9, at [88].

⁵⁰⁸ *2004 Penalty Guidance* (fn181), paragraph 2.10.

⁵⁰⁹ *2004 Penalty Guidance* (fn181), paragraph 2.10.

⁵¹⁰ *2012 Penalty Guidance* (fn181), paragraph 2.12.

- VII.29 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 (the motor vehicle distribution industry) and more generally, including in particular to companies involved in the supply of products which are brought to the market through a selective distribution system.
- VII.30 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.⁵¹¹ These can result in either an increase or a decrease of the financial penalty resulting from the application of Steps 1 and 2.
- VII.31 If the financial penalty at the end of Step 2 represents a relatively low proportion of an undertaking's total turnover, the OFT may consider that the penalty figure reached at the end of Step 2 does not represent a significant sum for that undertaking. It will therefore be necessary to consider increasing the undertaking's penalty at Step 3 to arrive at a sum that represents, for that undertaking, a sufficient deterrent, having regard to the seriousness of the infringements and the undertaking's total turnover.
- VII.32 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.33 In this case the OFT carried out detailed cross-checks by reference to certain relevant indicators of the Parties' size and financial position when

⁵¹¹ *2004 Penalty Guidance* (fn181), paragraph 2.11.

considering whether the proposed level of the penalty was appropriate and, in particular, whether it was necessary and proportionate.⁵¹²

VII.34 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.⁵¹³

VII.35 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 3, imposing financial penalties on Ciceley for its involvement in Infringement 2 and Infringement 3 and on Road Range for its involvement in Infringement 2. 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 the applicable infringements that are 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'.⁵¹⁴

VII.36 The OFT has made 'totality' adjustments to Ciceley's and Road Range's penalties for overall proportionality (see paragraphs VII.72 and VII.49). These adjustments are only appropriate in the circumstances as set out in this Decision, Decision 2 and Decision 3. 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

⁵¹² 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).

⁵¹³ *Kier* (fn490), at [177].

⁵¹⁴ *Kier* (fn490), at [180].

and £433,814 Infringement 3 and for Road Range it amount to £101,526 for Infringement 3 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 2 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.37 The OFT may increase the penalty where there are other aggravating factors, or decrease it where there are mitigating factors.⁵¹⁵
- VII.38 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.39 Mitigating factors can include adequate steps having been taken to ensure compliance with the Chapter I prohibition, and cooperation by a party which enables the enforcement process to be concluded more effectively and/or speedily, although undertakings benefiting from the leniency programme would not normally receive additional reductions in financial penalties under this head to reflect general cooperation.⁵¹⁶ These factors are also not exhaustive.

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

- VII.40 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').⁵¹⁷ The section 36(8) turnover is not restricted to a party's turnover in the relevant market.
- VII.41 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

⁵¹⁵ *2004 Penalty Guidance* (fn181), paragraph 2.14.

⁵¹⁶ *2004 Penalty Guidance* (fn181), paragraph 2.16 and footnote 19.

⁵¹⁷ Section 36(8) of the Act and the 2000 Order, as amended by the 2004 Order.

or other body in another Member State in respect of that agreement or concerted practice.⁵¹⁸ There have been no other penalties or fines imposed in relation to the Infringement.

VII.42 The OFT has assessed the Parties' penalties against these tests (as applicable). No reductions were required at Step 5 of the penalty calculation because the penalties for each of the Parties after Step 4 is below the maximum penalty that the OFT may impose.

Settlement

VII.43 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.78 (the 'Settlement Penalty'). The remaining 15 per cent (the 'Settlement Discount'), in relation to each Party, will only become payable in the event that the Party's Settlement Agreement is terminated in accordance with its terms.

VII.44 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.

Individual penalties

VII.45 As stated in paragraph VII.25, 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.27, the OFT has not applied a multiplier for duration at Step 2.

VII.46 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.47 After Steps 1 and 2, the OFT has considered the necessity and proportionality of the penalty in all the circumstances of this case. In

⁵¹⁸ Section 38(9) of the Act and *2004 Penalty Guidance* (fn181), paragraph 2.20.

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 (Infringements 2, 3 and 5).

- VII.48 Ciceley's penalty at the end of Step 2 constituted multiples of Ciceley's average profits after tax⁵¹⁹ and relatively high proportions of other indicators of Ciceley's financial position, such as average gross profits and average total turnover.⁵²⁰ The OFT therefore considered that a downwards adjustment was required and applied a reduction of 50 per cent.
- VII.49 In addition, and consistent with the approach taken by the CAT in *Kier*,⁵²¹ 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 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.50 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,⁵²² 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.

