Neutral citation: [2005] CAT 13

IN THE COMPETITION APPEAL TRIBUNAL

Cases: 1014 and 1015/1/1/03

Victoria House
Bloomsbury Place
London WC1A 2EB

29 April 2005

Before:

Sir Christopher Bellamy (The President)
The Honourable Antony Lewis
Ms Vindelyn Smith-Hillman

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) ARGOS LIMITED
(2) LITTLEWOODS LIMITED

-v.-

Appellants

THE OFFICE OF FAIR TRADING
(formerly the Director General of Fair Trading)

Respondent

Mr Mark Brealey QC (instructed by Burges Salmon LLP) appeared for Argos.

Mr Nicholas Green QC and Ms Marie Demetriou (instructed by DLA LLP) appeared for Littlewoods.

Mr Brian Doctor QC (instructed by Director of Legal Services, Office of Fair Trading) appeared for the respondent.

Heard at Victoria House on 27 January 2005

JUDGMENT ON PENALTY

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I INTRODUCTION

1. On 14 December 2004 the Tribunal gave judgment on liability ("the Liability Judgment") in the appeals by Argos and Littlewoods respectively against the OFT's Decision of 21 November 2003 ("the Decision"). In the Decision the OFT found that Hasbro, Argos and Littlewoods had infringed the Chapter I prohibition set out in Section 2 of the Competition Act 1998 ("the Act") between 1 March 2000 and 15 May 2001. The OFT imposed a penalty on Argos of £17.28 million, and a penalty on Littlewoods of £5.37 million.

2. Although the penalty on Hasbro was assessed in the Decision at £15.59 million, no penalty was in fact imposed on Hasbro because Hasbro applied for and received 100 per cent leniency in respect of the relevant findings of infringement (paragraph 411 of the Decision).

3. The facts and circumstances of this case are fully set out in the Liability Judgment. In summary, the Tribunal found as follows.

    1. At least from the Autumn/Winter 1999 catalogue onwards until 15 May 2001 there was a bilateral agreement within the meaning of the Chapter I prohibition between Hasbro and Argos to the effect that Argos would sell Hasbro's Action Man and Core Games ranges at retail prices recommended by Hasbro. That agreement was extended to certain other toys and games with effect from the Autumn/Winter 2000 catalogue. At the very least, the Tribunal found, there was a concerted practice between Hasbro and Argos to that effect (Liability Judgment, paragraphs 658 to 726).

    2. At least from the Autumn/Winter 1999 catalogue onwards until 15 May 2001 there was a bilateral agreement within the meaning of the Chapter I prohibition between Hasbro and Littlewoods to the effect that Littlewoods would sell Hasbro's Action Man and Core Games ranges at retail prices recommended by Hasbro. That agreement was extended to certain other toys and games with effect from the Autumn/Winter 2000 catalogue. At the

very least, the Tribunal found, there was a concerted practice between Hasbro and Littlewoods to that effect (Liability Judgment, paragraphs 727 to 777).

3. There was a trilateral concerted practice between Hasbro, Argos and Littlewoods, already in existence when the Chapter I prohibition came into force on 1 March 2000, to the effect that Argos and Littlewoods would to a material extent each price at or near Hasbro's RRPs on Action Man and Core Games and, for the Autumn/Winter 2000 and Spring/Summer 2001 catalogues, certain other products. That concerted practice lasted until 15 May 2001 (Liability Judgment, paragraphs 778 to 790).

4. This judgment now deals with the appeals of Argos and Littlewoods as regards the amount of the penalty, which have been the subject of written submissions, and oral argument before the Tribunal on 27 January 2005.

II THE STATUTORY FRAMEWORK AS REGARDS PENALTIES

Section 36

5. The OFT's power to impose penalties arises under section 36 of the Act as amended:

> "(1) On making a decision that an agreement has infringed the Chapter I prohibition, the OFT may require an undertaking which is a party to the agreement to pay the OFT a penalty in respect of the infringement.
>
> …
>
> (3) The OFT may impose a penalty on an undertaking under subsection (1) or (2) only if the OFT is satisfied that the infringement has been committed intentionally or negligently by the undertaking.
>
> …
>
> (8) No penalty fixed by the OFT under this section may exceed 10% of the turnover of the undertaking (determined in accordance with such provisions as may be specified in an order made by the Secretary of State).
>
> …"

The Penalties Order

6. The turnover of the undertaking for the purposes of calculating the maximum of 10% of turnover referred to in section 36 (8) of the Act was at the material time to be determined in accordance with the Competition Act 1998 (Determination of Turnover for Penalties) October 2000, SI 2000/ 309 ("the Penalties Order").

7. Under Article 3 of the Penalties Order

> "The turnover of an undertaking for the purposes of section 36(8) is –
>
> (1) the applicable turnover for the business year preceding the date when the infringement ended;
>
> (2) where the length of the infringement is more than 12 months, in addition the amount of the applicable turnover for the business year preceding that identified under paragraph (1) which bears the same proportion to the applicable turnover for that business year as the period by which the length of infringement exceeds 12 months bears to 12 months; and
>
> (3) where the length of the infringement is more than 24 months, in addition the amount of the applicable turnover for the business year preceding that identified under paragraph (2) which bears the same proportion to the applicable turnover for that business year as the period by which the length of infringement exceeds 24 months bears to 12 months; save that the amount added under (2) or (3) shall not exceed the amount of the applicable turnover for the preceding business year in question."

8. By virtue of Article 2 of the Penalties Order, read with paragraph 3 of the Schedule to that Order, the "applicable turnover" for the business year preceding the date when the infringement ended

> "shall be limited to the amounts derived by the undertaking from the sale of products and the provision services falling within the undertaking's ordinary activities to undertakings or consumers in the United Kingdom after deduction of sales rebates, value added tax and other taxes directly related to turnover."

9. For the purposes of Article 3 The "length of the infringement" and the "date when the infringement ended" are to be determined by reference to the period of infringement and the date of termination found in the decision of the OFT: see Article 2 of the Penalties Order.

10. In the present case, the OFT treated the infringement as terminating on 15 May 2001. In the case of Argos, the financial year preceding that date was the 52 week period ending on 24 March 2001. In the case of Littlewoods, the financial year preceding 15 May 2001 ended on 30 April 2001.

11. In the present case the infringements lasted 2.5 months longer than 12 months. The maximum applicable turnover under the Penalties Order then in force is thus to be calculated by adding together (i) the turnover for the business year preceding the date when the infringement ended and (ii) a proportion of the turnover for the business year preceding the business year in which the infringement ended, in accordance with Article 3 (1) and (2) of the Penalties Order. The latter business year is the business year ended 25 March 2000 in the case of Argos and the business year ended 30 April 2000 in the case of Littlewoods. According to the information supplied by the OFT to the Tribunal by letter of 8 February 2005, the proportion of the turnover in those years relevant to the calculation of penalty is taken to be 20 per cent.

12. The applicable turnover for Argos is £2278.6 million for the year ended 24 March 2001, and £2022.1 million for the year ended 25 March 2000. 20 per cent of the latter figure is £404 million. That gives a total applicable turnover of £2682.6 million (i.e. £2278.6 million plus £404 million). The OFT has, however, made an adjustment to exclude Argos' turnover in the Republic of Ireland, which reduces Argos' applicable turnover, for the purposes of the calculation of penalty, to £2602.5 million.

13. It follows that in this case the statutory maximum penalty for Argos under the Penalties Order was £260 million, i.e. 10 per cent of £2602.5 million.

14. The applicable statutory turnover for Littlewoods is £1942.3 million for the year ended 30 April 2001, and £2022.1 million for the year ended 30 April 2000. 20 per cent of the latter figure is £421.1 million. That gives a total applicable turnover of £2363.4 million for the purposes of the calculation of penalty (i.e. £1942.3 million plus £421.1 million).

15. It follows that in this case the statutory maximum penalty for Littlewoods under the Penalties Order was £236 million, i.e. 10 per cent of £2363.4 million.

16. The Penalties Order has since been amended by The Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 SI 2004/1259 which amends Article 3 to provide that the statutory maximum is to be calculated by reference to the worldwide turnover in the previous business year. That amendment came into force on 1 May 2004. That amendment does not appear to us to be material in the present case.

Section 38: the OFT's duty as to guidance

17. Section 38 of the Act as amended provides:

> "(1) The OFT must prepare and publish guidance as to the appropriate amount of any penalty under this Part.
>
> (2) The OFT may at any time alter the guidance.
>
> (3) If the guidance is altered, the OFT must publish it as altered.
>
> (4) No guidance is to be published under this section without the approval of the Secretary of State.
>
> (5) The OFT may, after consulting the Secretary of State, choose how it publishes its guidance.
>
> (6) If the OFT is preparing or altering guidance under this section it must consult such persons as it considers appropriate.
>
> (7) If the proposed guidance or alternation relates to a matter in respect of which a regulator exercises concurrent jurisdiction, those consulted must include that regulator.
>
> (8) When setting the amount of a penalty under this Part, the OFT must have regard to the guidance for the time being in force under this section."

The OFT's Guidance as to Penalties

18. The guidance published pursuant to section 38 of the Act was at the material time to be found in the *Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty*, OFT 423, March 2000 ("*the Guidance*")[1]. That was approved by the Secretary of State on 29 January 2000 (*Guidance*, paragraph 1.6).

[1] A revised version of the *Guidance* was issued in December 2004. References in this judgment are to the *Guidance* as it was in force at the material time.

19. Although the OFT may alter the *Guidance* at any time (section 38 (2)), it appears that the *Guidance* may not be altered except after consultation (section 38 (6) and (7)) and that any such alteration must be published and approved by the Secretary of State (section 38 (3) and (4)).

20. Under section 38 (8) the OFT must "have regard" to the guidance for the time being in force under that section when setting the amount of the penalty.

21. The policy objectives of the *Guidance* are explained therein in these terms:

> "1.8 The twin objectives of the [OFT's] policy on financial penalties are to impose penalties on infringing undertakings which reflect the seriousness of the infringement and to ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices. The [OFT] therefore intends, where appropriate, to impose financial penalties which are severe, in particular in respect of agreements between undertakings which fix prices or share markets and other cartel activities, as well as serious abuses of a dominant position, which the [OFT] considers are among the most serious infringements caught under the Act. The deterrent is not aimed solely at the undertakings which are subject to the decision, but also at other undertakings which might be considering activities that are contrary to the Chapter I and Chapter II prohibitions."

22. The *Guidance* is effectively divided into two parts, namely "Steps for determining the level of penalty" (section 2) and "Lenient treatment for undertakings coming forward with information" (section 3). We set out relevant passages from both those parts.

The steps for determining the level of penalty

23. According to the *Guidance*, there are five steps to be followed in determining the amount of the penalty. Step 1 is the calculation of the "starting point". The starting point is calculated by applying a percentage determined by the nature of the infringement to the "relevant turnover" of the undertaking, as explained in paragraphs 2.3 to 2.6 of the *Guidance*. Step 2 is an adjustment for duration, according to which the figure arrived at under Step 1 may be multiplied by not more than the numbers of years of the infringement, in cases where the infringement has lasted for more than one year (paragraph 2.7 of the *Guidance)*. Step 3 is an upwards adjustment for other factors, in

particular to ensure that the penalty has the appropriate deterrent effect (paragraphs 2.8 and 2.9). Step 4 is a further adjustment for further aggravating or mitigating factors (paragraphs 2.10 and 2.11). Step 5 is a cross-check to ensure that the maximum penalty permitted under the Penalties Order is not exceeded.

24. The relevant extracts from the *Guidance* provide as follows:

> "**Step 1 – starting point**
>
> 2.3 The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated by applying a percentage rate to the "relevant turnover" of the undertaking, up to a maximum of 10%[6]. The "relevant turnover" is the turnover of the undertaking in the relevant product market and relevant geographic market[7] affected by the infringement in the last financial year[8]. This may include turnover generated outside the United Kingdom if the relevant geographic market for the relevant product is wider than the United Kingdom.
>
> 2.4 The actual percentage rate which will be applied to the "relevant turnover" will depend upon the nature of the infringement. The more serious the infringement, the higher the percentage rate is likely to be. Price-fixing or market-sharing agreements and other cartel activities are among the most serious infringements caught under the Chapter I prohibition.
>
> **Step 2 – adjustment for duration**
>
> 2.7 The starting point may be increased to take into account the duration of the infringement. Penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement. Part years may be treated as full years for the purpose of calculating the number of years of the infringement.
>
> **Step 3 – adjustment for other factors**

"[6] In this Guidance, the expression "turnover" is used in two separate contexts: "relevant turnover" used to calculate the starting point and "section 36(8) turnover" (calculated in accordance with The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000 No. 309)) which is used in Step 5 in the adjustment of the penalty figure to prevent the maximum amount for the penalty being exceeded. The 'section 36(8) turnover' of the undertaking is not restricted to the turnover in the relevant product and relevant geographic market."

"[7] See the Competition Act guideline *Market Definition* for further information on the relevant product market and relevant geographic market. The relevant product market and relevant geographic market will be determined as part of the Director's decision that an infringement has taken place."

"[8] Relevant turnover" will be calculated after the deduction of sales rebates and value added tax and other taxes directly related to turnover." the Competition Act guideline *Market Definition* for further information on the relevant product market and relevant geographic market.

2.8 The penalty figure reached after the calculations in steps 1 and 2 may be adjusted as appropriate to achieve the policy objectives, outlined in paragraph 1.8 above, in particular, of imposing penalties on infringing undertakings in order to deter undertakings from engaging in anti-competitive practices. The deterrent is not aimed solely at the undertakings which are subject to the decision, but also at other undertakings which might be considering activities which are contrary to the Chapter I and Chapter II prohibitions… The assessment of the need to adjust the penalty will be made on a case by case basis for each individual infringing undertaking.

2.9 This step may result in a substantial adjustment of the financial penalty calculated at the earlier steps. The consequence may be that the penalty which is imposed is much larger than would otherwise have been imposed. The result of any one of steps 2 or 3 above or 4 below may well be to take the penalty over 10% of the "relevant turnover" identified at step 1, but the overall cap on penalties is 10% of the "section 36(8) turnover" referred to in step 5 below and must not be exceeded.

Step 4 – adjustment for further aggravating and mitigating factors

2.10 The basic amount of the financial penalty, adjusted as appropriate at steps 2 and 3, may be increased where there are other aggravating factors, or decreased where there are mitigating factors.

2.11 Aggravating factors include:

- role of the undertaking as a leader in, or an instigator of, the infringement;
- involvement of directors or senior management;
- retaliatory measures taken against other undertakings aimed at ensuring the continuation of the infringement;
- continuing the infringement after the start of the investigation;
- repeated infringements by the same undertaking or other undertakings in the same group.

2.12 Mitigating factors include:

- role of the undertaking, for example, where the undertaking is acting under severe duress or pressure;
- genuine uncertainty as to whether the agreement or conduct constituted an infringement;
- adequate steps having been taken with a view to ensuring compliance with the Act;

- infringements which are committed negligently rather than intentionally;
- cooperation which enables the enforcement process to be concluded more effectively and/or speedily than would otherwise be the case, over and above that expected of any undertaking…

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

2.13 The final amount of the penalty calculated according to the method set out above may not in any event exceed 10% of the "section 36(8) turnover" of the undertaking.

2.14 The penalty will be adjusted if necessary to ensure that it does not exceed this maximum. This adjustment will be made *after* all the relevant adjustments have been made in steps 2 to 4 above and also, in cartel cases, *before* any adjustments are made under paragraph 3.8 of this guidance…"

Lenient treatment for certain undertakings

25. Under paragraphs 3.1 to 3.12 of the *Guidance*, undertakings who come forward and inform the OFT of the existence of a cartel, and who satisfy the various requirements there set out, may benefit from either total or partial immunity from the financial penalties which would otherwise be imposed. According to paragraph 3.2 of the *Guidance*:

"3.2 The [OFT] considers that it is in the interest of the economy of the United Kingdom to grant favourable treatment to undertakings which inform [it] of cartels and which then cooperate with [it] in the circumstances set out below. It is the secret nature of cartels which justifies such a policy. The interests of customers and consumers in ensuring that such practices are detected and prohibited outweigh the policy objectives of imposing financial penalties on those undertakings which are members of the cartel and which cooperate with the [OFT]."