⁵¹⁹ The penalty at the end of Step 2 amounted to around 200 per cent of Ciceley's average profits after tax.

⁵²⁰ The penalty at the end of Step 2 amounted to just above 10 per cent of Ciceley's average gross profits and just below two per cent of its average total turnover.

⁵²¹ *Kier* (fn490), at [180].

⁵²² The OFT notes that Ciceley's net assets are significantly higher than that of the other Participating Dealers. OFT also notes that Ciceley has distributed much higher dividends in the past two years than both Enza and Road Range.

Step 4 – aggravating and mitigating factors

VII.51 The OFT considered increasing the penalty at Step 4 for the involvement of [Ciceley Manager C] in this Infringement, but has concluded, in light of [Ciceley Manager C]'s responsibilities, that an uplift for senior management involvement at Step 4 was not required in the particular circumstances of this case.

VII.52 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.53 As stated in paragraph VII.42, no adjustment to Ciceley'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.54 The total penalty, without the Settlement Discount, for Ciceley's involvement in Infringement 5 is £250,543. The Settlement Penalty is £212,961.⁵²³

Penalty component	Description		Penalty after each step
Step 1	Relevant turnover of £[C]		[C]
	Starting point	6%	
Step 2	Duration multiplier	x1	[C]
Step 3	Proportionality/deterrence	-50%	[C]
	Overall proportionality	-40%	[C]
Step 4	Aggravating factors	0%	[C]
	Mitigating factors	0%	
Step 5	Statutory maximum	N/A	[C]
Penalty for Infringement 5			£250,543
Settlement Penalty	Settlement Discount	-15%	£212,961

Penalty for Enza

Step 3 – adjustment for other factors

VII.55 After Steps 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 Enza's financial position.

VII.56 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

⁵²³ Ciceley's penalties for Infringement 2 and Infringement 3, pursuant to Decision 2 and Decision 3, after the Settlement Discount, are £225,468 and £221,245 respectively. The sum of the penalties for its involvement in Infringement 2, Infringement 3 and Infringement 5 after the Settlement Discount is £659,675.

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 10 per cent of its average gross profits.

VII.57 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

VII.58 The OFT considered that an uplift of 10 per cent is appropriate for the direct involvement of a director of the company, [Enza Director A], in this Infringement - see paragraph VI.39 (The Conduct of the Parties and Legal Assessment).

VII.59 The penalty also includes a reduction of five per cent at Step 4 for procedural co-operation as a mitigating factor to reflect the fact that 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.⁵²⁴

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

VII.60 As stated in paragraph VII.42, no adjustment to Enza'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.61 The total penalty, without the Settlement Discount, for Enza's involvement in Infringement 5 is £408,469. The Settlement Penalty is £347,198.

⁵²⁴ See, however, the OFT's conclusions at paragraphs VI.94 to VI.98 (The Conduct of the Parties and Legal Assessment) in relation to some of that evidence.

Penalty component	Description		Penalty after each step
Step 1	Relevant turnover of £[C]		[C]
	Starting point	6%	
Step 2	Duration multiplier	x1	[C]
Step 3	Proportionality/deterrence	0%	[C]
Step 4	Aggravating factors	+ 10%	[C]
	Mitigating factors	-5%	
Step 5	Statutory maximum	N/A	[C]
Penalty for Infringement 5			£408,469
Settlement Penalty	Settlement Discount	-15%	£347,198

Penalty for Mercedes

Step 3 – adjustment for other factors

- VII.62 After Steps 1 and 2, the OFT has considered the necessity and proportionality of the penalty in all the circumstances of this case.
- VII.63 The OFT considered that Mercedes' penalty at the end of Step 2 was insufficient to achieve deterrence in view of Mercedes' size and financial position. The proposed penalty was therefore doubled at Step 3.
- VII.64 The OFT considered whether a bigger uplift was required for deterrence. However, although Mercedes is a multinational company, the Infringement was committed at a local level. At just over 10 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 this Infringement.
- VII.65 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

- VII.66 The OFT has taken into account that Mercedes has provided voluntary co-operation above and beyond its legal obligations. Specifically, Mercedes made key staff available for interview which enabled the enforcement process to be concluded more effectively.⁵²⁵
- VII.67 A reduction of five per cent at Step 4 for procedural co-operation has therefore been applied to Mercedes' penalty.

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

- VII.68 As stated in paragraph VII.42, no adjustment to Mercedes' 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.69 The total penalty, without the Settlement Discount, for Mercedes' involvement in Infringement 5 is £1,756,054. The Settlement Penalty is £1,492,646.

⁵²⁵ See, however, paragraph III.18 (The OFT's Investigation) in relation to Mercedes' rejection of the OFT's request for the interview transcripts to be signed with a declaration of truth.