26. The relevant provisions regarding leniency, as they were at the relevant time, are set out at paragraphs 3.4 to 3.8 of the *Guidance*

Total immunity for the first to come forward <u>before</u> an investigation has commenced

"3.4 In order to benefit from total immunity under this paragraph, the undertaking must be the **first** to provide the [OFT] with evidence of the existence and activities of

a cartel **before** the [OFT] does not already have sufficient information to establish the existence of the alleged cartel, and the following conditions are satisfied:

the undertaking must:

a) provide the [OFT] with all the information, documents and evidence available to it regarding the existence and activities of the cartel;

b) maintain continuous and complete cooperation throughout the investigation;

c) not have compelled another undertaking to take part in the cartel and not have acted as the instigator of or played the leading role in the cartel; and

d) refrain from further participation in the cartel from the time it discloses the cartel.

3.5 If an undertaking does not fulfil all the requirements in paragraph 3.4 above, it may still benefit from total immunity from financial penalties if it fulfils all the requirements in paragraph 3.6 below.

Total immunity for the first to come forward <u>after</u> an investigation has commenced

3.6 In order to benefit from the possibility of total immunity under this paragraph:

- The undertaking seeking immunity under this paragraph must be the **first** to provide the [OFT] with evidence of the existence and activities of a cartel **before** the [OFT] has given written notice of his proposal to make a decision that the Chapter I prohibition has been infringed; and
- Conditions (a) to (d) in paragraph 3.4 above must be satisfied.

3.7 The grant of immunity by the [OFT] in these circumstances is, however, **discretionary**. In order for the [OFT] to exercise his discretion to grant immunity to the undertaking he must be satisfied that the undertaking should benefit from immunity, taking into account the stage at which the undertaking comes forward and whether or not at that stage the director has sufficient evidence to make a decision that the Chapter I prohibition has been infringed.

Reduction in the level of financial penalties in cartel cases

3.8 Undertakings which provide evidence of the existence and activities of a cartel **before written notice of a proposed infringement decision is given,** but are not the

> first to come forward, or do not meet all the requirements under paragraphs 3.4 or 3.6 above, will be granted a **reduction** in the amount of a financial penalty which would otherwise be imposed of up to 50%, if the following conditions are met:
>
> the undertakings must:
>
> a) provide the [OFT] with all the information, documents and evidence available to them regarding the existence and activities of the cartel;
>
> b) maintain continuous and complete cooperation throughout the investigation; and
>
> c) refrain from further participation in the cartel from the time they disclose the cartel."

27. In the *OFT's guidance as to the appropriate amount of the penalty*, published in December 2004, paragraph 3.4(c) of the *Guidance* has been replaced with the requirement that the undertaking must "not have taken steps to coerce another undertaking to take part in the cartel activity" (see paragraph 3.9(d) of the OFT's new guidance). That modification occurred after the events of this case.

The powers of the Tribunal

28. Schedule 8, paragraph 3 of the Act as amended provides that:

> "3. (1) The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.
>
> (2) The Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may –
>
> (a) remit the matter to the OFT,
>
> (b) impose or revoke, or vary the amount of, a penalty,
>
> (c) grant or cancel an individual exemption or vary any conditions or obligations imposed in relation to the exemption by the OFT,
>
> (d) give such directions, or take such other steps, as the OFT could itself have given or taken, or
>
> (e) make any other decision which the OFT could itself have made.

29. Section 60 of the Act provides:

"(1) The purpose of this section is to ensure that so far as is possible (having regard to any relevant difference between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.

(2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is not inconsistency between –

(a) the principles applied, and decision reached, by the court in determining that question; and

(b) the principles laid down by the Treaty and European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law.

…"

30. As discussed later in this judgment, a number of decisions of the Court of Justice and the Court of First Instance deal with the imposition of penalties for infringement of the competition rules of the EC Treaty. There are a number of differences of detail between the calculation of penalties by the OFT under the United Kingdom system and the calculation of penalties by the European Commission: see the European Commission's *Guidelines on the Method of Setting Fines* OJ 1998 C9/3. However, we do not consider it necessary in this case to determine how far section 60 of the Act is, strictly speaking, applicable to the calculation of penalties. In our view we should not so far as possible act inconsistently with the principles applicable to comparable situations under Community law.

31. In *Napp Pharmaceutical Holdings Limited v. Director General of Fair Trading* [2002] CAT 1 [2001] Comp AR 1 ("*Napp*") the Tribunal said, at paragraphs 497 to 502:

"497. We observe first, that the Tribunal is not bound by the *Director's Guidance*. The Act contains no provision which requires the Tribunal to even have regard to that *Guidance.*

498. Schedule 8, paragraph 3(2) of the Act, provides that "the tribunal may confirm or set aside the decision which is the subject to the appeal, or any part of it, and

may … (b) impose, or revoke, or vary the amount of, a penalty … or (e) make any other decision which the Director could have made."

499. It follows, in our judgment, that the Tribunal has a full jurisdiction itself to assess the penalty to be imposed, if necessary regardless of the way the Director has approached the matter in application of the *Director's Guidance*. Indeed, it seems to us that, in view of Article 6(1) of the ECHR, an undertaking penalised by the Director is entitled to have that penalty reviewed *ab initio* by an impartial and independent tribunal able to take its own decision unconstrained by the *Guidance*. Moreover, it seems to us that, in fixing a penalty, this Tribunal is bound to base itself on its own assessment of the infringement in the light of the facts and matters before the Tribunal at the stage of its judgment.

500. That said, it does not seem to us appropriate to disregard the *Director's Guidance*, or the Director's own approach in the Decision under challenge, when reaching our own conclusion as to what the penalty should be. The *Director's Guidance* will no doubt over time take account of the various indications given by this Tribunal in appeals against penalties.

501. We emphasise, however, that the only constraint on the amount of the penalty binding on this Tribunal is that which flows from the Maximum Penalties Order... It is clear from that Order that Parliament intended that it is the overall turnover of the undertaking concerned, rather than its turnover in the products affected by the infringement, which is the final determinant for the amount of the penalty…

502. We agree with the thrust of the *Director's Guidance* that while the turnover in the products affected by the infringement may be an indicative starting point for the assessment of the penalty, the sum imposed must be such as to constitute a serious and effective deterrent, both to the undertaking concerned and to other undertakings tempted to engage in similar conduct. The policy objectives of the Act will not be achieved unless this Tribunal is prepared to uphold severe penalties for serious infringements. As the *Guidance* makes clear, the achievement of the necessary deterrent may well involve penalties above, often well above, 10 per cent of turnover in the products directly concerned by the infringement, subject only to the overall 'cap' imposed by the Maximum Penalties Order. The position in this respect is no different in principle under Article 15(2) of Council Regulation no. 17, albeit that the applicable

maximum penalty under that provision is differently calculated.

..."

32. In *Napp* the Tribunal commented on the Director's application of the *Guidance* (in that case as regards Steps 3 and 4): see paragraphs 504 to 516 of the judgment. However, the Tribunal set out its own views on the seriousness of the infringement, at paragraphs 517 to 534 of the Judgment. The Tribunal then made its own assessment of the penalty on the basis of a "broad brush" approach, taking the case as a whole, at paragraphs 535 to 541. At paragraph 539 of the judgment the Tribunal carried out a "cross check" to see whether the amount arrived at by the Tribunal would equally be within the parameters set out in the *Guidance*, and concluded that it would be.

33. In *Aberdeen Journals v. Director General of Fair Trading* (*No. 2*) [2003] CAT 11 [2003] Comp AR 67, the Tribunal similarly made its own assessment of the amount of the penalty, applying a "broad brush" approach: see paragraphs 489 to 500 of the judgment. The Tribunal followed the same approach in *Genzyme v. OFT* [2004] CAT 4 [2004] Comp AR 358 (paragraph 698 of the judgment). In that case the Tribunal reduced the penalty to take account of the facts that, on the evidence before the Tribunal, the duration of the abuse was two years rather than three, and that only one abuse, rather two abuses, was found to be proved.

III THE OFT'S DECISION AS REGARDS THE PENALTY

34. In the present case the OFT deals with the imposition of penalties at paragraphs 371 to 435 of the Decision. After setting out in what way it has had regard to the *Guidance* (paragraphs 375 to 393), the OFT then deals separately with Hasbro (paragraphs 394 to 411), Argos (paragraphs 412 to 422) and Littlewoods (paragraphs 423 to 433).

General considerations taken into account by the OFT

35. As regards the starting point at Step 1, the OFT refers to paragraphs 2.3 to 2.6 of the *Guidance*. The OFT emphasises in particular paragraph 2.4, which indicates that price-fixing agreements are among the most serious infringements of the Chapter I prohibition, and that accordingly the starting point for such infringements will be likely

to be at or near 10% of the "relevant turnover" of the infringing undertakings (paragraphs 376 to 378 of the Decision). In the present case, the OFT emphasises at paragraph 379 of the Decision:

> "The products concerned are consumer goods sold to a mass market through an established retail environment. They are very familiar, branded toys and games, that are aimed directly at children. Parents are under pressure to accede to the growing demands of children for the latest fad or trend. The heavy promotion and advertising of many such toys means that non-branded, cheaper alternatives are not viable substitutes for many parents. This also applies to "old favourites", toys and games with long-established brand names such as Monopoly."

36. At paragraphs 380 to 386 of the Decision, the OFT states in particular:

- Hasbro is a subsidiary of one of the two leading manufacturers in the world and supplies many of the leading brand names in toys and games, such as Action Man and Monopoly. Those brands were among the first to be targeted in the price fixing agreements, and are considered as "must have" products, i.e. retailers cannot be seen as viable toy retailers without stocking these brands, regardless of how low the margins might be (paragraph 380).
- the OFT believes that as a result of the price fixing agreements, retail prices were higher than they would otherwise have been (paragraph 383).
- the OFT believes that because Argos was a price leader, the agreements had horizontal effects beyond Argos and Littlewoods, with the result that the prices charged by other retailers for Hasbro toys and games were also higher than they would have been in the absence of the agreements (paragraph 384).
- the OFT believes that, given the strong market position of Hasbro in some of the branded toys in question, for example boys' toys and games and puzzles, the prices of competing products of other manufacturers were also maintained at prices that were higher than those that would have prevailed had there been no agreements (paragraph 385).

37. For those reasons the OFT considers that a starting point under Step 1 of 10 per cent of the parties' relevant turnover is appropriate.

38. As regards the adjustment for duration under Step 2, the OFT considers it appropriate to apply a multiplier of 1.2 to the relevant turnover in Action Man and Core Games, to reflect the fact that the agreements affecting those products lasted one year and two and a half months. No adjustment for duration is made in respect of the other products concerned (paragraphs 388 to 390 of the Decision).

The Relevant product market used for Step 1

39. It appears that the turnover in the relevant product market used at Step 1 of the OFT's calculations was based on the OFT's market analysis set out at paragraphs 22 to 36 of the Decision.

40. The OFT points out, correctly, at paragraph 22 of the Decision, that it had no need to define the relevant market in this case for the purpose of proving the infringement: see Case T-62/98 *Volkswagen v. Commission* [2000] ECR II-2707, at paragraph 230. However, the OFT, referring to paragraph 2.3 of the *Guidance*, considered that "Nevertheless market definition is the first step in the process of assessing penalties". According to paragraph 23 of the Decision:

> "23 The OFT has considered the scope of the relevant product market for toys and games in the UK. In particular, it has looked at the degree of substitutability between different categories, or sectors, of toys and games. It has also considered the extent to which electronic games fall within the same market as traditional toys and games."

41. After considering various matters at paragraphs 24 to 34 of the Decision, the OFT concludes at paragraph 36 of the Decision:

> "36 In the circumstances of the present case the OFT does not consider it necessary to choose between the wider definition of all toys and games or the narrower definition given below of separate markets for each separate category. It is not necessary in this case to arrive at a precise definition in order to demonstrate an infringement of the Chapter I prohibition. However, the calculation of level of penalties depends partly on definition of the relevant market. The OFT has taken a narrow view of the market which results in penalties which are lower than if a broader definition had been adopted. Therefore, for the purposes of this Decision and in particular for the purpose of assessing the level of penalties the OFT has considered

the relevant turnover of the parties in each of the following 10 categories of toys and games:

1) **Infant and pre-school**
   - Infant
   - Pre-school
2) **Boys' Toys**
   - Action figures
   - Vehicles
   - Outdoor action sport
3) **Girls' Toys**
   - Large dolls
   - Mini dolls
   - Collectables
4) **Games and puzzles**
   - Family games
   - Children's games
   - Adult games
   - Travel games
   - Puzzles
5) **Creative Toys**
6) **Construction**
7) **Plush**
8) **Ride-ons**
9) **Electric learning aids**
10) **Hand-held electronic games**

and is treating each of these 10 categories as a separate relevant product market for the purpose of the OFT's Guidance on Penalties. The OFT considers that the evidence and analysis in this Decision equally demonstrate an infringement of the Chapter I prohibition if a broader view of the relevant product market is adopted as the frame of reference. For the purposes of this Decision, Hasbro's Action Man range is in the category boys' toys and Hasbro's core games are in the category games and puzzles."

42. Hasbro's Action Man range is a well known series of Action Figures. Hasbro's Core Games comprise Monopoly, Battleships, Trivial Pursuit Genus, Trivial Pursuit Family,

Jenga, Pictionary, Mousetrap, Monopoly Jr, Cluedo, Guess Who?, Hungry Hippos, Twister, Buckaroo, Kerplunk, Frustration, Operation, and Connect 4.

The Penalty for Hasbro

43. At Step 1, the OFT took into account as "relevant turnover" Hasbro's United Kingdom turnover in the United Kingdom markets for infant and pre-school, boys' toys, girls' toys, games and puzzles, creative, plush and hand-held electronic toys (paragraph 394 of the Decision). This totalled some £124.2 million (see footnote 201), arrived at as follows:

Boys' toys	£54.2 million
Games and puzzles	£33.2 million
Hand held electronic games	£1.7 million
Girls' toys	£1.5 million
Creative	£2.9 million
Plush	£14.0 million
Infant and pre-school	£16.7 million
	£124.2 million

44. The OFT then applied a percentage of 10% to that figure, to give a starting point of £12.42 million under Step 1 (paragraph 395).

45. At Step 2, the OFT multiplied the Step 1 figure which related to turnover in boys' toys and games and puzzles (£8.74 million) by 1.2, to reflect the fact that for Action Man and Core Games the infringement lasted for longer than one year. That increased the Step 1 turnover by £1.748 million. The result of that calculation was a penalty at the Step 2 stage of £14.7 million: see paragraph 396 of the Decision.

46. At Step 3, the OFT decided not to increase the figure of £14.17 million for deterrence, on the basis that "a penalty figure of £14.17 million, at this stage of the calculation, is sufficient to act as an effective deterrent both to Hasbro and others" (paragraph 400 of the Decision).

47. At Step 4, the OFT increased the penalty by 10% because Hasbro's senior management were involved (paragraphs 401 to 402) and by a further 10% because "on any reading

of the evidence the OFT believes that it is sufficiently persuasive for it to find that Hasbro acted as an instigator of the infringements" (paragraph 403). However, the OFT also reduced the penalty by 10 per cent because of the remedial action taken by Hasbro Inc, following its discovery of the infringement (paragraph 405). As a result, the considerations relevant at Step 4 resulted in a net increase of the penalty for Hasbro of 10%, to £15.59 million (paragraph 408).

48. It appears from the calculations carried out by the OFT at Step 5 that the maximum penalty that could have been imposed on Hasbro under the Penalties Order was £20.571 million (paragraph 410 of the Decision). Hence Hasbro's penalty of £15.59 million was below the statutory maximum.

The grant of leniency to Hasbro

49. Paragraph 411 of the Decision states

> "Hasbro applied for and received 100 per cent leniency in respect of findings of infringement in its dealings with retailers. The penalty for Hasbro is therefore reduced to nil"

50. In the course of the proceedings before the Tribunal, the correspondence between Hasbro and the OFT relating to Hasbro's leniency application was disclosed to Argos and Littlewoods: see *Argos and Littlewoods v. OFT (Disclosure)* [2004] CAT 5, and the Tribunal's Liability Judgment at paragraph 49.

51. In brief, it is apparent from that correspondence that Hasbro's solicitors first applied for leniency on 14 September 2001. A leniency agreement granting Hasbro total immunity from penalty was signed on 18 September 2001.

52. The agreement of 18 September 2001 provided that the grant of total immunity was subject to a number of conditions, including the condition that "The Applicant has not compelled another undertaking to take part in the cartel to which the reported possible infringement relates and has not acted as the instigator or played the leading role in that cartel" (paragraph 3 (c)). Paragraph 6 of that letter, read with Annex B, provided that if condition 3 (c) was not met, Hasbro would be entitled to only 50% leniency. Those provisions reflect paragraphs 3.4(c) and 3.8 of the *Guidance*, cited above.

53. On 19 September 2001 Hasbro disclosed to the OFT a bundle of documents, including emails of 18 May 2000, 19 May 2000, 25 May 2000 and 30 November 2000, which played a central part in enabling the OFT to establish the infringements alleged. On 26 and 27 September 2001 the OFT carried out on site investigations at Argos and Littlewoods under section 27(3) of the Act, in the course of which certain further documents were obtained. Between 10 and 15 October 2001 Hasbro made 11 employees available for interview.

54. On 1 May 2002 the OFT informed Hasbro's solicitors by letter that it was not minded to accord Hasbro total immunity from penalty, since the evidence "points clearly to [Hasbro] being the instigator of, and having played the leading role in, the cartel activities in question; and contains no suggestion that any other undertaking in these activities should be looked on as an instigator", contrary to condition 3 (c) in the leniency agreement of 18 September 2001 and to paragraph 3.4 (c) of the *Guidance*. On the same date the OFT issued the original Rule 14 notices to Hasbro, Argos and Littlewoods.

55. Hasbro made both written and oral representations in response to the Rule 14 notice, including on the issue of leniency, on the 10 and 16 July 2002.

56. On the 11 November 2002 the OFT wrote to Hasbro's solicitors maintaining the position that Hasbro was not entitled to total immunity from penalty, as distinct from a reduction of 50%, and setting out the evidence relied on by the OFT to show that Hasbro was "the instigator of the cartel activities in question".

57. On 27 November 2002 Hasbro made detailed submissions to the OFT as to why Hasbro's total immunity from penalty should be maintained.

58. On 5 February 2003, and again in a second letter of 6 February 2003 which "replaced" the letter of 5 February, the OFT informed Hasbro's solicitors that the OFT had decided after all not to withdraw the full immunity as to penalty contained in the letter of 18 September 2001. In consequence, Hasbro's penalty was reduced to nil, in the original decision adopted on 19 February 2003. The same applies to the present Decision,

which was readopted on 21 November 2003, following the Tribunal's interlocutory judgment in this case on 30 July 2003, [2003] CAT 16.

The penalty for Argos

59. The calculations as to the penalty for Argos are set out at paragraphs 412 to 422 of the Decision.

60. As regards the starting point under Step 1, paragraph 412 and footnote 206 of the Decision state that Argos's turnover in the relevant product and geographic markets (i.e. the United Kingdom markets for boys' toys, games and puzzles, girls' toys, infant and pre-school, plush, creative and hand-held electronic) in the financial year preceding the termination of the agreements (the 52 week period ended 24 March 2001) was £181.11 million. That turnover figure is made up as follows:

Boys' toys	£39.0 million
Games and puzzles	£15.3 million
Hand held electronic games	£25.3 million
Girls' toys	£48.8 million
Creative	£14.6 million
Plush	£11.0 million
Infant and pre-school	£27.1 million
	£181.1 million

61. As regards the seriousness of Argos' infringement, the OFT states at paragraphs 413 and 414 of the Decision:

> "413 The OFT has made an analysis of the seriousness of this infringement at paragraphs 376 to 387 above. With specific regard to Argos, the OFT takes into account the very serious nature of the infringement (price-fixing) and its comments in those paragraphs regarding the nature of the products, entry conditions, damage to consumers and the effects on competitions. In addition Argos was the largest toy retailer in the UK with 17.6 per cent of the retail supply of traditional toys and games in 2000 (see paragraph 38).
>
> 414 Argos is generally considered to be the price leader in the retail toy market, with other toy retailers to a large extent following Argos's prices. This made Argos's co-operation with Hasbro's attempt at maintaining

> recommended resale prices essential for its success. It was expected that other retailers would follow Argos's lead. Argos was aware of this position. It must therefore also have been aware of the wider consequences for the retail toy market of its maintaining Hasbro's recommended resale prices. This is especially the case as Argos sought assurances from Hasbro as to the co-operation of its main competitor in the catalogue business, Littlewoods, before it would enter into any agreement."

62. In those circumstances the OFT fixed the starting point under Step 1 at 10% of Argos' relevant turnover, giving a starting point of £18.11 million (paragraph 415).

63. Under Step 2, adjustment for duration, the OFT multiplied the Step 1 figure which related to Argos' turnover in the categories boys' toys and games and puzzles (£54.3 million) by a factor of 1.2 to reflect the fact that for Action Man and Core Games the infringement lasted for more than one year. That increased the Step 2 turnover by £1.086 million. The calculation gave rise to a total penalty of £19.20 million at Step 2: see paragraph 416 of the Decision.

64. Under Step 3, the OFT made no further adjustment to Argos' penalty for deterrence, explaining its approach in these terms:

> "417 The infringement enabled Argos to charge the recommended retail price for the Hasbro products concerned, with minimal risk of being undercut by its competitors. This allowed Argos to make higher margins on the Hasbro products concerned than it would have made without the infringement and thus to make considerable gain. However, arithmetical calculation of a gain should not form the sole or even the main means of marking the seriousness of an infringement except in the clearest cases (see paragraph 398).
>
> 418 The OFT is satisfied that a penalty figure of £19.20 million at this stage of the calculation is sufficient to act as an effective deterrent to Argos and others, in particular undertakings that might be considering engaging in price-fixing, and taking the factors of gain and deterrence together has decided not to increase the amount of penalty at this step."

65. Under Step 4, adjustment for further aggravating and mitigating factors, the OFT stated:

"419 The OFT finds that Hasbro was an instigator of the infringing agreements. While there is some evidence that Argos was an instigator, there is no clear evidence against Argos in this respect and therefore it is not appropriate to make an adjustment to the penalty of Argos in respect of this aggravating factor.

420 In recognition of Argos's full co-operation with the investigation the OFT has reduced the amount of the penalty by 10 percent.

421 As a result, there are no increases of the penalty for aggravating factors and that total percentage deducted from the penalty for mitigating circumstances is 10 per cent. The penalty for Argos is therefore determined at £17.28 million."

66. That figure was well below the statutory maximum permissible under the Penalties Order. Argos' penalty was therefore set at £17.28 million.

The penalty for Littlewoods

67. The calculations as to penalty for Littlewoods are set out at paragraphs 423 to 433 of the Decision.

68. As regards the starting point under Step 1, paragraph 423 and footnote 208 of the Decision states that Littlewoods' turnover in the relevant product and geographic markets (i.e. the United Kingdom markets for boys' toys, games and puzzles, girls' toys, infant and pre-school, plush, creative and hand-held electronic) in the financial year preceding the termination of the agreements (the financial year ended 30 April 2001) was £56.32 million. That turnover is made up as follows:

Boys' toys	£12.4 million
Games and puzzles	£4.5 million
Hand held electronic games	£4.9 million
Girls' toys	£17.2 million
Creative	£4.7 million
Plush	£1.4 million
Infant and pre-school	£11.2 million
	£56.32 million

69. As regards the seriousness of Littlewoods' infringement, the OFT stated at paragraphs 424 to 425 of the Decision:

> "424 The OFT has set out its views generally about the seriousness of this infringement at paragraphs 376 to 387. With specific regard to Littlewoods, the OFT takes into account the very serious nature of the products, entry conditions, damage to consumers and the effects on competitors. Although the position of Littlewoods in the retail toy sector is less important than the position of Argos, Littlewoods's share of the retail supply of traditional toys and games is significant. Littlewoods is a substantial and well known retailer in its own right.
>
> 425 Despite Littlewoods's lower market share in the retail toy sector compared with Argos, Littlewoods is seen as Argos's main competitor in the high street catalogue sector. This is caused by the similarity of their outlet channel, the ease with which consumers can compare their prices because these are included in their catalogues, and their price-match guarantees. This means that Argos would not have taken part in the infringing agreements without the participation of Littlewoods. In the OFT's view Littlewoods would have been well aware that its participation in the infringing agreements was essential in order to bring Argos and its much larger market share within the scope of the infringement. It would also have known that other retailers would have been likely to follow Argos's prices since Argos is the acknowledged price leader in the market. Littlewoods' lower market share is not, therefore, a factor that should lead the OFT to find that its participation in the agreements should be viewed less seriously than that of Argos. Market share in any event is only one of the factors taken into account in assessing the seriousness of an infringement at step 1 and the OFT is in no doubt that, in the light of all the relevant factors as far as Littlewoods is concerned, this was a very serious infringement."

70. In those circumstances the OFT fixed the starting point under Step 1 at 10 per cent of the relevant turnover, i.e. £5.63 million.

71. The OFT made the same adjustment for duration under step 2 as it had in the case of Hasbro and Argos, applying a multiplier of 1.2 to Littlewoods' Step 1 turnover in boys' toys and games and puzzles (£1.69 million). That increased the Step 1 turnover by £0.338 million. The calculation thus gave rise to a total penalty of £5.97 million at Step 2.

72. Under Step 3, the OFT made no further adjustment to the penalty for deterrence, explaining its approach at paragraphs 428 to 429 of the Decision:

> "428 Arithmetical calculation of a gain should not form the sole or even the main means of marking the seriousness of an infringement except in the clearest cases (see paragraph 398 above). However, it is clear that the infringement enabled Littlewoods to charge the recommended retail price for the Hasbro products concerned, with minimal risk of being undercut by its main competitor. This allowed Littlewoods to make higher margins on the Hasbro products concerned than it would have made without the infringement and thus to make considerable gain.
>
> 429 Nevertheless, the OFT believes that the penalty calculated in the earlier steps will act as an adequate deterrent to Littlewoods and others, in particular those who might be considering engaging in price-fixing. Taking the factors of gain and deterrence into consideration, he has decided not to adjust the amount of the penalty at this step."

73. Under Step 4, adjustment for further aggravating and mitigating factors, the OFT stated:

> "430 In its written representations, Littlewoods claims that if there was an infringement it was not an instigator of the infringement. Also, Littlewoods claims that only its lowest level employees were involved and any infringement was in no way condoned by its more senior management. The OFT accepts these arguments and therefore does not consider these aspects as aggravating factors.
>
> 431 In its representations, Littlewoods also claims that it has co-operated with the OFT by making its employees available for interviews by the OFT and by providing the OFT voluntarily with explanations and additional documents over and above those found during the OFT's on-site investigation at Littlewoods's headquarters. The OFT accepts this and in recognition of this co-operation with the investigation the OFT has reduced the amount of the penalty by 10 per cent.
>
> 432 As a result, there are no increases of the penalty for aggravating factors and the total percentage deducted from the penalty for mitigating circumstances is 10 per cent. The penalty for Littlewoods is therefore determined at £5.37 million.

74. As with Argos, the resulting penalty was well below the statutory maximum under the Penalties Order calculated under Step 5. Littlewoods' penalty was, therefore, fixed at £5.37 million.

The issues

75. The submissions made by Argos and Littlewoods have a degree of overlap, and may be regrouped under the following four headings (1) Discrimination; (2) The relevant product market for the purposes of Step 1; (3) The starting point of 10% for the purposes of Step 1; (4) Other matters.

IV THE ISSUE OF DISCRIMINATION

ARGUMENTS OF THE PARTIES

76. Both Argos and Littlewoods submit that the OFT acted unfairly, and in breach of the principles of equal treatment and non-discrimination, in imposing heavy penalties on Argos and Littlewoods while not imposing any penalty on Hasbro.

77. The appellants argue, essentially, that the OFT is bound by the principle of equal treatment: Cases T-236/ 01 etc. *Tokai Carbon v. Commission*, judgment of 29 April 2004, paragraph 219; Case T-213/100 *CMA CGM v. Commission* [2003] ECR II-913, paragraphs 405 to 432. According to the appellants, it was unlawful for the OFT to differentiate between the appellants, on the one hand, and Hasbro, on the other hand. First, on the evidence, Hasbro's infringement was more serious than that of Argos or Littlewoods, not least because of the aggravating factors taken into account against Hasbro at paragraphs 401 to 403 of the Decision. Secondly, and in any event, the OFT's decision to reduce Hasbro's penalty to nil constitutes a breach of the principles of non-discrimination and equal treatment. In this case, say the appellants, the difference in treatment is not objectively justified.

78. In particular, submit the appellants, there is no objective justification in this case, for the favourable treatment of Hasbro because, in granting Hasbro total immunity, the OFT did not follow its own *Guidance*. In particular (i) Hasbro did not come forward before an investigation had commenced, contrary to paragraph 3.4 of the *Guidance.* (ii)

Hasbro was "the instigator or played the leading role in the cartel" within the meaning of paragraph 3.4 (c) of the *Guidance*. (iii) Hasbro did not maintain continuous and complete cooperation throughout the investigation, contrary to paragraph 3.4 (b) of the *Guidance*, in particular because Hasbro failed to respect paragraph 3 (iii) of the leniency agreement of 18 September 2001, which refers to Hasbro using its best efforts to secure the complete and truthful cooperation of its officers and employees with the OFT's investigation. (iv) Hasbro did not make any material admissions of liability, but denied the allegations in the first Rule 14 notice in material respects. (v) The OFT gave no adequate reasons for the grant of full leniency in the Decision, given particularly that the OFT's previous position was that Hasbro was entitled to no more than 50% leniency. (vi) There are grounds for supposing that the full leniency was granted for improper or irrelevant reasons.

79. In relation to (vi), the appellants rely on the coincidence of timing between the lodging on 29 January 2003 of Hasbro's appeal against the OFT's decision of 28 November 2002 imposing a penalty on Hasbro in parallel proceedings known as the Distributors' case (see [2003] CAT 1), the OFT's letters of 5 and 6 February 2003 confirming 100 per cent leniency, and Hasbro's withdrawal of the appeal in the Distributors' case with the permission of the Tribunal on 3 March 2003 ([2003] CAT 2), following the adoption of the OFT's original decision in this case on 19 February 2003.

80. According to the appellants, the only way to eliminate the discrimination against them is to reduce their fine to zero, so that they are treated equally with Hasbro.

81. The OFT submits, essentially, that Hasbro is in a quite different position from Argos and Littlewoods because Hasbro provided evidence to the OFT which enabled the OFT to prove the infringement. Hasbro also encouraged its employees to come forward and made relevant employees available to give evidence. The leniency accorded to Hasbro is therefore fully in accordance with the underlying purpose of the leniency programme. The OFT does not accept that there has been any breach of the *Guidance*. Even if there was any such breach, the OFT does not concede that that is relevant to Argos and Littlewoods, who, according to the OFT, have each been fined a proper amount for the infringement they have committed. The appellants have no standing to challenge the Decision vis-à-vis Hasbro.

82. Following the hearing, the parties made submissions at the Tribunal's invitation on the principles to be derived from a number of EC cases, including Cases C-89/95 etc. *Ahlström Osakeyhtiö v. Commission* ("*Woodpulp*") [1993] ECR I-1307, Case T-49/95 *Van Megen Sports v. Commission* [1996] ECR II-1799 and Case T-17/99 *KE KELIT v. Commission* [2002] ECR II-1647. According to the OFT, those cases show that the circumstances in which the OFT granted leniency to Hasbro are not relevant to Argos and Littlewoods and should not be investigated by the Tribunal. The appellants maintain that nothing in those cases prevent the Tribunal from adjudicating on the correctness of the OFT's grant of leniency to Hasbro. The correct course for the Tribunal to follow in order to remove the breach of the principle of equal treatment would be to level down the penalty on Argos and Littlewoods to nil: see in particular Cases T-67/00 etc. *JFE Engineering Corp and others v. Commission*, judgment of 8 July 2004, not yet reported, at paragraphs 574 to 579.

THE TRIBUNAL'S ANALYSIS

83. It is not suggested that the penalty of £15.59 million which the OFT would have imposed on Hasbro, but for the grant of full leniency, would have been discriminatory as regards Argos and Littlewoods. It is, say the appellants, the grant of immunity to Hasbro, compared with the imposition of penalties of £17.28 million on Argos and £5.37 million on Littlewoods, which gives rise to discrimination and unequal treatment in this case.