Penalty component	Description		Penalty amount after each step
Step 1	Relevant turnover of £[C]		[C]
	Starting point	6%	
Step 2	Duration multiplier	x1	[C]
Step 3	Proportionality/deterrence	+ 100%	[C]
Step 4	Aggravating factors	0%	[C]
	Mitigating factors	-5%	
Step 5	Statutory maximum	N/A	[C]
Penalty for Infringement 5			£1,756,054
Settlement Penalty	Settlement Discount	-15%	£1,492,646

Penalty for Road Range

Step 3 – adjustment for other factors

VII.70 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 smallest of the Parties in terms of net assets, turnover and profits after tax.⁵²⁶

VII.71 At the end of Step 2, Road Range's penalty for the Infringement constituted nearly 120 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 dividends.⁵²⁷ The OFT therefore considered that a downwards adjustment was required and applied a reduction of 50 per cent.

VII.72 In addition, and consistent with the approach taken by the CAT in *Kier*,⁵²⁸ the OFT took a final step back and considered whether the penalties for Infringement 3 and Infringement 5, in sum, were necessary

⁵²⁶ *Kier* (fn490), at [177].

⁵²⁷ The penalty at the end of Step 2 amounted to around 15 per cent of its net assets and its net assets plus dividends.

⁵²⁸ *Kier* (fn490), at [180].

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 to 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.73 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.74 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.75 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.

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

- VII.76 As stated in paragraph VII.42, 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.77 The total penalty, without the Settlement Discount, for Road Range's involvement in Infringement 5 is £60,059. The Settlement Penalty is £51,050.⁵²⁹

Penalty component	Description		Penalty amount after each step
Step 1	Relevant turnover of £[C]		[C]
	Starting point	6%	
Step 2	Duration multiplier	x1	[C]
Step 3	Proportionality/deterrence	-50%	[C]
	Overall proportionality	-25%	[C]
Step 4	Aggravating factors	0%	[C]
	Mitigating factors	0%	
Step 5	Statutory maximum	N/A	[C]
Penalty for Infringement 5			£60,059
Settlement Penalty	Settlement Discount	-15%	£51,050

Payment of penalty

VII.78 The OFT therefore requires the Parties to pay their respective Settlement Penalty for Infringement 5 set out in the tables above at paragraphs VII.54, VII.61, VII.69 and VII.77. Payment should be made to the OFT by close of banking business on 31 May 2013 or on such date or dates as agreed in writing with the OFT.⁵³⁰

VII.79 In the event that the Settlement Agreement with any of the Parties 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

⁵²⁹ Road Range's penalty for Infringement 3, pursuant to Decision 3, after the Settlement Discount, is £64,723. The sum, therefore, of the penalties for its involvement in Infringement 3 and Infringement 5, after the Settlement Discount, is £115,774.

⁵³⁰ Details on how to pay are set out in the letter accompanying this Decision.

Agreement is terminated.

VII.80 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.⁵³¹

A handwritten signature in black ink, appearing to read 'Ali Nikpay', with a horizontal line underneath.

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

⁵³¹ 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');¹
- 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');² 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

¹ See paragraphs VI.83 to VI.124 of the Statement of Objections.

² See paragraphs VI.125 to VI.188 of the Statement of Objections.

2010 ('Settlement Infringement 5');³

(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

³ 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.⁴ 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;

⁴ 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 Guidance⁵ (in accordance with the transitional provisions set out in OFT's 2012 Penalty Guidance).⁶

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

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

⁶ 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:

Position:

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').¹
2. The undertakings listed below (the 'Settling Parties')² have indicated their wish to settle the case with the OFT:³
 - 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'):⁴
 - 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

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

² 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.

³ 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.

⁴ 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');⁵

- 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');⁶ 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').⁷

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.⁸ 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.

⁵ 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).

⁶ See paragraphs VI.125 to VI.188 of the Statement of Objections.

⁷ See paragraphs VI.288 to VI.411 of the Statement of Objections.

⁸ 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.⁹ For the Settlement Infringements, they are:

Settlement Infringement	Adjustment at Step 2 for duration
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.

⁹ 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.¹⁰
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.¹¹
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.

¹⁰ 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.

¹¹ 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.¹² 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.

¹² 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
Step 1 - starting point	6%	6%	6%
Step 2 - duration multiplier	x2.25	x2	x1
Step 3 - proportionality/deterrence	-50%	-75%	-50%
-overall proportionality	-40%		
Step 4 - aggravating factors	+ 5%	0	0
- mitigating factors	0	0	0
Step 5 - statutory maximum	n/a	n/a	n/a
Settlement discount	-15%		
Total settlement penalty	£659,675		

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 tax¹³ and a relatively high proportion of other indicators of Ciceley's financial position, such as average gross profits and average total turnover.¹⁴

¹³ 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.