84. We deal later in this judgment with the appellants' arguments that the penalties imposed on them were in any event excessive. At this stage of the analysis, it seems to us correct to assume, for the purposes only of this submission, that the penalties imposed on Argos and Littlewoods are fully justified in themselves for the breaches of the Chapter I prohibition which those companies have committed. The question then is whether, as the appellants submit, the penalties on Argos and Littlewoods, on this hypothesis well merited, should nonetheless be reduced to nil on the grounds that Hasbro was wrongly granted full immunity, and thus "let off" altogether?

85. In answering that question, we have first asked and answered three sub-questions, as follows:

86. Should the Tribunal investigate the circumstances in which immunity was granted to Hasbro? Answer: No, if the *Woodpulp* jurisprudence is strictly applied.

87. Assuming, in the alternative, that the Tribunal should investigate the grant of leniency to Hasbro, is there in principle unequal treatment in this case? Answer: No, because the circumstances of Hasbro are different from those of Argos and Littlewoods.

88. What, if any, is the relevance to the penalties imposed on Argos and Littlewoods if the OFT granted leniency to Hasbro in breach of the *Guidance*? Answer: Any such breach is in principle irrelevant to the penalties imposed on Argos and Littlewoods, absent manifest injustice. No such manifest injustice has been shown.

Should the Tribunal investigate the circumstances in which immunity was granted to Hasbro?

89. The appellants' submission invites the Tribunal, in effect, to make findings of fact adverse to Hasbro, for example that Hasbro was "the" rather than "an" instigator, that Hasbro came forward after the investigation had started, that Hasbro failed to cooperate fully, and that Hasbro employees such as Mr. McCullough had not given truthful answers to the OFT (transcript, p. 15). However, Hasbro is not a party to these proceedings. Findings of the kind the appellants invite us to make would adversely affect Hasbro and its employees for example as regards reputation, and might possibly have other consequences, for example in the context of civil actions for damages against Hasbro.

90. In a number of appeals from decisions of the European Commission to the Court of First Instance or the Court of Justice, those Courts have declined to consider arguments that there has been a breach of the principle of equal treatment because the appellant had been fined excessively as compared with another party who was not before the Court.

91. Thus for example in *Woodpulp,* cited above, the Court of Justice said at paragraphs 196 to 197:

> "196. Finally, it should be noted that, so far as this penalty is concerned, the applicants Canfor and Westar claim to

have been discriminated against by comparison with the producer ITT Rayonier. Although that producer had also inserted clauses prohibiting export and resale in its general conditions of sale, no penalty at all was imposed on it by the Commission. Westar, which was found by the Commission to have only one contract containing the contested clause, claims to have been discriminated against it in a particularly flagrant manner.

197. That argument cannot be upheld. Where an undertaking has acted in breach of Article 85(1) of the Treaty, it cannot escape being penalized altogether on the ground that another trader had not been fined, when that trader's circumstances are not even the subject of proceedings before the Court."

92. In *Van Megen Sports v. Commission,* cited above, the Court of First Instance said at paragraph 56:

> "Finally, the applicant's reliance on the fact that no fine was imposed on Tenimport can be of no assistance to its case. An applicant may not argue from such a circumstance in order himself to escape a penalty imposed for breach of Article 85 of the Treaty when the other undertakings' circumstances are not even the subject of proceedings before the Community judicature (see Joined Cases C-89/ 85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström and Others v. Commission* [1993] ECR I-1307, paragraph 197, and *Dunlop Slazenger*, cited above, paragraph 176).

93. Similarly in *KE KELIT,* cited above, the Court of First Instance said at paragraph 101:

> "101. Furthermore, even on the assumption that the situation of some undertakings to which the contested decision was not addressed was comparable to that of the applicant, that could not in any event constitute a ground for setting aside the finding of an infringement by it, provided that the infringement was properly established on the basis of documentary evidence (*Ahlström Osakeyhtiö and Others v Commission,* cited above, paragraph 146). It is settled case-law that where the conduct of an undertaking infringes Article 85(1) of the Treaty it cannot escape any penalty on the ground that no fine was imposed on other economic operators when, as in the present case, those other undertakings' circumstances are not even the subject of proceedings before the Community judicature (*Ahlström Osakeyhtiö and Others v Commission,* cited above, paragraph 197, Case T-43/92 *Dunlop Slazenger v Commission* [1994] ECR II-441, paragraph 176, and Case T-49/95 *Van Megen Sports v. Commission* [1996] ECR II-1799, paragraph 56)."

94. Those cases suggest that, under Community law, the circumstances of Hasbro, which is not before the Tribunal, are irrelevant to the question of the appropriate penalty to be imposed on Argos and Littlewoods and that, in consequence, the Tribunal should not investigate the grant of leniency to Hasbro.

95. On the other hand, the appellants submit that the principle of equal treatment has assumed greater importance since those cases were decided. Reliance is placed in particular on *JFE Engineering*, cited above, decided in July 2004. In that case, a cartel consisted of two groups of undertakings, European and Japanese. Three European undertakings, and four Japanese undertakings, appealed against their fines to the Court of First Instance. In the Japanese cases, joined for the purposes of the judgment, the Court held that the Commission had wrongly imposed higher fines on the Japanese producers than on the European producers, contrary to the principle of equal treatment, because the Commission had failed to penalise the European producers for a separate infringement for which the Japanese producers had been penalised: see paragraphs 566 to 574 of the judgment. In reaching that conclusion, the Court held that the Japanese producers had standing to challenge the factual finding of the Commission which led to the imposition of a lower fine on the European producers: paragraphs 451 and 568 of the judgment. The Court then went on to hold that although the most appropriate way to achieve "a fair balance" between the addressees of the contested decision would be to exercise its jurisdiction to increase the fines on the European producers, that possibility had not been pleaded by the Commission, and the European producers had not been heard on that question. In those circumstances, said the Court, the most suitable way of remedying the unequal treatment in question was to reduce the fines on the Japanese producers by an appropriate amount (paragraphs 576 to 578 of the judgment).

96. According to the appellants, *JFE Engineering* shows an increased willingness by the Community Courts to examine differences in penalties imposed on undertakings participating in the same infringement. Although formally speaking, Hasbro is not before the Tribunal, the appellants submit that the Tribunal has all the material it needs in order to decide whether Hasbro was wrongly granted leniency, including Hasbro's correspondence with the OFT and the evidence of the Hasbro witnesses. The Tribunal should now find on the facts (i) that Hasbro did not qualify for leniency, at least to the

extent of 100 per cent; (ii) that there has, therefore, been a breach of the principle of equal treatment; and (iii) that the only way to remedy that breach is to quash the penalties imposed on the appellants.

97. In our judgment, the decision of the Court of First Instance in *JFE Engineering*, cited above, does not directly contradict the principle established by the constant line of authority from *Woodpulp* onwards to the effect that the Court will not entertain arguments based on the fact that another undertaking has not been fined when "the other undertaking's circumstances are not even the subject of proceedings before the Community judicature" (*KE KELIT* at paragraph 101). In *JFE Engineering*, all the relevant undertakings were the subject of proceedings before the Community judicature, and a joint hearing had been held, albeit that the various cases were the subject of separate judgments by the Court of First Instance.

98. The *Woodpulp* principle, it seems to us, reflects the fact that in many if not most cases it would be impossible or at least very difficult for the Community Court, or in the domestic context this Tribunal, to investigate the circumstances of another undertaking, who was not before it, in order to determine whether there had been a breach of the principle of equal treatment as regards the appellant who was before the Court. In any event, the Court, or in this case the Tribunal, would risk being drawn into the essentially collateral exercise of determining what was the proper penalty for the other undertaking not before it, rather than determining whether the penalty imposed on the appellant who was before it was appropriate to the infringement committed by that appellant. To attempt such a collateral exercise would, in our view, normally be inappropriate.

99. On the other hand, as we see it, the *Woodpulp* principle applies where "the other undertaking's circumstances are not even the subject of proceedings before the Community judicature". In our judgment, there is a degree of ambiguity about the ambit of that phrase. For example, in the present case, although Hasbro is not a party to these proceedings, Hasbro witnesses have given evidence, all the Hasbro documents are before the Tribunal, and Hasbro's correspondence with the OFT has been disclosed. In a practical, if not in a formal sense, Hasbro's "circumstances" do form an important part of the proceedings before the Tribunal. Those somewhat unusual facts seem to us

to be a possible basis for distinguishing this case, at least to some extent, from the factual circumstances that arose in *Woodpulp* and subsequent cases.

100. We also accept that cases such as *JFE Engineering* place emphasis on the principle of equal treatment. We do not necessarily rule out exceptional circumstances in which, notwithstanding *Woodpulp*, the principle of equal treatment might require the Tribunal to consider the penalty imposed on an appellant in comparison to that imposed on another party not before the Tribunal.

101. In light of the above, in our view the strict position is that we should not investigate the appropriateness of the leniency granted to Hasbro with a view to reducing the penalties on Argos and Littlewoods: see *Woodpulp* and subsequent cases. However, since in this case Hasbro's "circumstances" have formed part of the proceedings before the Tribunal we have decided to consider, in the alternative, the merits of the appellants' argument that there has been a breach of the principle of equal treatment, notwithstanding that Hasbro itself is not a party to these appeals.

Is there, as a matter of principle, unequal treatment in this case?

102. In dealing with the substantive question as to whether there was unequal treatment as between Argos and Littlewoods, on the one hand, and Hasbro on the other hand, we consider the matter first in broad terms. The principle of equal treatment requires that like cases should be treated alike, and unlike cases should be treated differently. In our judgment, Hasbro is in a quite different position from Argos and Littlewoods.

103. The essential feature which distinguishes Hasbro's position from that of Argos and Littlewoods is that Hasbro voluntarily came forward to the OFT with evidence of an infringement of the Chapter I prohibition. That evidence enabled the OFT to commence an investigation under the Act and ultimately to prove serious infringements of the Act on the part of Argos and Littlewoods. On the assumption, which we must make at this stage of the argument, that the penalties imposed on Argos and Littlewoods were otherwise fully merited, we see no basis in broad principle for expunging those penalties on the ground that no penalty was imposed on Hasbro. The difference between the parties is that Hasbro's evidence and assistance enabled the

OFT to prove the infringements against Argos and Littlewoods, despite the prolonged and determined resistance of the latter. It is not, therefore, in our judgment a case of failing to treat like cases alike: the two cases are quite unalike.

What is the relevance to Argos and Littlewoods even if the OFT failed to follow the Guidance in granting leniency to Hasbro?

104. The appellants, however, advance a more detailed argument, to the effect that (i) the difference between the penalties imposed on Argos and Littlewoods and the nil penalty imposed on Hasbro represents unequal treatment unless it is objectively justified (ii) that difference could be objectively justified only if the OFT had followed the *Guidance*, (iii) the OFT did not follow the *Guidance*, nor did Hasbro comply with the terms of the leniency agreement dated 18 September 2001 (iv) the unequal treatment is not, therefore, objectively justified and (v) since Hasbro's penalty cannot now be increased, the only way to cure the unequal treatment is to quash the penalties on Argos and Littlewoods.

105. In our judgment, there is an air of unreality about those submissions. Given, as we have just held, that Hasbro is in a fundamentally different position from Argos and Littlewoods, it seems to us that the OFT was, in principle, "objectively justified" in differentiating between them. Even if it were shown that the OFT had not followed the *Guidance* vis-à-vis Hasbro, it still remains the case that Hasbro, on the one hand, and Argos and Littlewoods on the other hand, are not "like cases". In our judgment, an "objective justification" for the difference in treatment thus arises, independently of the *Guidance*.

106. We accept, in principle, that when imposing a penalty on an undertaking, the OFT must "have regard" to the *Guidance:* section 38(8) of the Act. In our judgment, in the statutory context "have regard" imports a stronger obligation than merely "take into account". If the OFT were able to deviate significantly from the *Guidance* that would largely nullify the OFT's obligation not to alter the guidance without consultation (section 38(6) and 7) and render superfluous the need to obtain the approval of the Secretary of State (section 38(4)).

107. On the other hand, in our judgment it is implicit in the fact that the *Guidance* is just that – i.e. guidance, rather than precise statutory rules – that the OFT retains a margin of appreciation, both as to the interpretation of the *Guidance*, and as to its application in any particular case.

108. In the present case, Argos and Littlewoods do not complain of the application of the *Guidance* vis-à-vis themselves: they complain about the application of the Guidance vis-à-vis Hasbro, a third party. In our judgment, it is one thing if A complains that the OFT has not followed the *Guidance* in arriving at the penalty imposed on him. It is quite another thing if A argues that the OFT has not followed the *Guidance* in imposing a lesser or no penalty on B. As already pointed out above, the latter argument involves a collateral investigation into the circumstances affecting B, who is not before the Tribunal.

109. Even assuming that the matter is not entirely precluded by the *Woodpulp* jurisprudence, in our judgment any investigation by the Tribunal at the behest of A as to whether the OFT had followed the *Guidance* as regards the treatment of B, could extend at most to the question whether it is established that the OFT's treatment of B fell outside a reasonable application of the *Guidance* given the OFT's margin of appreciation in that regard.

110. Even if A were to show, to the Tribunal's satisfaction, that the OFT had applied the *Guidance* vis-à-vis B in a manner that was outwith any reasonable margin of appreciation, there would still remain the question as to what extent, if any, the Tribunal should vary the penalty on A in the exercise of its unlimited jurisdiction under Schedule 8, paragraph 3(2), of the Act.

111. As to the latter question, in our judgment the Tribunal should at most interfere only if it is satisfied that the OFT's failure to apply the *Guidance* in any reasonable way vis-à-vis B gave rise to a manifest injustice vis-à-vis A. In the present case, as we have said, we consider that Hasbro is in a fundamentally different position from Argos and Littlewoods in that Hasbro informed the OFT of the infringing agreements, while Argos and Littlewoods denied them. Accordingly we would see no manifest injustice in principle in maintaining the penalties on Argos and Littlewoods in the exercise of the

Tribunal's full jurisdiction as to penalty, even if it were shown that the OFT had acted outside any reasonable interpretation of the *Guidance* in granting leniency to Hasbro.

The submissions that the OFT wrongly applied the Guidance

112. On the basis of the foregoing, there is no need for the Tribunal to deal with the question whether the OFT did in fact wrongly apply the *Guidance* to Hasbro. We do so only in the alternative, in deference to the arguments that have been advanced. Those arguments essentially are that the OFT was wrong to grant Hasbro leniency, at least to 100%, since (i) Hasbro was "the" instigator or played "the" leading role in the cartel; (ii) Hasbro did not come forward before the relevant investigation had started (iii) Hasbro did not co-operate fully with the OFT; (iv) the OFT gave no reasons from granting leniency to Hasbro and (v) the OFT had improper reasons for granting leniency to Hasbro.

113. For the reasons given below, we do not think that any of those matters would, in any event, give grounds for reducing the penalty imposed on Argos or Littlewoods.

Is it shown that the OFT wrongly failed to find that Hasbro was "the" instigator or played "the" leading role?

114. The appellants' principal argument is that Hasbro was not entitled to full leniency because it is plain that Hasbro had "acted as the instigator or played the leading role in the cartel" within the meaning of paragraph 3 (1) of the *Guidance*. Since the OFT found, at paragraph 403 of the Decision, that Hasbro was "an" instigator, this submission largely turns on whether Hasbro is properly to be regarded as "an" instigator or "the" instigator of the infringements in question, or played "the" rather than "a" leading role in the cartel.

115. The relevant findings in the Decision are at paragraphs 403 (Hasbro) and 419 (Argos).

> "403 The OFT has considered the evidence regarding who should be considered to have been an instigator or the instigator of the infringing agreements. As noted in paragraph 296 above, it is the OFT's view that discussions between Hasbro and Argos and Hasbro and Littlewoods took place over a period of time and that there evolved an understanding (which the OFT can

> accept was partly influenced by a desire on the part of both Argos and Littlewoods to increase profitability on toys and games by moving towards RRPs) that both Argos and Littlewoods would agree to adhere to RRPs on Action Man and core games on the understanding that the other would do likewise. In the circumstances the OFT accepts it would be difficult to point to a particular meeting or discussion as the occasion when the infringing price-fixing agreements came into being. However, on any reading of the evidence the OFT believes that it is sufficiently persuasive for it to find that Hasbro acted as an instigator of the infringements. Therefore the OFT has decided to increase the amount of the penalty by 10 per cent."
>
> "419 The OFT finds that Hasbro was an instigator of the infringing agreements. While there is some evidence that Argos was an instigator, there is no clear evidence against Argos in this respect and therefore it is not appropriate to make an adjustment to the penalty for Argos in respect of this aggravating factor."