¹⁴ 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*,¹⁵ 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,¹⁶ 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 2.¹⁷
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.

¹⁵ *Kier* (fn11), paragraph 180.

¹⁶ 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.

¹⁷ See Statement of Objections, paragraphs VI.87 and VI.133.

Road Range

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

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.¹⁸
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.¹⁹ The OFT applied a downwards adjustment of 75 per cent for Settlement Infringement 3 and 50 per cent for Settlement Infringement 5.

¹⁸ *Kier* (fn11), paragraph 177.

¹⁹ 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*,²⁰ 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.

²⁰ *Kier* (fn11), paragraph 180.

Enza

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

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 2009.²¹
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.²²

²¹ See Statement of Objections, paragraph VI.326.

²² 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.

Mercedes²³

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

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

²³ 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.²⁴

²⁴ 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 terms¹

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.

¹ 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

Enza Motors Limited
Enza Holdings Limited
Enza Group Limited

c/o Laurence Pritchard
Weightmans LLP
100 Old Hall Street
Liverpool
L3 9QJ

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 Pritchard

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 a decision (a 'Decision') that Enza Motors Limited, Enza Holdings Limited and Enza Group Limited (collectively referred to as 'Enza') 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, 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' or the 'Settlement Infringement').¹

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 Enza's willingness to admit its involvement in the Settlement Infringement. You have also indicated Enza'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, Enza agrees to the terms of this Agreement. Enza enters into this Agreement voluntarily and

¹ See paragraphs VI.288 to VI.411 of the Statement of Objections.

understands fully the implications of doing so. Enza 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 will remain binding against Enza. Enza also understands and accepts that any Decision may refer to this Agreement, including to Enza'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. Enza admits its liability for the Settlement Infringement, and the facts as set out in sections IV, V, VI.288 to VI.411 and VII of the Statement of Objections insofar as they are relevant to Enza's involvement in the Settlement Infringement, subject to the memorandum referred to in paragraph 3, (if any).

Streamlined procedure

2. 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 Enza signed a copy of this Agreement, Enza agrees not to provide any written representations on the Statement of Objections. Enza agrees to limit any written representations on any Supplementary Statement of Objections that the OFT may issue in respect of the Settlement Infringement to a concise memorandum indicating any material factual inaccuracies.
3. Enza agrees not to request an oral hearing in respect of the Statement of Objections, or of any Supplementary Statement of Objections.
4. Enza has already been provided with access to documents on the OFT's file at the time when the Statement of Objections was issued. Enza 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 Enza.
5. Enza has been provided with a memorandum (attached as Annex I) setting out the calculation of the penalty for the Settlement Infringement. Enza 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.² Without prejudice to the above, should the OFT decide in the exercise of its discretion to issue a Draft Penalty Statement, Enza

² OFT Guidance 1263rev, *A guide to the OFT's investigation procedures in competition cases* (October 2012).

agrees to limit any representations to a concise memorandum indicating any material factual inaccuracies.

6. Enza shall adhere to the deadlines set by the OFT for the performance of the obligations set out in this Agreement.

Cooperation

7. Enza agrees to cooperate fully, as set out below, throughout the remainder of the OFT's Investigation in relation to the Settlement Infringement, and until the conclusion of any action involving the OFT arising as a result of the Investigation in relation to the Settlement Infringement (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, Enza will provide the OFT with any information or documents in its possession or under its control which are directly or indirectly relevant to the Settlement Infringement;
 - b. if requested by the OFT, Enza 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 the Settlement Infringement, 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 the Settlement Infringement;
 - 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, Enza 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 Enza 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.

8. Enza 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

9. Any Decision adopted by the OFT will:

- a. set out the OFT's findings in substantially the terms of sections IV, V, 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 Settlement Infringement;
- b. note Enza's admission of the Settlement Infringement and conclude that Enza has committed the Settlement Infringement;
- c. impose a penalty on Enza of no more than £408,469 (the 'Total Penalty'). Liability for 85 per cent of the Total Penalty (the 'Settlement Penalty') will arise on the date specified in the Decision. In recognition of Enza'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 12 and/or 13; and
- d. set out the OFT's approach to calculating the penalty under its 2004 Penalty Guidance³ (in accordance with the transitional provisions set out in OFT's 2012 Penalty Guidance).⁴

³ OFT Guidance 423, *OFT's Guidance as to the Appropriate Amount of a Penalty* (December 2004).

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

Time to pay

11. Provided that Enza continues to comply with the terms of this Agreement, the OFT will offer Enza 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

12. This Agreement will be automatically terminated should Enza 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.
13. 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 8 above has not been complied with.
14. Before terminating this Agreement in accordance with paragraph 13 the OFT shall serve written notice to Enza of the nature of the non-compliance and that the OFT is considering terminating the Agreement. Enza 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 Enza fails to remedy the breach within that time, the OFT may terminate the Agreement.

Consequences of termination

15. 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 15 to 18, will cease to have effect.
16. Where this Agreement is terminated before a Decision is adopted, the OFT will pursue its Investigation in accordance with its normal procedures.
17. If, following the adoption of a Decision, Enza brings appeal proceedings before the CAT against any Decision (including as to penalty) or any other action or decision by the OFT

⁴ See OFT Guidance 423, *OFT's Guidance as to the Appropriate Amount of a Penalty* (September 2012), paragraph 1.11.

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 Enza in relation to the Settlement Infringement; and
- b. to require Enza to pay the OFT's full costs of the appeal regardless of the outcome of that appeal.

Information and other investigations

18. All information, documents and other evidence provided by Enza 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 Enza's current or former directors, officers, employees or agents. In particular, where this Agreement is terminated according to paragraphs 12 and/or 13, the OFT will still be able to rely on the admission made by Enza in this Agreement and all information, documents and other evidence provided by Enza to the OFT under the Agreement.

Entire agreement

19. This Agreement constitutes the entire settlement agreement between Enza and the OFT. It supersedes and extinguishes all previous drafts, agreements, arrangements and understandings between Enza and the OFT, whether written or oral, relating to its subject matter.
20. Enza 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

21. 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.
22. Enza agrees to the OFT making an announcement that it has entered into this Agreement with Enza at any time after the Agreement becomes effective in accordance with paragraph 23. Enza 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 Enza without the express written consent of the OFT.

23. This Agreement will be executed in counterparts and shall only become effective when both Enza 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 Infringement fails to enter into and return its settlement agreement to OFT within the timetable set by the OFT.

If Enza agrees to the terms set out in the Agreement, a duly authorised representative of Enza 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

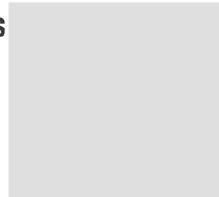
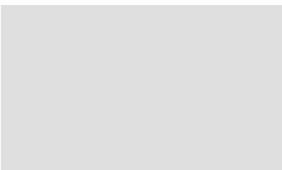
Cartels and Criminal Enforcement Group

SIGNED FOR AND ON BEHALF OF ENZA MOTORS

Name:

Position:

Date:



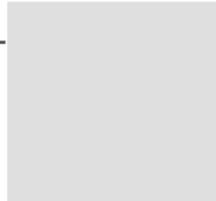
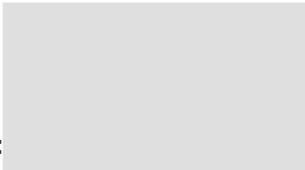
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SIGNED FOR AND ON BEHALF OF ENZA HOL

Name:

Position:

Date:



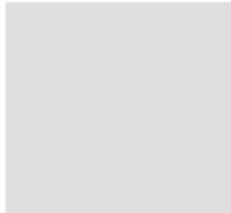
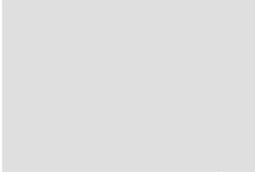
14.2.2013

SIGNED FOR AND ON BEHALF OF ENZA GRO

Name:

Position:

Date:



14. 2. 2013

COUNTERSIGNED FOR AND ON BEHALF OF THE OFFICE OF FAIR TRADING

Name: Ali Nikpay

Position: Senior Director – Cartels and Criminal Enforcement Group, OFT

Date:

2012/13

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').¹
2. The undertakings listed below (the 'Settling Parties')² have indicated their wish to settle the case with the OFT:³
 - 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'):⁴
 - 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

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

² 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.

³ 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.

⁴ 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');⁵

- 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');⁶ 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').⁷
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.⁸ 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.

⁵ 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).

⁶ See paragraphs VI.125 to VI.188 of the Statement of Objections.

⁷ See paragraphs VI.288 to VI.411 of the Statement of Objections.

⁸ 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.⁹ For the Settlement Infringements, they are:

Settlement Infringement	Adjustment at Step 2 for duration
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.

⁹ 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.¹⁰
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.¹¹
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.

¹⁰ 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.

¹¹ 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.¹² 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.