116. The appellants submit that paragraph 419 of the Decision contains a conclusion either expressly or by necessary implication that Argos was not an instigator. Since it is not suggested that Littlewoods was an instigator, that leaves only the finding in paragraph 403 that Hasbro was an instigator. Since neither Argos nor Littlewoods is found to be an instigator, it follows from the text of the Decision that Hasbro must be treated as "the" instigator.

117. In our judgment that argument is incorrect. While it is true that paragraph 419 of the Decision does not increase Argos' penalty on the ground that Argos is found to be an instigator, the OFT does find that there was "some evidence" that Argos was an instigator, although such evidence was insufficiently clear to form the basis for a positive finding that such was the case. However paragraph 419 of the Decision does not in our judgment contain a positive finding in the opposite sense, namely that Argos was *not* an instigator.

118. Similarly, paragraph 403 of the Decision finds only that Hasbro was an instigator, not "the" instigator. Indeed, the tenor of paragraph 403 of the Decision is to the effect that there were discussions "over a period of time" from which "there evolved an understanding". In such a situation we can see that it may well be difficult to pinpoint

exactly who was "the" instigator of the cartel or played "the" leading role. Indeed the fact that there was in the OFT's view "some evidence" that Argos was an instigator (paragraph 419) logically leads to the conclusion that there was some uncertainty as whether or not Hasbro was "the" (i.e. the only) instigator, albeit that the OFT was prepared to find in paragraph 403 that Hasbro was "an" instigator.

119. In our judgment paragraphs 403 and 419 of the Decision cannot be read as containing a finding that Hasbro was "the" instigator or played "the" leading role. Indeed, it is plain on the face of paragraph 403 that the OFT did not intend to make such a finding.

120. The appellants, however submit that whether the OFT intended or not, the facts found in the Decision by the OFT show plainly that Hasbro was "the" instigator or played "the" leading role in the cartel, within the meaning of the *Guidance*. As far as the Decision is concerned, the appellants rely not only on paragraphs 403 and 419, already discussed above, but also in particular on paragraphs 311 and 401.

121. At paragraph 311 of the Decision the OFT dealt with certain representations by Hasbro to the effect that Hasbro's original "pricing initiative" in 1998 was not itself unlawful, and that even if Hasbro was "a facilitator" it was not "a fixer". Paragraph 311 of the Decision states:

> "311 …In the OFT's view the evidence is strongly persuasive that at all times Hasbro was both fixer and facilitator in that it set the arrangements up, arranged for them to be extended and kept a close eye on their smooth running. That Hasbro may have had to do little active intervening only goes to demonstrate how effective the agreements were in satisfying price competition in the products in question."

122. Paragraph 401 of the Decision is in these terms:

> "401 The OFT believes that Hasbro's senior management had knowledge of, and was involved in, the agreements. In his witness statement, Neil Wilson states that "Hasbro's senior management at director level (i.e. Mike McCulloch as well as David Bottomley and Mike Brighty, both Sales Directors) developed Hasbro's strategy. David Bottomley, a Hasbro Sales Director, and Mike McCulloch, Hasbro's Head of Sales and Marketing, have both stated, in a witness statement and to OFT officials respectively, that they were aware of a pricing initiative,

> although their understanding of what this meant appears to differ. It is the OFT's view that they were fully aware of what it involved and actively encouraged its implementation. Furthermore, Mike Brighty, another Hasbro Sales Director, was clearly aware not only of the pricing initiative itself but also of its illegality when he suggested to Ian Thomson to ask Lesley Paisley of Littlewoods to delete an incriminating e-mail ("its highly illegal and It could bite you right in the arse!!!! Suggest you phone Lesley and tell her to trash?", see paragraph 73 above)."

123. The finding at paragraph 401 of the Decision to the effect that senior management of Hasbro encouraged the pricing initiative which Mr. Brighty at least knew to be unlawful at the time of the extension of the initiative to other toys and games in May 2000 is in our view inconclusive on the "instigator" issue.

124. However, we accept that the OFT's finding, at paragraph 311 of the Decision, that

> "Hasbro was both fixer and facilitator in that it set the arrangements up, arranged for them to be extended and kept a close eye on their smooth running"

supports the view that Hasbro was "the instigator or played the leading role in the cartel".

125. It is also true that, between 1 May 2002 and 11 November 2002, the OFT maintained in correspondence that Hasbro was "the" instigator. In that correspondence the OFT expressed the intention to revoke the 100% immunity granted to Hasbro in the leniency agreement of 18 September 2001, and to grant Hasbro only 50% leniency. The OFT relied on the matters set out in the annex to the OFT's letter of 11 November 2002.

126. On the other hand, in response to that letter, Hasbro argued, in the letter to the OFT from its solicitors of 27 November 2002, that (i) the burden of proof was on the OFT to show that Hasbro was "the" instigator if it wished to revoke the immunity already granted; (ii) the OFT had not produced sufficient evidence to show that Hasbro was "the", as distinct from "an" instigator; (iii) the fact that it cannot be proved that another company was "an" instigator is not sufficient to show that Hasbro was "the" instigator; (iv) the evidence showed only that Hasbro had instigated a pricing initiative in 1998 which was not itself unlawful; (v) the unlawful cartel evolved later, without it being

possible to say whether Hasbro, Argos or Littlewoods "instigated" the cartel; (vi) any "instigation" relied on necessarily took place before the Act came into force on 1 March 2000, at a time when any such activity was not contrary to the Chapter I prohibition (vii) the matters set out in the annex to the OFT's letter of 11 November 2002 were inconclusive.

127. The situation in which the OFT found itself when it adopted its first decision on 19 February 2003 was, therefore, that although there was evidence that Hasbro was "the" instigator (see paragraph 311 of the Decision), there were also arguments advanced by Hasbro going the other way. In our judgment, two particularly significant arguments were advanced by Hasbro in its letter of 27 November 2002. First, that Hasbro should not be deprived of full immunity unless the OFT could convincingly demonstrate that only Hasbro was "the" instigator, i.e. that the OFT could exclude the possibility that Argos was also an instigator; and secondly, that much of the material then being relied on by the OFT in the annex to the letter of 11 November 2002 predated the coming into force of the Act. As to the latter argument, it seems to us far from obvious that the OFT would have been entitled to deprive Hasbro of its 100 per cent immunity on the basis of alleged "acts of instigation" carried out at a time when there was no infringement because the Act was not yet in force.

128. As already set out above, in our view the question then is whether the OFT, in applying the *Guidance*, exceeded a reasonable margin of appreciation in deciding, on the evidence available, merely that Hasbro was "an" instigator, rather than going further and deciding that Hasbro was "the" instigator.

129. In answering that question – insofar as it is an exercise which the Tribunal should embark on at all – in our view the correct course is to consider the reasonableness of the OFT's decision not to revoke the grant of full immunity at the time that decision was made, i.e. at the stage of the OFT's letters of 5 and 6 February 2003 and the adoption of the first decision of 19 February 2003.

130. Notwithstanding paragraphs such as paragraph 311 of the Decision, we are unable to persuade ourselves that the OFT exceeded its margin of appreciation in applying the *Guidance* in failing to find in the Decision that Hasbro was "the" instigator or played

"the" leading role. It is not obvious to us that the balance struck by the OFT was manifestly incorrect. Essentially, the OFT had to balance the matters set out in the annex to its letter of 11 November 2002 with the arguments advanced by Hasbro in its letter of 27 November 2002. We bear in mind that despite the "must have" nature of some Hasbro products, Argos and Littlewoods are both much larger companies than Hasbro in the United Kingdom; that Argos in particular was the market leader; that the agreements or concerted practices found in the Liability Judgment required a consensus to be arrived at between the respective participants; that it is difficult to determine precisely when that consensus emerged; that much of the "instigation" relied on pre-dated the coming into force of the Act; that even if there were strong arguments that Hasbro was "the" instigator, there were arguments the other way; and that the burden would have been on the OFT to show that it was entitled to revoke the immunity granted in the letter of 18 September 2001 by establishing that Hasbro was "the" instigator.

131. In all those circumstances the appellants have not satisfied us that the conclusion that Hasbro was "the" instigator or played "the" leading role within the meaning of the *Guidance* was the only conclusion that the OFT could reasonable have reached on the material before it when it adopted the decision of 19 February 2003.

132. In our view, it would not have been open to the OFT to re-examine the question of the leniency granted to Hasbro in the light of the witness statements later provided by Hasbro employees and ex-employees following Argos' and Littlewoods' appeals to the Tribunal against the first decision of 19 February 2003. Those statements were provided after the decision of 19 February 2003 in the context of active co-operation by Hasbro employees and ex-employees with a view to sustaining that decision, which was not appealed by Hasbro. The Tribunal's judgment of 30 July 2003 [2003] CAT 16 remitted the matter to the OFT with a view to those witness statements being put to Argos and Littlewoods in the administrative procedure, and not with a view to reopening the issue of the leniency granted to Hasbro.

What is the relevance of the Tribunal's findings in the Liability judgment?

133. However, the appellants further seek to rely on the Tribunal's own findings in the Liability Judgment which, the appellants submit, find clearly that Hasbro was "the" instigator or played "the" leading role. Reliance is placed notably on paragraphs 432, 604, 730 and 732. Also relied on are paragraphs 585, 586, 592, 597 and the Tribunal's conclusions at paragraphs 727 and following which, it is said, show that Hasbro was found by the Tribunal to be the instigator, not only in relation to the initial period of the agreements, but also as regards the extension of the agreements to other products in May 2000, after the Act came into force.

134. Again, we consider that this part of the submission is unfounded. In the Liability Judgment the Tribunal was not addressing the question of whether, for the purposes of the *Guidance*, Hasbro was to be regarded as "the", rather than "an" instigator. The Tribunal was simply not applying its mind to that issue. The question the Tribunal was addressing was whether the OFT had sufficiently proved the infringements of the Chapter I prohibition alleged against Argos and Littlewoods. The Tribunal gave an affirmative answer to that question, but was not deciding the quite different question of whether or not the OFT had been correct not to revoke the grant of full immunity to Hasbro. Moreover, we do not see how we could properly have made a finding to that effect without hearing Hasbro, nor by what procedure Hasbro could have been brought before the Tribunal for that issue to be decided.

135. As to the submission that the findings of fact made by the Tribunal in the Liability Judgment necessarily give rise to the conclusion that Hasbro was "the" instigator within the meaning of the *Guidance*, even if the tenor of the evidence before the Tribunal did support the view that Hasbro was "the" instigator or played "the" leading role, it seems to us extremely doubtful whether later findings made by the Tribunal in December 2004, after full oral evidence and cross-examination, are relevant to the validity of the OFT's decision not to revoke Hasbro's full immunity taken in February 2003. Even if, in the Liability Judgment, the Tribunal had been considering the question whether Hasbro was "the" rather than "an" instigator (which it was not) and had given a judgment on that point (which it did not) any such view reached by the Tribunal would not in itself resolve the quite different question of whether *the OFT* had remained

within its margin of appreciation in deciding, in February 2003, not to withdraw full immunity from Hasbro.

136. We are un-persuaded that the particular passages of the Liability Judgment to which our attention has been drawn give rise to the unambiguous inference that Hasbro was "the" instigator rather than "an" instigator or played "the" rather than "a" leading role. However, we do not need to address that matter further since in our judgment; (i) the Tribunal has not made a definitive finding to that effect and (ii) the question is not what the Tribunal now might or might not consider Hasbro's role to have been, but whether it was reasonable for the OFT to take the view it did in February 2003.

137. We do, however, accept that in assessing in broad terms the justice of the penalties imposed on Argos and Littlewoods, we are entitled to take into account all the evidence we have heard on the appeal, including the evidence as to Hasbro's role, and the fact that Hasbro has escaped a penalty. We see that exercise not so much in terms of whether the OFT correctly applied the *Guidance*, but as part of the Tribunal's overall jurisdiction to assess the penalty taking all relevant circumstances into account.

138. However, as we have already held, in making that broad assessment we do not see it as manifestly unjust to Argos and Littlewoods that Hasbro escaped a penalty in this case, notwithstanding the role that Hasbro played. Hasbro provided the OFT with the information necessary to establish the infringements and helped the OFT to maintain those infringements before the Tribunal. Argos and Littlewoods denied the infringements. Moreover, Argos and Littlewoods are both large commercial concerns, much larger than Hasbro in the United Kingdom, and Argos is the market leader in the toys sector. Nothing compelled Argos or Littlewoods to enter into the agreements or concerted practices with Hasbro which the Tribunal has found to exist.

139. Accordingly, in our judgment, for all the above reasons, the fact that no penalty was imposed on Hasbro, notwithstanding the part played by Hasbro in the infringements in question, provides no basis for reducing the penalties imposed on Argos and Littlewoods.

Did Hasbro come forward after a relevant investigation had commenced?

140. The appellants' next submission is that Hasbro did not come forward "before an investigation had commenced" within the meaning of paragraph 3.4 of the *Guidance.* The appellants submit that the OFT had commenced an investigation into the activities of Hasbro in relation to certain distributors and retailers on 9 February 2001, and carried out an on-site investigation at Hasbro's premises on 15 and 21 May 2001. Certain information requests were sent to Hasbro and retailers such as Toys 'R' Us, Woolworths and Tesco on 10 August 2001. Those requests asked notably for information regarding Hasbro's prices and discounts over the past five years. The focus of that investigation, submit the appellants, was the enforcement by Hasbro of resale price maintenance, and there is no valid distinction between the OFT's investigation which commenced in February 2001, and the subsequent extension of the investigation to Argos and Littlewoods in September 2001. Since Hasbro only applied for leniency on 14 September 2001, Hasbro did not come forward "before an investigation had commenced" within the meaning of paragraph 3.4 of the *Guidance*.

141. Again we consider this argument to be unreal. First, the appellants accept that Hasbro could still have been entitled to full leniency, on a discretionary basis, under paragraph 3.6 of the *Guidance*. Secondly for the reasons already given, the fact that no penalty has been imposed on Hasbro does not in our view give rise to any manifest injustice vis-à-vis Argos and Littlewoods.

142. Moreover, in our judgment, the appellants' argument is unfounded, because no breach of the *Guidance* is shown.

143. As is apparent, notably, from the decision in the Distributor's case adopted by the OFT on 28 November 2002, the OFT investigation which commenced in February 2001 concerned certain contracts that Hasbro had made with some 10 distributors preventing the latter from offering discounts or rebates off Hasbro's list prices. Apparently some of the distributors in question had been selling on to customers supplied directly by Hasbro on terms more favourable than those customers could obtain from Hasbro itself.

144. Following a Rule 14 Notice issued on 1 May 2002, the OFT found, in the Distributors' decision of 28 November 2002, that an infringement of the Chapter I prohibition had

been established in relation to the distributor contracts in question. In our view, however, those contracts did not have anything to do with Argos and Littlewoods.

145. In our view it is plain that the investigation which led to the Distributors' decision was a different investigation from that which led to the Decision against Argos and Littlewoods in this case. The Distributors' investigation did not concern Hasbro's relationship with either Argos or Littlewoods, who did not figure in that investigation at all. It was only as a result of the disclosure by Hasbro, in September 2001, of the various emails and documents relating to Argos and Littlewoods that the OFT then commenced a new investigation into Hasbro's agreements with these companies.

146. The two investigations also followed separate tracks. The Distributors' investigation commenced in February 2001, involved an on-site visit at Hasbro in May 2001, the issue of various section 26 notices in August 2001, the Rule 14 notice of 1 May 2002 and the Distributors' decision of 28 November 2002. In the present case, by contrast, matters commenced with the disclosure by Hasbro of the various documents concerning Argos and Littlewoods on 14 September 2001, a separate Rule 14 notice on 1 May 2002, and the contested Decision, adopted initially on 19 February 2003 and then readopted, following the Tribunal's judgment of 30 July 2003 [2003] CAT 16, on 21 November 2003.