¹² 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
Step 1 - starting point	6%	6%	6%
Step 2 - duration multiplier	x2.25	x2	x1
Step 3 - proportionality/deterrence	-50%	-75%	-50%
- overall proportionality	-40%		
Step 4 - aggravating factors	+ 5%	0	0
mitigating factors	0	0	0
Step 5 - statutory maximum	n/a	n/a	n/a
Settlement discount	-15%		
Total settlement penalty	£659,675		

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 tax¹³ and a relatively high proportion of other indicators of Ciceley's financial position, such as average gross profits and average total turnover.¹⁴

¹³ 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.

¹⁴ 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*,¹⁵ 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 around between 5 and 10 per cent of Ciceley's net assets and net assets plus dividends in the last two financial years,¹⁶ 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] [REDACTED] in the Settlement Infringements. The OFT has applied a five per cent uplift for the limited involvement of one director in Settlement Infringement 2.¹⁷
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.

¹⁵ *Kier* (fn11), paragraph 180.

¹⁶ 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.

¹⁷ See Statement of Objections, paragraphs VI.87 and VI.133.

Road Range

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

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.¹⁸
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.¹⁹ The OFT applied a downwards adjustment of 75 per cent for Settlement Infringement 3 and 50 per cent for Settlement Infringement 5.

¹⁸ *Kier* (fn11), paragraph 177.

¹⁹ 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*,²⁰ 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.

²⁰ *Kier* (fn11), paragraph 180.

Enza

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

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 2009.²¹
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.²²

²¹ See Statement of Objections, paragraph VI.326.

²² 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.

Mercedes²³

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

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

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

²³ 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.²⁴

²⁴ 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 terms¹

1. Liability for the Settlement Penalty will arise two months after Enza is notified of the Decision (the date on which liability for the Settlement Penalty arises is the 'Specified Date').
2. However, the OFT will offer Enza 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 Enza accept the terms of this offer, the OFT will provide Enza 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 Enza 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 Enza decide to accept this offer, it should notify the OFT in writing within three weeks from the date in which Enza is notified of the Decision. 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.

¹ 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

**Mercedes-Benz UK Limited
Daimler UK Limited
Daimler AG**

c/o Cyrus Mehta
Nabarro LLP
Lacon House
84 Theobald's Road
London
WC1X 8RW

Case ref	CE/9161-09	Direct line	020 7211 8153
Date	15 February 2013	Fax	020 7211 8992
Your ref		Email	Stephanie.E.Oneil@oft.gsi.gov.uk

Dear Mr Mehta

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 a decision (a 'Decision') that Mercedes-Benz UK Limited, Daimler UK Limited and Daimler AG (collectively referred to as 'Mercedes') 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, 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' or the 'Settlement Infringement').¹

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 Mercedes' willingness to admit its involvement in the Settlement Infringement. You have also indicated Mercedes' 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, Mercedes

¹ See paragraphs VI.288 to VI.411 of the Statement of Objections.

agrees to the terms of this Agreement. Mercedes enters into this Agreement voluntarily and understands fully the implications of doing so. Mercedes 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 will remain binding against Mercedes. Mercedes also understands and accepts that any Decision may refer to this Agreement, including to Mercedes' 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. Mercedes admits its liability for the Settlement Infringement, and the facts as set out in sections IV, V, VI.288 to VI.411 and VII of the Statement of Objections insofar as they are relevant to Mercedes' involvement in the Settlement Infringement, subject to the memorandum referred to in paragraph 2 (if any).

Streamlined procedure

2. 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 Mercedes signed a copy of this Agreement, Mercedes agrees not to provide any written representations on the Statement of Objections. Mercedes agrees to limit any written representations on any Supplementary Statement of Objections that the OFT may issue in respect of the Settlement Infringement to a concise memorandum indicating any material factual inaccuracies.
3. Mercedes agrees not to request an oral hearing in respect of the Statement of Objections, or of any Supplementary Statement of Objections.
4. Mercedes has already been provided with access to documents on the OFT's file at the time when the Statement of Objections was issued. Mercedes will not seek any further access to documents on the OFT's file in relation to the Settlement Infringement 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 Mercedes.
5. Mercedes has been provided with a memorandum (attached as Annex I) setting out the calculation of the penalty for the Settlement Infringement. Mercedes accepts that in respect of the Settlement Infringement it will not also receive a Draft Penalty Statement provided for in the OFT's Procedures Guidance.² Without prejudice to the above, should

² OFT Guidance 1263rev, *A guide to the OFT's investigation procedures in competition cases* (October 2012).

the OFT decide in the exercise of its discretion to issue a Draft Penalty Statement, Mercedes agrees to limit any representations to a concise memorandum indicating any material factual inaccuracies.