147. The information requests sent to retailers such as Toys 'R' Us and Woolworths, upon which the appellants rely, were, as we understand it, not prompted by any concerns that the OFT had at that stage as to any agreement or agreements between Hasbro, Argos and Littlewoods – of which the OFT had no knowledge – but solely to gather information relevant to the Distributors' investigation. Similarly the facts that some of the Hasbro employees were involved in the Distributors' investigation, and that, for convenience, the OFT's interviews in October 2001 addressed both investigations, do not mean that the OFT was not pursuing separate investigations of two distinct infringements, which led to separate Rule 14 notices, separate decisions, and separate penalties.

148. In our judgment, the requirement in paragraph 3.4 of the *Guidance* that the undertaking must come forward "before an investigation has commenced" may properly be

construed as referring to "an investigation as regards the matters for which leniency is sought", irrespective of the fact that the OFT may have already commenced an investigation into other matters. Were it otherwise, undertakings who find in the course of an investigation that they may have committed other infringements of the Chapter I prohibition, of which the OFT was currently unaware, would be discouraged from disclosing those other matters. That would undermine the effectiveness of the leniency programme.

149. For those reasons, we reject the submissions based on the time at which Hasbro "came forward" under paragraph 3.4 of the *Guidance*.

Did Hasbro co-operate?

150. The appellants further submit that Hasbro did not give the OFT "complete and continuous" co-operation throughout the investigation in accordance with paragraph 3.4(b) of the *Guidance*, and paragraph 3(b) of the leniency agreement of 18 September 2001. Paragraph 3(b) (iii) of that agreement required Hasbro "using its best efforts to secure the complete and truthful co-operation of its current and former directors, officers, employees and agents and encouraging such persons voluntarily to provide the [OFT] with any information relevant to the reported possible infringement". Paragraph 3(b) (v) required Hasbro "using its best efforts to ensure that current and former directors, officers, employees and agents… respond completely and truthfully to all questions asked in interviews".

151. We reject this submission. First, Hasbro's obligation under sub-paragraphs 3(b) (iii) and (v) of the letter of 18 September 2001 was a "best efforts" obligation. Hasbro made some 11 employees available for interview, and the fact that the OFT did not accept in its entirety the evidence of two of them does not in our view establish that Hasbro was not "using its best efforts". Secondly, as regards Mr. McCulloch, the Tribunal has no basis for finding that Mr. McCulloch's answers during interview with the OFT were deliberately untruthful, even if the OFT did not accept all his answers. A witness, albeit mistaken, may still be attempting to convey the truth as he sees it. In the Liability Judgment, the Tribunal went no further than saying that it accepted the evidence of the witnesses who it had seen and heard in preference to parts of Mr.

McCulloch's OFT statement, Mr. McCulloch not having given evidence to the Tribunal. On other parts of Mr. McCulloch's statement, however, the Tribunal found that certain passages supported the OFT (paragraphs 341 and 450 to 451 of the Liability Judgment). Similarly the Tribunal found that the evidence of Mr. Cooper tended to support the OFT's case (paragraph 343).

152. We do not therefore accept that the answers Mr. McCulloch and Mr. Cooper gave to the OFT involved a breach by Hasbro of the leniency agreement of 18 September 2001.

153. The appellants' next submission is that Hasbro did not give complete and continuous co-operation within the meaning of paragraph 3.4 (b) of the *Guidance* and paragraph 3 (b) of the leniency agreement in that, in its reply to the Rule 14 notice, Hasbro made only the most minimal of admissions (if that), maintained that its original pricing initiative was lawful, and contested the width of the infringement set out in the Rule 14 Notice.

154. We accept that Hasbro did put in issue a number of matters set out in the Rule 14 Notice of 1 May 2002, as set out in paragraphs 305 to 313 of the Decision. As appears from those passages, Hasbro's submissions mainly were that the original pricing initiative was not unlawful, and that the agreements in question were confined to the exchange of confidential information. The OFT rejected those arguments, principally on the basis that "what may have started as a lawful pricing initiative" then led "seamlessly" into unlawful agreements to fix retail prices (paragraphs 306 to 309). Hasbro did, however, admit "that it assisted Argos and Littlewoods to gain reassurance from each other that each intended to price certain Hasbro products at RRP" (paragraph 305). It addition, it was Hasbro which provided the relevant documentary evidence to the OFT, and made its employees available for interview.

155. The OFT's *Guidance* does not deal with the relationship between the obligation of the leniency-seeker to maintain complete and continuous co-operation, on the one hand, and the extent to which the leniency-seeker may legitimately contest the Rule 14 Notice, on the other hand. In many cases this conflict will not arise, since the leniency-seeker will not necessarily wish to contest the scope of the infringement, which will already be apparent from the material supplied to the OFT by the leniency-seeker.

156. However in this case, at the stage of the Rule 14 notice, the OFT had informed Hasbro that it was minded to withdraw Hasbro's full immunity. Hasbro was therefore at risk of a substantial penalty, albeit at the reduced rate of 50 per cent under paragraph 3.8 of the *Guidance*. In those circumstances, it seems to us that it was legitimate for Hasbro to defend its interests by arguing that the scope of its infringement was narrower than that alleged in the Rule 14 notice. Were it otherwise, an undertaking facing at least a 50 per cent penalty under paragraph 3.8 of the *Guidance* would never be able to defend itself on the basis that the infringement was too widely expressed, given that the obligation of "complete and continuous co-operation" applies under paragraph 3.8 as well.

The submission that the OFT failed to give reasons

157. The appellants submit that no adequate reasons are given in the Decision for the grant of leniency, nor in the OFT's letters of 5 and 6 February 2002. The OFT, in its skeleton argument, submits that notwithstanding the views expressed in its letter to Hasbro of 11 November 2002 "it revised its opinion in the light of all the facts and submissions made by Hasbro".

158. We observe that paragraph 411 of the Decision merely states that "Hasbro applied for and received 100 per cent leniency in respect of findings of infringement in its dealings with retailers". The letters of 5 and 6 February 2003 do not elaborate on the OFT's reasons, although it is in our view a reasonable inference that in reaching the view set out in those letters the OFT had taken account of Hasbro's submissions in the letter of 27 November 2002.

159. In our judgment the OFT's duty to give reasons in infringement cases (which is generally accepted but appears not to have been set out expressly in the Act) does not ordinarily extend to spelling out, in the Decision, the detailed circumstances in which leniency has been accorded to a particular party. The fact that it is stated that Hasbro applied for and receive leniency necessarily implies that, in the OFT's view, the conditions for the grant of leniency are fulfilled in accordance with the *Guidance*. If in a particular case, it was necessary to go further into the matter in the course of an appeal, the Tribunal's procedures are sufficiently flexible to permit that to be done.

The submission that the OFT's action was improperly influenced by extraneous considerations

160. Finally the appellants make what is very near to being an allegation of improper conduct against the OFT, namely that the OFT's decision of 5 February 2003 not to revoke Hasbro's immunity from penalty was motivated or at least influenced by the belief that if the OFT were to maintain Hasbro's full immunity, Hasbro would not proceed with its appeal in the Distributors' case lodged with the Tribunal on 29 January 2003, following Hasbro's unsuccessful application for an extension of time on 24 January 2003. At the very least, submit the appellants, the OFT's decision on leniency of 5 February 2003 took into account an irrelevant consideration.

161. Shortly before the hearing of the appeal on penalty, the appellants asked the OFT to disclose its internal documents relating to the grant of immunity to Hasbro, but the OFT declined to do so. No application for disclosure was made to the Tribunal.

162. In our judgment there is no evidence to support this submission and no basis on which the Tribunal could draw the inference which the appellants invite us to draw. We bear in mind that in the leniency agreement of 18 September 2001 the OFT had already granted Hasbro full immunity. Hasbro had provided internal documentary evidence and made its employees available. The OFT would have needed a reasoned basis, in the Decision, for reducing Hasbro's immunity to 50 per cent, were it minded to do so. The OFT would have had to address the arguments put forward by Hasbro in its letter of 27 November 2002. For the reasons already given, the OFT's decision not to proceed down that path is not shown to have been unreasonable. We see no reason to attribute to the OFT some ulterior motive based on the timing of events in the Distributors' appeal.

163. We therefore conclude that the appellants' arguments based on breach of the principles of equal treatment or non-discrimination do not provide a basis for reducing the penalties on Argos and Littlewoods.

V THE ISSUE OF THE RELEVANT PRODUCT MARKET

ARGUMENTS OF THE PARTIES

164. Argos submits that the OFT erred in its definition of the relevant product market for the purposes of calculating the penalties to be imposed. Argos argues, essentially, that a much more detailed approach was called for than that to be found at paragraph 412 of the Decision. The fact that it is not necessary to define the relevant market for the purposes of establishing an infringement does not relieve the OFT of its obligation to carry out a full analysis of the relevant market for establishing the appropriate penalty. The OFT cannot simply rely on citations from a few sources, but must rather undertake a proper economic analysis. Indeed, the various citations at paragraphs 24 to 30 of the Decision show that the categories chosen by the OFT are far too wide to constitute relevant product markets. Because of the OFT's inadequate approach, submits Argos, the relevant product markets should be limited to the markets for the specific Hasbro products the subject of the infringement. On that approach, in its case, the "relevant turnover" for Argos for the purposes of Step 1 in the penalty calculation is £20.21 million (i.e. Argos' turnover in Hasbro products) rather than £181.11 million set out in paragraph 412 of the Decision.

165. The OFT, for its part, submits that its approach to the relevant market should not be interfered with. It points out that it did consider, with reference to various evidence, the issues of demand-side and supply-side substitutability at paragraphs 24 to 30 of the Decision. Rather than take a wider approach, namely that the relevant market comprised all toys and games generally, the OFT concluded that it was more in line with market practice to classify the relevant product markets more narrowly into categories along the lines adopted by Hasbro and Argos themselves.

166. The OFT further submits that Argos did not challenge this approach at the stage of the Rule 14 notice; indeed it implicitly agreed with the use of separate categories. Even at the appeal stage, Argos has not come up with their own suggestion of the relevant market, confining itself instead to arguing that the Tribunal should adopt the "default" position that the market comprises only those products the subject of the infringement.

That approach, says the OFT, is absurd: common sense dictates that each of the toys to which the infringement related does not constitute a separate product market.

167. Finally the OFT argues that the figure at Step 1 of the penalty calculation is only a starting point. The purpose of defining the market in cases such as the present is very different from that in cases involving the application of the Chapter II prohibition contained in section 18 of the Act: there is no obvious reason why the same extensive exercise should be conducted simply to work out the starting point of a penalty assessment.

THE TRIBUNAL'S ANALYSIS

General observations

168. We observe, first, that the *Guidance* is what it says, namely guidance, and is not to be construed as if it were a statute. Secondly, as we have already held, the OFT has a margin of appreciation in applying the *Guidance*. Thirdly, whether or not the OFT correctly applied the *Guidance*, the Tribunal retains jurisdiction under Schedule 8, paragraph 3(2), of the Act, to fix the penalty. In our view that jurisdiction applies even if the OFT has mistakenly applied the *Guidance*, or if the application of *Guidance* produces a result that, in the Tribunal's view, does not properly reflect the justice of the case. The Tribunal will, however, take into account the *Guidance* when reaching its own conclusions as to what the penalty should be: *Napp*, cited above, at paragraph 500.

169. The *Guidance* is published with the laudable objective of providing an outline framework for the calculation of penalties by the OFT. In our view, however, it would not be appropriate to analyse each individual "Step" in arriving at the penalty in isolation from the other Steps.

170. For example, the percentage "starting point" used under Step 1, when applied to the relevant turnover, may give rise to a figure which, in the OFT's view, is too low from the point of view of deterrence. If so, a multiplier may be applied to that figure under Step 3. On the other hand, if the Step 1 figure is high enough, a low multiplier or even no multiplier need be applied at Step 3. The consequence of this is that even if it is

arguable that, in a given case, the OFT's approach to the relevant market under Step 1 is open to criticism, one must also bear in mind that it would have been open to the OFT to choose a different multiplier under Step 3, with the consequence that the overall figure arrived at might well have been no different. The same applies to the percentage starting point identified for the purposes of Step 1. If a different percentage starting point had been identified, producing a lower figure at Step 1, there is still the possibility that a different multiplier would have been applied at Step 3, so as give the same result. Similarly, the various adjustments for aggravating and mitigating factors under Step 4 are in our view bound to have regard to the question whether the final figure to be arrived at is proportionate to the infringements involved, looking at the matter in the round.

171. In other words, although each Step of the *Guidance* is formally distinct, the *Guidance* in our view cannot be treated as if the OFT is merely making a mechanical calculation according to a predetermined mathematical formula. Although no doubt the OFT's calculations should be carried out as objectively as possible, the *Guidance* contains, rightly in our view, a number of subjective areas of judgment which necessarily play a part in fixing the final penalty.

172. In our view in all those circumstances the Tribunal should focus primarily on whether the overall penalty imposed is appropriate for the infringements in question. In our view, provided that the OFT has remained within its margin of appreciation in applying the *Guidance*, the Tribunal's primary task is to assess the justice of the overall penalty, rather than to consider in minute detail the individual Steps applied by the OFT, particularly as regards Step 1 and Step 3. The criticisms by the appellants in this case directed at Step 1 should not overlook the fact that, had the OFT taken a different starting point at Step 1, a different calculation could have been used in Step 3, for example.

173. Thus, in the present case, the OFT's calculations under Step 1, as adjusted for duration under Step 2, led to a penalty of £19.2 million for Argos. The OFT considered that that penalty was sufficient to act as an effective deterrent for Argos and, in consequence, decided not to apply a multiplier to that figure at Step 3. In our view it cannot be

assumed that the OFT would have applied no multiplier at Step 3 if the Step 1 calculation had been done differently, producing a lower figure.

The relevant market in a Chapter I case

174. Against that background, we turn to the issue of the relevant market calculation in the present case, which is a Chapter I case. Paragraph 2.3 of the *Guidance* provides:

> "2.3 The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated by applying a percentage rate to the "relevant turnover" of the undertaking, up to a maximum of 10%. The "relevant turnover" is the turnover of the undertaking in the relevant product market and relevant geographic market[7] affected by the infringement in the last financial year. This may include turnover generated outside the United Kingdom if the relevant geographic market for the relevant product is wider than the United Kingdom."

175. Footnote 7 to that paragraph reads as follows:

> "See the Competition Act guideline *Market Definition* for further information on the relevant product market and relevant geographic market. The relevant product market and relevant geographic market will be determined as part of the Director's decision that an infringement has taken place."

176. Pausing there, the second sentence of the above footnote is in our view incorrect insofar as it might be taken to imply that the OFT is always obliged to determine the relevant product market or relevant geographic market when finding an infringement of the Chapter I prohibition. In Chapter I cases, unlike Chapter II cases, determination of the relevant market is neither intrinsic to, nor normally necessary for, a finding of infringement: see *Volkswagen v. Commission*, cited above.

177. As is apparent from the guideline on *Market Definition* (OFT 403, March 2000) referred to in the footnote cited above, the primary purpose of defining the relevant product market is to determine whether an undertaking has market power: see section 2 of OFT 403. But market power is irrelevant in a case such as the present, which concerns Chapter I infringements and not, for example, an abuse of dominance under Chapter II where the issue of market power would be highly relevant. Paragraph 2.2 of

OFT 403 itself recognises that a finding that a price fixing agreement infringed the Chapter I prohibition does not require any determination of market power.

178. In our judgment, it follows that in Chapter I cases involving price-fixing it would be inappropriate for the OFT to be required to establish the relevant market with the same rigour as would be expected in a case involving the Chapter II prohibition. In a case such as the present, definition of the relevant product market is not intrinsic to the determination of liability, as it is in a Chapter II case. In our judgment, it would be disproportionate to require the OFT to devote resources to a detailed market analysis, where the only issue is the penalty.

179. We therefore reject Argos' submission that in a case such as the present the OFT is required to prove the relevant market used for the purposes of the Step 1 calculation in the same way as it would need to establish the relevant market in a case of dominance, for example. In our view, it is sufficient for the OFT to show that it had a reasonable basis for identifying a certain product market for the purposes of Step 1 of its calculation.

180. We observe next that although Step 1 refers to the turnover in the "relevant product market… affected by the 'infringement'" any link sought to be made in the calculation between the infringement and its possible effect on the market concerned, may be somewhat arbitrary.

181. For example, under Step 1 the "relevant turnover" is the undertaking's turnover "in the relevant product market… affected by the infringement in the last financial year". The OFT considers that the "last financial year" is the business year preceding the date when the infringement ended (Decision, paragraph 376). Suppose the case of an undertaking which is guilty of an infringement between March and September 2004, and whose last financial year ended 31 December 2003. In that example, the relevant turnover under Step 1 of the *Guidance* is the turnover in the relevant product market in the whole of 2003, not the turnover in the products which were subject to the infringement. In this example there is no obvious connection between "the relevant turnover" and the turnover relating to the infringement, which in this example took place over a shorter period and at a later date.

182. In those circumstances, when assessing the reasonableness of the OFT's calculation in a given case, the Tribunal is prepared to accept that such a calculation may contain an arbitrary element, provided of course that the overall figure resulting from the totality of the calculation is appropriate to the infringement in question.

183. In this case Argos' financial year is taken by the OFT to be the year ending 24 March 2001 and Littlewoods' financial year is taken to be the year ending 30 April 2001. That coincides, as it happens, largely with the period of infringement.

The relevant product market in this case

184. Turning to the relevant product market(s) used by the OFT in this case the OFT identified separate product markets for the following categories: boys' toys, games and puzzles, hand-held electronic games, girls' toys, creative, plush, and infant and pre-school. It is clear the OFT's approach in this case was to identify particular broad categories of toys and games, without investigating whether, within those categories there were relevant sub-markets: see paragraph 27 of the Decision. No challenge is made by Argos to the categories identified as such; what is said is that it cannot be assumed that all the toys within each category necessarily constitute a relevant market in the sense of the *Guidance*.

185. We accept Argos' submission that the analysis in support of the categories constituting the relevant product market set out in paragraphs 23 to 36 of the Decision would not be adequate to establish that those categories constituted relevant markets for the purposes of establishing dominance in a case under the Chapter II prohibition. We also accept that at least two of the decisions cited by the OFT in paragraphs 24 and 25 of the Decision, namely the decision of the Conseil de la Concurrence in France in the Barbie doll case and the decision of the US Supreme Court in the *Toys 'R' Us* case, suggest that in some contexts relatively narrow product markets may be found, e.g. fashion dolls of the Barbie or Sindy type models may be held to constitute a separate market from dolls generally. We therefore accept Argos' submission that those cases do not appear to support, and at first sight tend to contradict, the product categories identified by the OFT as relevant product markets in this case. It is also common ground that the OFT carried out no economic analysis (for example using a SNIPP test) to determine

how far the products *within* each of the categories identified by the OFT were substitutable for each other.

186. However, at paragraphs 26 to 29 of the Decision, the OFT supports its approach by reference to (i) a report by Mintel Market Intelligence, which apparently treats toys and games as being divided into recognisably different sectors (ii) the fact that the OFT's categorisation is also used internally by Hasbro and by Argos' buying department and (iii) market research commissioned by Hasbro, which is said to focus "on individual categories or even individual brands", together with the fact that Hasbro monitors competitors' sales within the categories concerned (paragraphs 26 to 29 of the Decision). At paragraph 30 the OFT concludes that there is little likelihood of supply side substitution between the categories.

187. That evidence in our view supports the conclusion that in the toys industry there are recognised market sectors which broadly correspond to the categories identified by the OFT. We also note that paragraph 37 of the Decision sets out Hasbro's share of supply for traditional toys and games in the United Kingdom by reference to, notably, the categories boys' toys, games and puzzles, girls' toys, creative, plush and infant and pre-school. The fact that data is apparently collected and presented by the market research organisation NPD by reference to those categories is in our view a strong indication that from a business point of view there is a recognised market for boys' toys, or games and puzzles, or as the case may be.

188. We do not consider it necessary, in the context of the calculation of the penalty, for the OFT to have broken down the categories any further, by reference to a SNIPP test or similar exercise. In the first place, as OFT 403 *Market Definition* points out, at paragraph 2.8, the SNIPP test based on the hypothetical monopolist is an exercise to determine market power, but in this case, which is a Chapter I case, the issue of market power does not arise. Moreover it seems to us that it would have been quite unrealistic, and a massive waste of resources, to expect the OFT to conduct a SNIPP test type analysis to determine relative price elasticities between what may well be very many products within each market category, simply as an exercise of the calculation of a penalty. The single and in our view erroneous reference to *Market Definition* in footnote seven to the *Guidance* is not in our view a sufficient basis for saying that that

was what the *Guidance* required the OFT to do. The OFT's approach in this case had the merit of simplicity, and we are not prepared to say that it was unreasonable.

189. We also note that none of the three principal parties contested the OFT's approach at the stage of the Rule 14 notice. Hasbro, moreover, argued that a particular toy should be categorised as "Plush" rather than as "Infant and Pre-School", an argument which the OFT rejected at paragraph 389 of the Decision. The fact that Hasbro, one of the largest toy manufacturers in the world, did not challenge the OFT's market categories, but only which toy belonged to which, strongly suggests to us that Hasbro saw the sense of the market categories relied on by the OFT. The same may be said of Argos and Littlewoods, who made no challenge either, despite disputing numerous other points in the Rule 14 notice.

190. In our view the issue is not raised by Littlewoods in its notice of appeal. Although the issue is raised by Argos, Argos has not identified any alternative relevant product market other than "the Hasbro products concerned". We regard that latter suggestion as fanciful since, on any view, the products sold by Hasbro are in competition with other products, and there is no evidence before the Tribunal to suggest that "Hasbro products" form a relevant market in themselves.

191. Moreover Argos has not adduced any economic or other evidence to show that the OFT's categories are too widely drawn, although it had every incentive to demonstrate that such was the case. Instead Argos simply asserts that the OFT has not sufficiently "proved" the relevant market on which it relies. Our view, however, is that there is sufficient material before the Tribunal to show that the OFT's approach was not unreasonable. Argos has produced no evidence to the contrary, nor to suggest a credible alternative relevant market.

192. In these circumstances we are not persuaded that the OFT exceeded its margin of appreciation in taking as a starting point the market sectors boys' toys, games and puzzles, hand-held electronic games (distinguished from traditional games for the reasons given in paragraphs 31 to 34 of the Decision) girls' toys, creative, plush and infant and pre-school as the relevant product market(s) for the purposes of the penalty calculation. As the OFT pointed out in argument, a purchaser who is looking for a toy

for a boy, may be expected to consider the range of "boys' toys" in order to find what he is looking for.

The turnover brought into the calculation

193. There is, however, a further stage in the argument advanced by Argos. As indicated in the Liability Judgment, the infringing agreements initially concerned Hasbro's Action Man and Core Games, which fall within the boys' toys and games and puzzles categories respectively. However the infringing agreements were extended for the Autumn/Winter 2000 and Spring/Summer 2001 catalogues to a number of other products mentioned in Hasbro's email of 18 May 2000. According to paragraph 389 of the Decision, those products fall into the categories indicated below[2]:

Baby All Gone	Girls' toys
Tweenies All Story Time Product	Infant and Pre-school
Get Set	Creative
Chocolate Factory	
Egyptian Mystery	
Mastering Mosaics	
Gardener's Galore	
Design and Draw	Creative
Spirograph	
Super Sticker Factory	
Tweenies All Standard Plush	Plush
Tweenies Cuddle and Squeeze	Plush
Doodles	
Monopoly	Hand-held electronic games
Bop-It	Hand-held electronic games

194. The approach of the OFT in the Decision seems to have been to bring into the calculation as "relevant turnover" the total turnover of each of Hasbro, Argos and Littlewoods respectively in each of the categories represented by one or more of the products mentioned in the email of 18 May 2000. In other words, by virtue of the

[2] The other products mentioned in the email of 18 May 2000 but not referred to in paragraph 389 of the Decision, namely Battle Figures, Pokeball Blaster, Interactive Pikachu, Transfiguring Team Truck and Rally Race Track fall into the category "Boys' toys".

products mentioned in the email of 18 May 2000, the OFT brought in as "relevant turnover" the total turnover of each respective party in the categories girls' toys, infant and pre-school, creative, plush and hand-held electronic games.

195. The overall turnover by category brought into account for Hasbro, Argos and Littlewoods respectively can be seen in the following table:

Relevant Turnover used by the OFT in the penalty calculation

£ million

	Hasbro	Argos	Littlewoods
Boys' toys	54.2	39.0	12.4
Games and puzzles	33.2	15.3	4.5
Hand-held electronic games	1.7	25.3	4.9
Girls' toys	1.5	48.8	17.2
Creative	2.9	14.6	4.7
Plush	14.0	11.0	1.4
Infant and pre-school	16.7	27.1	11.2
	124.2	181.1	56.32

196. Argos' essential submission is that it is wrong to bring into account the whole turnover of each of the above categories, at least without showing some competitive relationship between the Hasbro products and the other toys or games within the category concerned.

197. According to the table set out at paragraph 39 of the Decision, Hasbro's market shares in the above categories (except hand-held electronic games which is not shown) were as follows in the period 1999 to 2001.

Hasbro shares of supply (%) 1999 to 2001

	1999	2000	2001
Boys' toys	33.9	25.5	16.5
Games and puzzles	39.5	46.4	42.8
Girls' toys	3.4	2.4	1.2
Creative	5.9	5.1	1.1
Plush	35.1	28.6	15.6
Infant and pre-school	3.0	3.4	2.7

Observations on the turnover brought into the calculation

198. Taking first boys' toys, Hasbro had a share of 25 per cent in 2000, the main year of the infringements, and averaged a share of around 25 per cent of that sector during the period from 1999 to 2001. The Action Man range was the best selling boys' toy, and brand leader, and the Pikachu range was extremely popular in the period around 2000 (footnote 21 to the Decision). The OFT also finds, at paragraph 385 of the Decision that, given Hasbro's strong market position in boys' toys and games and puzzles, the infringing agreements would have had the effect of enabling the prices of competing brands to be maintained at prices that were higher than those that would have prevailed had there been no agreements. That finding has not been challenged in the appeal.

199. In those circumstances, bearing in mind Hasbro's leading position, the likely repercussions of the agreements in the boys' toys sector, and the fact that various boys' toys were the subject of the extended agreements in 2000 as well as the original agreements, in our view it was reasonable for the OFT to bring in as a starting point in the calculation of penalty the total turnover of each party in boys' toys. The appellants have not produced any evidence to show that some boys' toys should be excluded.

200. The same analysis applies to games and puzzles, where Hasbro commanded nearly half the market in 2000, and had an average share of over 40 per cent during the period 1999 to 2001. Again, many well known branded products were involved. The finding at paragraph 389 of the Decision that the infringements would also have affected the prices of competing products is made in relation to games and puzzles as well as boys' toys. Again, in the absence of any evidence to support a contrary approach, it was in our view reasonable for the OFT to include the whole turnover of each party in games and puzzles in the calculation.

201. Although not specifically mentioned in paragraph 389 of the Decision, in our view the same analysis would also apply to plush, where Hasbro had a market share of nearly 30 per cent in 2000, and an average share of around 28 per cent in the period 1999 to 2001. It can reasonably be assumed in our view that the pricing of Hasbro's products would have had an effect on the prices of other products in the plush sector.

202. As regards girls' toys, creative and infant and pre-school, Hasbro's market shares in those categories are much less, roughly in a range of 2 to 5 per cent. The infringements from May 2000 onwards involved one girls toy (Baby All Gone), two creative ranges (Get Set and Design and Draw), and one infant and pre-school product (Tweenies All Story Time Product). In addition there were two hand-held electronic games products (Monopoly and Bop-It) although we have no information about Hasbro's market share in electronic games. On that footing the OFT brought in to account for the calculation of the penalty the whole turnover of Argos and Littlewoods in those sectors, as follows:

	£ million	
	Argos	Littlewoods
Hand-held electronics	25.3	4.9
Girls' toys	48.8	17.2
Creative	14.6	4.7
Infant and pre-school	27.1	11.2
	115.8	38.0

203. We understand the OFT's approach which, put simply, is that if there is one product subject to the infringements which falls within a category identified as a relevant product market, that is sufficient to bring into the calculation as relevant turnover the parties' total turnover in that category, that being a "relevant product market affected by the infringement" within the meaning of the *Guidance*.

204. As already pointed out above, the calculations required by the *Guidance* have certain arbitrary elements. The OFT's approach represents a simple and understandable starting point, and is not devoid of any rational basis. It avoids detailed economic analysis, which in our view is desirable when it comes to the calculation of the penalty. If the overall penalty produced by the OFT's approach is appropriate, we should in our view be slow to interfere with the detailed calculations. As seen in Section VIII of this judgment, we do not consider that the overall penalty arrived at by the OFT is disproportionate.

205. On the other hand, we can also see that in product categories where Hasbro has only a small market share and there are only one or two infringing products, any suggested link between the infringement and the total turnover in the product category concerned may, economically speaking, be tenuous. Thus, for girls' toys for example, there is

only one infringing product. Hasbro's total sales in that category to all its customers amount to only £1.7 million, yet the OFT has brought into account a turnover of £48 million for Argos and £17 million for Littlewoods.

206. In those circumstances, our view is that the OFT's approach is insufficiently supported by evidence or analysis, insofar as the OFT has brought into account the whole of the turnover for the sectors girls' toys, infant and pre-school, creative and hand-held electronic games. On the other hand, in our view a proportion of that turnover should be included, since infringements relating to products in that sector did occur. We have already held that the total turnover relating to boys' toys, games and puzzles, and plush should be included in any event, for the reasons given above.

207. We also bear in mind that in its original calculation the OFT did not apply a multiplier for deterrence under Step 3. If the turnover base used under Steps 1 and 2 were to be reduced, in our view the question whether the resulting penalty was sufficiently high to have the necessary deterrent effect would have to be re-examined.

208. Thus, to illustrate the latter point, suppose hypothetically that the OFT had taken as its calculation total turnover for boys' toys, games and puzzles and plush, while allocating an arbitrary 5 per cent of turnover to girls' toys, infant and pre-school, hand-held electronics and creative. On that hypothetical basis, the OFT's calculation would be approximately as follows for Argos and Littlewoods:

	£ million	
	Argos	Littlewoods
Boys' toys	39.0	12.4
Games and Puzzles	15.3	4.5
Plush	11.0	1.4
Hand-held electronics, girls' toys, creative and infant and pre-school	5.8	1.9
Total relevant turnover	71.0	20.2
of which 10% under Step 1	7.10	2.02
Add adjustment for duration for boys' toys, games and puzzles under Step 2	1.08	0.338
Total after Steps 1 and 2	8.18	2.358

209. In our view, penalties of that order would not have a sufficient deterrent effect in the circumstances of this case, and would have called for an adjustment by the OFT under Step 3. In our view a multiplier in the range between 2 and 3 would have been fully justified. If, hypothetically, the OFT had then applied to those figures a multiplier of 2.5 under Step 3 to ensure deterrence, the resulting figures of £20.45 million for Argos and £5.90 million for Littlewoods are very close to the figures arrived at by the OFT at Step 3.

210. In our view those are illustrative calculations which the OFT would have been fully entitled to make, and which the Tribunal would if necessary be prepared to make, in order to ensure that the penalties imposed were adequate for the purposes of deterrence. Since the appellants resist remitting the matter to the OFT, in our opinion the Tribunal should make its own assessment of the penalty, bearing in mind the above considerations. The Tribunal's own assessment is set out in Section VIII below.

211. In those circumstances we reject Argos' submissions on the relevant market issue, subject to the Tribunal's overall assessment set out under Section VIII below.

VI THE STARTING POINT OF 10%

212. The appellants submit that the OFT erred in calculating the starting point for the penalty by reference to 10% of relevant turnover. This, it is submitted, was not a classic price-fixing agreement involving direct horizontal contact, but rather a much looser exchange of information which was, moreover, very common in the industry. The line between permissible and impermissible discussions is very fine and not very clear. In particular, says Littlewoods, it was unclear whether the communications between the parties displayed the requisite "concurrence of wills" such as to amount to a concerted practice. It was not clear, until the Liability Judgment, that the judgment of the Court of Justice in Case C-2/01 *Commission v Bayer*, 6 January 2004, had not qualified the principles set out in Case 40/73 *Suiker Unie v Commission* [1975] ECR 1663. In any event such an exchange of information should, say the appellants, attract a figure lower than 10%.