6. Mercedes shall adhere to the deadlines set by the OFT for the performance of the obligations set out in this Agreement.

Cooperation

7. Mercedes agrees to cooperate fully, as set out below, throughout the remainder of the OFT's Investigation in relation to the Settlement Infringement, and until the conclusion of any action involving the OFT arising as a result of the Investigation in relation to the Settlement Infringement (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, Mercedes will provide the OFT with any information or documents in its possession or under its control which are directly or indirectly relevant to the Settlement Infringement;
 - b. if requested by the OFT, Mercedes 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 the Settlement Infringement, 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 the Settlement Infringement;
 - 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, Mercedes 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 Mercedes 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.

8. Mercedes 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

9. Any Decision adopted by the OFT will:

- a. set out the OFT's findings in substantially the terms of sections IV, V, 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 the Settlement Infringement;
- b. note Mercedes' admission of the Settlement Infringement and conclude that Mercedes has committed the Settlement Infringement;
- c. impose a penalty on Mercedes of no more than £1,756,054 (the 'Total Penalty'). Liability for 85 per cent of the Total Penalty (the 'Settlement Penalty') will arise on the date specified in the Decision. In recognition of Mercedes' 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 11 and/or 12; and

- d. set out the OFT's approach to calculating the penalty under its 2004 Penalty Guidance³ (in accordance with the transitional provisions set out in OFT's 2012 Penalty Guidance).⁴

10. The OFT may without notice make adjustments that have the effect of reducing Mercedes' final penalty.

Termination

11. This Agreement will be automatically terminated should Mercedes 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 in relation to the Settlement Infringement to any court, including but not limited to the CAT.
12. 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 8 above has not been complied with.
13. Before terminating this Agreement in accordance with paragraph 12 the OFT shall serve written notice to Mercedes of the nature of the non-compliance and that the OFT is considering terminating the Agreement. Mercedes 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 Mercedes fails to remedy the breach within that time, the OFT may terminate the Agreement.

Consequences of termination

14. 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 14 to 17, will cease to have effect.
15. Where this Agreement is terminated before a Decision is adopted, the OFT will pursue its Investigation in accordance with its normal procedures.
16. If, following the adoption of a Decision, Mercedes brings appeal proceedings before the CAT against any Decision (including as to penalty) or any other action or decision by the

³ OFT Guidance 423, *OFT's Guidance as to the Appropriate Amount of a Penalty* (December 2004).

⁴ See OFT Guidance 423, *OFT's Guidance as to the Appropriate Amount of a Penalty* (September 2012), paragraph 1.11.

OFT as a result of or otherwise arising from the Investigation in relation to the Settlement Infringement, the OFT reserves the right to make an application to the CAT:

- a. to increase the penalty imposed on Mercedes in relation to the Settlement Infringement; and
- b. to require Mercedes to pay the OFT's full costs of the appeal regardless of the outcome of that appeal.

Information and other investigations

17. All information, documents and other evidence provided by Mercedes 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 Mercedes' current or former directors, officers, employees or agents. In particular, where this Agreement is terminated according to paragraphs 11 and/or 12, the OFT will still be able to rely on the admission made by Mercedes in this Agreement and all information, documents and other evidence provided by Mercedes to the OFT under the Agreement.

Entire agreement

18. This Agreement constitutes the entire settlement agreement between Mercedes and the OFT. It supersedes and extinguishes all previous drafts, agreements, arrangements and understandings between Mercedes and the OFT, whether written or oral, relating to its subject matter.
19. Mercedes 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

20. Nothing in this Agreement affects any OFT action that is beyond the scope of this Investigation in relation to the Settlement Infringement, including the OFT's ongoing investigation into Alleged Infringement 1, as well as any other separate ongoing or future investigations by the OFT 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.

21. Mercedes agrees to the OFT making an announcement that it has entered into this Agreement with Mercedes at any time after the Agreement becomes effective in accordance with paragraph 22. Mercedes 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 Mercedes without the express written consent of the OFT.
22. This Agreement will be executed in counterparts and shall only become effective when both Mercedes 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 Infringement fails to enter into and return its settlement agreement to OFT within the timetable set by the OFT.

If Mercedes agrees to the terms set out in the Agreement, a duly authorised representative of Mercedes should sign the Agreement as indicated below and return by email or fax 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 MERCEDES-BENZ UK LIMITED

Name:

Position:

Date:

19-02-2013

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').¹
2. The undertakings listed below (the 'Settling Parties')² have indicated their wish to settle the case with the OFT:³
 - 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'):⁴
 - 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

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

² 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.

³ 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.