213. In accordance with the approach set out earlier in this judgment, we consider that the OFT has a margin of appreciation in how it applies each step of the *Guidance*: the Tribunal's primary task is to determine whether the overall figure the OFT ultimately arrives at is an appropriate penalty in all the circumstances.

214. At paragraphs 376 to 386 of the Decision the OFT explains its reasons for choosing the 10% starting percentage. These include the seriousness of price fixing agreements which, in accordance with paragraph 2.4 of the *Guidance*, will normally attract a starting percentage at or near 10% of the relevant turnover; the fact that the present case concerns familiar, well-known consumer goods; that the market is aimed at children, whose parents come under pressure to buy the toys or games in question; that the Hasbro group is one of the two leading toy manufacturers in the world, selling well-known branded products with "must have" status; that retail prices were higher than they otherwise would have been; that because Argos was the price leader, the effect of the agreements was likely to extend beyond Argos and Littlewoods to the prices of other retailers of Hasbro products; and that the price of competing products would also have been likely to be higher.

215. In our judgment, in the light of the above factors, the OFT was within its margin of appreciation in deciding that a starting percentage of 10% was appropriate.

216. It is true that in applying the *Guidance*, the OFT needs to leave itself room for manoeuvre to deal with cases of the most serious kind. For that reason, in the criminal context, the maximum statutory penalty is only rarely applied, that being reserved for the worst cases. However under the system envisaged by the *Guidance*, the seriousness of a particular case can be further taken into account by the cumulative adjustments for duration (Step 2) for deterrence (Step 3) and for aggravating, factors at Step 4. In those circumstances we see no objection in principle to the OFT using a starting percentage at or near 10% in price fixing cases such as the present.

217. As to the appellants' argument that this was a less serious price fixing agreement than some that could be envisaged, we regard this as a serious case of infringement for the reasons given by the OFT and summarised above. Manufacturers of well known goods and leading retailers must expect the OFT to take an extremely serious view of the

activities here in question. We do not, moreover, share the appellants' view that this case was necessarily less serious than a "classic" price fixing agreement, or that all that was involved was a "much looser" exchange of information. In our view this case involves subtle and largely oral agreements or concerted practices in which Argos and Littlewoods contrived, with Hasbro acting as middleman and go-between, to raise retail prices to RRPs on the basis of assurances from Hasbro that they would not be undercut by the other party if they did so. The parties largely avoided putting anything in writing, at least until the emails of 18 and 19 May 2000 gave the game away. In our view agreements or concerted practices of this kind are no less serious than more formal price-fixing agreements.

218. Finally, we reject the submission that there was uncertainty as to what was lawful and what was not, or as to where the line was. As set out in detail in the Liability Judgment, the facts of this case give rise to agreements and concerted practices which were plainly contrary to the Chapter I prohibition in accordance with well known legal principles. If, as the appellants submit, practices of the kind here in question are common in the industry, that in our view is all the more reason for the OFT to take a serious view.

VII OTHER MATTERS

219. We deal here with a number of miscellaneous submissions advanced by the appellants.

The submission as to "negligence"

220. First the appellants submit that the OFT erred in coming to the conclusion that the infringements were committed negligently. They say that there was genuine uncertainty as to whether the conduct complained of amounted to an infringement of the Act. In particular, it is submitted that the proposition of law found in paragraph 659 of the Tribunal's judgment in *JJB and Allsports v OFT* [2004] CAT 17 and applied to this case was not one that had been clearly established previously. Argos adds that the cases referred to by the Tribunal in *JJB and Allsports*, namely Cases T-25/95 etc *Cimenteries v Commission* [2000] ECR II-491 and Cases T-202/98 etc *Tate & Lyle plc v Commission* [2001] ECR II-2035, were decided after the infringements took place.

221. The Tribunal has previously held that an infringement is committed intentionally for the purpose of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting 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. The OFT is not, however, obliged to decide whether an infringement is committed intentionally or negligently: see *Napp*, cited above, at paragraphs 453 to 457.

222. At paragraph 372 of the Decision the OFT found that Argos and Littlewoods had infringed the Chapter I prohibition intentionally or negligently:

> "The agreements were clearly intended to fix the resale prices of certain Hasbro products and the parties could not have been unaware that resale price fixing amounted to a restriction of competition."

223. In the Liability Judgment the Tribunal held at paragraphs 658 to 777 that each of Argos and Littlewoods had entered into a bilateral agreement, or at least a concerted practice, with Hasbro to sell Action Man and Core Games, and later other products, at the resale prices recommended by Hasbro. We have no doubt that neither Argos nor Littlewoods could have been unaware that such an agreement or concerted practice as to resale price maintenance had as its object or would have the effect of restricting competition. At the very least, Argos and Littlewoods ought to have known that such would be the case. Those bilateral agreements were thus plainly entered into either intentionally or negligently within the meaning of section 36(3) of the Act, in our judgment.

224. The Tribunal further held that there was a trilateral concerted practice between Hasbro, Argos and Littlewoods to the effect that Argos and Littlewoods would to a material extent each price at or near Hasbro's RRPs on Action Man and Core Games, and later other products. In our view the parties could not have been unaware, or at the very least ought to have been aware, that such a concerted practice had as its object or would have as its effect a restriction on competition.

225. Nor do we accept that the Tribunal's reasoning as set out at paragraphs 778 to 790 of the Liability Judgment involves any new principle of law. The prohibition on *indirect*

contacts between economic operators the object or effect of which is to influence the conduct on the market of an actual or potential competitor, or to disclose a future course of conduct, or reduce uncertainty on the market, has been established at least since *Suiker Unie*, decided in 1975, at paragraphs 174 to 175. Paragraphs 778 to 790 of the Liability Judgment apply the principles of *Suiker Unie* to the facts of this case.

The alleged gain

226. The parties submit that the OFT erred in finding at paragraph 417 of the Decision that they had made a "considerable gain" from the infringement. Reliance is placed on the low margins in toys.

227. In our judgment, the OFT was entitled to conclude, at paragraph 417 of the Decision, that Argos had made higher margins on the Hasbro products concerned than it would have made without the infringement, and thus made "a considerable gain". The parties have not denied the proposition that their margins were higher during the period of infringement than previously, from which the OFT could reasonably infer that a gain had been made. As to whether the gain was "considerable" or not, the Tribunal has previously expressed the view that it is not normally appropriate to calculate the penalty on the basis of some quantification of the gain: see *Napp*, cited above, at paragraph 511. In this case the OFT respected that view, as paragraph 417 of the Decision states, and did not calculate the penalty on the basis of the gain. Moreover, the OFT did not increase the penalty at Step 3 to reflect the fact that a gain had been made. We therefore reject this argument.

228. We add that we do not consider it relevant that, according to Argos, the penalty is several times greater than the profit margin it would have earned on the products in question. Penalties in our view have to be set at the level necessary to have a significant deterrent effect on major companies.

The alleged delay in the proceedings

229. The appellants submit that a reduction in the penalty should be made in recognition of the delay of nine months, and general inconvenience, caused by the OFT having to

adopt an amended decision following the Tribunal's remittal in July 2003 to enable fresh witness statements to be put to the appellants by way of a supplementary Rule 14 notice. Littlewoods refers to the judgment of the Court of Justice in Cases 6/73 etc *Commercial Solvents* [1974] ECR 223 and the decision of the Commission in *FEG* OJ 2000 L39/1.

230. We do not accept that submission. Whilst it is unfortunate that the witness statements of Messrs Thomson, Wilson and Bottomley were served after the Decision was adopted, we take into account that this was one of the first cases of its type under the Act, at a time when the OFT was, understandably, still feeling its way to some extent. Moreover, that evidence was important and the OFT was entitled to adduce it. In our view no unnecessary delay was occasioned once it came to light, since the supplementary Rule 14 procedure proceeded with reasonable expedition.

231. *Commercial Solvents*, cited above, does not assist the appellants. That case involved a delay in dealing with a complaint. The Court of Justice accepted that the duration of the appellants' infringement might well have been shorter had the Commission intervened more quickly. It was for this reason that a reduction in the penalty was justified. In the present case, the same cannot be said. The delay occasioned by the OFT revisiting the matter in July 2003 did not cause the infringements to last longer than would otherwise have been the case. As for the *FEG* case, the Commission accepted that an eight year delay in adopting a decision was excessive. In our view that can hardly be compared with a small delay of nine months in this case.

Littlewoods' co-operation

232. Finally, Littlewoods submits that it should have received a greater discount for having co-operated with the OFT, particularly since it terminated the infringement as soon as the OFT intervened.

233. We reject that argument as well. Littlewoods has already received a 10 per cent discount for co-operation. Paragraph 2.11 of the *Guidance* refers to aggravating factors, including "continuing the infringement after the start of the investigation". Paragraph 2.12, which deals with mitigating factors, does not include prompt

termination of the infringement as soon as the OFT intervenes. It seems to us that termination of an infringement when the OFT intervenes should happen as a matter of course and not be a factor justifying a reduction in the penalty.

VIII THE TRIBUNAL'S OVERALL ASSESSMENT

234. Finally, we stand back from the detailed arguments and look at this case in the round. The infringements here in question were committed by large, well known, firms and concern well known branded products sold to consumers, predominantly as presents for children. At the heart of the infringement was a subtle and largely verbal scheme to procure Argos and Littlewoods to sell at Hasbro's RRPs, thereby earning higher margins than would otherwise be the case. Since Argos, in particular, is the price leader, it appears highly likely that most retailers, and not just Littlewoods, in fact followed Argos and sold the Hasbro products in question at RRPs. As a result, price competition on those products was effectively stifled for a period of some fourteen months throughout an important sector of the retail trade. In addition, there would have been an effect on competing products, especially where Hasbro had a strong market position.

235. In addition, Argos and Littlewoods are the two principal catalogue retailers. They have built up their respective businesses largely on the basis of a reputation for being competitive on price. In this instance however, they engaged in agreements and concerted practices inimical to price competition in the toys and games in question, to the detriment of their customers.

236. In those circumstances we agree with the OFT that substantial penalties are appropriate for the infringements in question. If and to the extent the parties themselves submit that discussions about retail selling prices are commonplace between suppliers and High Street retailers, there is need for a clear message that any such discussions leading to infringements of the Chapter I prohibition risk heavy sanctions under the Act.

237. We have already rejected, for the reasons already given, the mitigating factors suggested, such as the "low margins" on toys, the alleged uncertainty in the law, and the allegedly "loose" nature of the infringements in question. Both Argos and

Littlewoods chose to contest the allegations against them to the fullest extent, even after receiving the witness statements of Messrs. Thomson, Wilson and Bottomley. That course was one which the appellants were fully entitled to take, but it does mean that the substantial mitigation which would normally flow from an acceptance of liability is not available to these appellants.

238. In that latter connection we observe that, in our view, a company which accepts responsibility for an infringement of the Act and takes steps to make reparation for the harm suffered, for example by reimbursing consumers or by contributing to causes likely to benefit the consumers in question, would in our view be entitled to substantial mitigation of penalty. That, however, does not arise in the present case.

239. As regards Argos, the penalty imposed is £17.28 million. The statutory maximum was £260 million. The penalty is therefore less than one-tenth of the statutory maximum. Argos' annual turnover at the material time was over £2 billion. Argos was the price leader in the industry, is the major catalogue retailer, and is a household name. The infringements were serious. We bear in mind all the factors that have been drawn to our attention, including the fact that Hasbro was accorded leniency, and the less than satisfactory treatment of the relevant market issue in the Decision. Nonetheless, for the reasons already given, and having regard to all the evidence we have heard, the penalty imposed on Argos does not seem to us to be disproportionate.

240. As regards Littlewoods, the penalty imposed is £5.37 million. The statutory maximum was £236 million. The penalty is therefore of the order of one-fortieth of the statutory maximum, which reflects the fact that Littlewoods' turnover in toys and games is less than that of Argos, both in absolute terms and as a proportion of total turnover. In Littlewoods' case its annual turnover at the material time was also over £2 billion. Although not the price leader, and perhaps less well known nationally than Argos, Littlewoods was the other principal catalogue retailer in this country. The evidence shows that Littlewoods' participation in the agreements or concerted practices was necessary to the objectives sought to be achieved. In terms of the seriousness of the infringements, we see little to distinguish Littlewoods from Argos in terms of relative culpability.

241. Again we bear in mind everything that has been said on behalf of Littlewoods, including the fact that no penalty was imposed on Hasbro. However for the reasons already given, and having regard to all the evidence we have heard, the penalty imposed on Littlewoods does not seem to us to be disproportionate.

242. All that said, we remain conscious of the argument advanced by Argos that, by bringing into the penalty calculation the whole of Argos and Littlewoods turnover in girls' toys, creative, infant and pre-school and hand-held electronics, the OFT did include as "relevant turnover" some turnover which may have been affected only peripherally by the infringements.

243. It is true that we have held that, even if the OFT had included a smaller proportion of that turnover, the OFT would have been fully entitled to include a multiplier of between 2 and 3 at Step 3 to bring the penalty up to an appropriate deterrent level. Nonetheless, in our view care should be taken to ensure that any penalties so re-calculated should not inadvertently become inflated above the level necessary for deterrence.

244. In those circumstances we propose to reassess the penalties on Argos and Littlewoods on the basis of assumptions that seem to us both realistic and conservative. In our view, in the context of the Tribunal's jurisdiction to make a broad assessment we have decided to reduce the penalties on Argos and Littlewoods to £15 million and £4.50 million respectively, on the technical ground that the OFT's method of calculation may have given rise to penalties that are slightly too high.

245. As a "cross-check", if we were to apply the OFT's methodology, we would make first the conservative assumption that only 5 per cent of relevant turnover in girls' toys, hand-held electronics, creative and infant and pre-school should be brought into the penalty calculation. That broadly reflects Hasbro's market share in the sector, but takes account of the fact that key brands were involved. On that basis, the figures set out at paragraph 208 above would indicate "relevant turnover" of some £8.20 million for Argos and £2.40 million for Littlewoods after Step 2.

246. Penalties of that order would not in our view be an adequate deterrent in that case. Again making a conservative assumption, we think the lowest multiplier that could

reasonably be applied is a multiplier of 2.0. Applying a multiplier of 2.0 to those figures to reflect deterrence, the resulting figure after Step 3 would be £16.40 million for Argos and £4.80 for Littlewoods. Applying then the reduction of 10 per cent applied by the OFT at Step 4 would give rise to penalties for Argos of £14.76 million and for Littlewoods of £4.32 million.

247. On the other hand, it is necessary to take account of the fact that the above calculations are extremely conservative. We also bear in mind that, in this case, the infringements affected not just the prices and turnover of Argos and Littlewoods but the prices and hence the turnover of other retailers which is not reflected in the calculations at all. In those circumstances a small rounding up of the above figures is in our view fully justified. The above approach gives us rise to an average reduction of around 15 per cent in the penalties compared with the penalties imposed by the OFT. In percentage terms the reduction is slightly more for Littlewoods and slightly less for Argos as a result of the different "mix" within the relevant turnovers of the two companies. Nonetheless the overall result is in our view fair to both Argos and Littlewoods.

248. Taking all the above into account, our assessment is that a penalty of £15.0 million for Argos and £4.50 million for Littlewoods is the lowest penalty that could reasonably be justified in the circumstances, to meet the gravity of the case and to have an appropriate deterrent effect.

IX CONCLUSIONS

249. It results from the above that (1) the penalty on Argos is fixed at £15.0 million. (2) The penalty on Littlewoods is fixed at £4.50 million. To that extent the Decision is set aside and varied. (3) Subject to the foregoing the appeals of Argos and Littlewoods against the OFT's decision of 21 November 2003 are dismissed. The decision of the Tribunal is unanimous.

250. There will be interest on the penalty to run, subject to any further submissions the parties wish to make, at 1 per cent above the Bank of England base rate from 21 November 2003 until payment or judgment under section 37(1) of the Act.

251. We will hear further argument on the issues of costs.

Christopher Bellamy Antony Lewis Vindelyn Smith-Hillman

Charles Dhanowa 29 April 2005

Registrar