⁴ 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');⁵

- 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');⁶ 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').⁷
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.⁸ 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.

⁵ 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).

⁶ See paragraphs VI.125 to VI.188 of the Statement of Objections.

⁷ See paragraphs VI.288 to VI.411 of the Statement of Objections.

⁸ 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.⁹ For the Settlement Infringements, they are:

Settlement Infringement	Adjustment at Step 2 for duration
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.

⁹ 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.¹⁰
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.¹¹
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.

¹⁰ 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.

¹¹ 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.¹² 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.

¹² 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
Step 1	- starting point	6%	6%	6%
Step 2	- duration multiplier	x2.25	x2	x1
Step 3	- proportionality/deterrence	-50%	-75%	-50%
	- overall proportionality	-40%		
Step 4	- aggravating factors	+5%	0	0
	- mitigating factors	0	0	0
Step 5	- statutory maximum	n/a	n/a	n/a
Settlement discount		-15%		
Total settlement penalty		£659,675		

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 tax¹³ and a relatively high proportion of other indicators of Ciceley's financial position, such as average gross profits and average total turnover.¹⁴

¹³ 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.

¹⁴ 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*,¹⁵ 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,¹⁶ 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 2.¹⁷
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.

¹⁵ *Kier* (fn11), paragraph 180.

¹⁶ 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.

¹⁷ See Statement of Objections, paragraphs VI.87 and VI.133.

Road Range

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

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.¹⁸
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.¹⁹ The OFT applied a downwards adjustment of 75 per cent for Settlement Infringement 3 and 50 per cent for Settlement Infringement 5.

¹⁸ *Kier* (fn11), paragraph 177.

¹⁹ 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*,²⁰ 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.

²⁰ *Kier* (fn11), paragraph 180.

Enza

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

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 2009.²¹
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.²²

²¹ See Statement of Objections, paragraph VI.326.

²² 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.

Mercedes²³

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

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

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

²³ 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.²⁴

²⁴ 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.

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');¹ 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');²

(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

¹ See paragraphs VI.125 to VI.188 of the Statement of Objections.

² 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.³ 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;

³ 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 Guidance⁴ (in accordance with the transitional provisions set out in OFT's 2012 Penalty Guidance).⁵

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.

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

⁵ 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

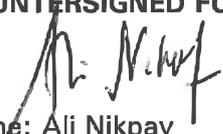
SIGNED FOR AND ON BEHALF OF ROAD RANGE LIMITED

Name:

Position:

Date: 15TH 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').¹
2. The undertakings listed below (the 'Settling Parties')² have indicated their wish to settle the case with the OFT:³
 - 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'):⁴
 - 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

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

² 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.

³ 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.

⁴ 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');⁵

- 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');⁶ 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').⁷

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.⁸ 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.

⁵ 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).

⁶ See paragraphs VI.125 to VI.188 of the Statement of Objections.

⁷ See paragraphs VI.288 to VI.411 of the Statement of Objections.

⁸ 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.⁹ For the Settlement Infringements, they are:

Settlement Infringement	Adjustment at Step 2 for duration
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.

⁹ 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.¹⁰
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.¹¹
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.

¹⁰ 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.

¹¹ 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.¹² 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.

¹² 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
Step 1	- starting point	6%	6%	6%
Step 2	- duration multiplier	x2.25	x2	x1
Step 3	- proportionality/deterrence	-50%	-75%	-50%
	- overall proportionality	-40%		
Step 4	- aggravating factors	+ 5%	0	0
	- mitigating factors	0	0	0
Step 5	- statutory maximum	n/a	n/a	n/a
Settlement discount		-15%		
Total settlement penalty		£659,675		

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 tax¹³ and a relatively high proportion of other indicators of Ciceley's financial position, such as average gross profits and average total turnover.¹⁴

¹³ 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.

¹⁴ 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*,¹⁵ 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,¹⁶ 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 2.¹⁷
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.

¹⁵ *Kier* (fn11), paragraph 180.

¹⁶ 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.

¹⁷ See Statement of Objections, paragraphs VI.87 and VI.133.

Road Range

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

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.¹⁸
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.¹⁹ The OFT applied a downwards adjustment of 75 per cent for Settlement Infringement 3 and 50 per cent for Settlement Infringement 5.

¹⁸ *Kier* (fn11), paragraph 177.

¹⁹ 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*,²⁰ 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.

²⁰ *Kier* (fn11), paragraph 180.

Enza

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

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 2009.²¹
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.²²

²¹ See Statement of Objections, paragraph VI.326.

²² 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.

Mercedes²³

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

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

²³ 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.²⁴

²⁴ 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 terms¹

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.

¹ 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.