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IN THE COMPETITION APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A 2EB

Cases: 1019/1/1/03
1020/1/1/03
1021/1/1/03
1022/1/1/03

19 May 2005

Before:

Sir Christopher Bellamy (President)
Mr. Barry Colgate
Mr. Richard Prosser OBE

Sitting as a Tribunal in England and Wales

BETWEEN

UMBRO HOLDINGS LIMITED

Appellant

-and-

OFFICE OF FAIR TRADING

Respondent

MANCHESTER UNITED PLC

Appellant

-and-

OFFICE OF FAIR TRADING

Respondent

JJB SPORTS PLC

Appellant

-and-

OFFICE OF FAIR TRADING

Respondent

ALLSPORTS LIMITED

Appellant

-and-

OFFICE OF FAIR TRADING

Respondent

JUDGMENT ON PENALTY

Mr. Nicholas Green QC and Miss Kelyn Bacon (instructed by Umbro Holdings Limited Legal Department) appeared for Umbro Holdings Limited.

Mr. Peter Roth QC and Mr. Paul Harris (instructed by James Chapman & Co) appeared for Manchester United plc.

Lord Grabiner QC and Mr. Mark Hoskins (instructed by DLA Piper Rudnick Gray Cary UK LLP) appeared for JJB Sports plc.

Mr. George Peretz (instructed by Addleshaw Goddard) and Mr. Adam Aldred (of Addleshaw Goddard) appeared for Allsports Limited.

Mr. Stephen Morris QC, Mr. Jon Turner and Miss Anneli Howard (instructed by Director of Legal Services, Office of Fair Trading) appeared for the OFT.

Heard at Victoria House on 17, 18, 19 and 20 January 2005

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I INTRODUCTION

1. On 1 October 2004 the Tribunal gave judgment on liability in the appeals by Allsports Limited ("Allsports") and JJB Sports plc ("JJB") respectively against the OFT's Decision no. CA 98/06/2003 dated 1 August 2003 ("the Decision"). Umbro Holdings Limited ("Umbro") and Manchester United plc ("MU") did not appeal on the question of liability but have appealed against the level of the penalties imposed by the OFT on them, as have Allsports and JJB. This judgment deals with the issue of penalties.

2. In the Decision, the OFT found that various infringements of the Chapter I prohibition set out in section 2 of the Competition Act 1998 ("the Act") had been committed, notably as follows:

   (1) An agreement between Umbro and Sports Soccer fixing the retail price of Umbro replica shirts during key selling periods between April 2000 and August 2001 ("the Umbro/Sports Soccer Agreement").

   (2) An agreement between Umbro, JJB, Allsports, Sports Soccer, Blacks and JD fixing the retail price of the England replica shirt during the Euro 2000 tournament ("the England Agreement").

   (3) An agreement between at least JJB, Allsports and Sports Soccer, as well as MU, Umbro and Blacks, fixing the price of the MU home replica shirt launched on 1 August 2000 ("the MU Agreement").

   (4) An agreement between at least JJB, Umbro and Sports Soccer fixing the price of England and MU replica shirts during key selling periods until August 2001 ("the Continuation Agreement").

   (5) An agreement between the Football Association (FA), Sportsetail, Umbro and JJB to align the retail prices of England replica kit sold by the England Direct

website operated by Sportsetail with JJB's retail prices ("the England Direct Agreement")[1].

(6) An agreement between Umbro and Sports Connection fixing the retail price of the Celtic home replica shirt from March to May 2001 ("the Umbro/Sports Connection Agreement").

3. Agreements (1) to (4) are referred to in the Decision as "the Replica Shirts Agreements".

4. JJB appealed to the Tribunal on liability in respect of the OFT's findings against it concerning the England Agreement, the MU Agreement, the Continuation Agreement and the England Direct Agreement, and, in any event, against the penalty imposed. Allsports appealed to the Tribunal on liability in respect of the OFT's findings concerning the England Agreement and the MU Agreement, and in any event against the penalty imposed.

5. MU appealed to the Tribunal only as regards the penalty, which is imposed in relation to MU's participation in the MU Agreement.

6. Umbro also appealed to the Tribunal solely on the issue of penalty. In its notice of appeal, Umbro advanced only one argument, namely that it should have received a greater discount as regards the penalty because of Umbro's cooperation with the OFT which the Decision fails to acknowledge. Because of the distinct and self contained nature of Umbro's appeal, we deal with Umbro's appeal separately in this judgment.

7. The penalties imposed on each of the four appellants are:

JJB	£8.373 million
Umbro	£6.641 million
MU	£1.652 million
Allsports	£1.350 million

[1] A further agreement between the FA and Sportsetail relating to the resale prices of products sold on the Sportsetail website is not relevant to this judgment.

8. The facts as found by the Tribunal are set out in the Tribunal's judgment on liability [2004] CAT 17 ("The Liability Judgment"). In summary, the Tribunal found as follows.

(1) JJB and Allsports, respectively, were party with Umbro, Sports Soccer, JD and Blacks to the England Agreement, namely an agreement or concerted practice contrary to the Chapter I prohibition having as its object or effect the maintenance of the retail price of England replica shirts at £39.99 in the period immediately before and during the Euro 2000 football tournament (see [637] to [670] and [704] to [727] of the Liability Judgment).

(2) JJB and Allsports, respectively, were party with Umbro, Sports Soccer, and Blacks to the MU Agreement, namely an agreement or concerted practice contrary to the Chapter I prohibition having as its object or effect the fixing of the retail price during the key selling period of the new Manchester United home shirt due to be launched on 1 August 2000 at £39.99 (see [830] to [885] of the Liability Judgment).

(3) JJB was party to a concerted practice contrary to the Chapter I prohibition having as its object or effect the maintenance of the retail price of the Manchester United Centenary shirt at £39.99 at launch on 20 July 2001 until the end of August 2001 ("the MU Centenary Shirt Agreement") (see [933] to [989] of the Liability Judgment).

(4) The OFT had otherwise not proved its case against JJB as regards the alleged Continuation Agreement (see [894] to [932] of the Liability Judgment).

(5) The OFT had not proved its case against JJB in respect of the England Direct Agreement (see [990] to [1053] of the Liability Judgment).

II THE STATUTORY FRAMEWORK AS REGARDS PENALTIES

Section 36 of the Act

9. 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

10. The turnover of the undertaking for the purposes of calculating the maximum of 10% of turnover referred to in section 36 (8) was at the material time to be determined in accordance with the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000, SI 2000/ 309, (“the Penalties Order”).[2]

11. 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

[2] That Order has since been amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order, SI 2004/1259. The principal effect of that Order is to substitute a new Article 3 which provides as follows:

> “The turnover of an undertaking for the purposes of section 36(8) is the applicable turnover for the business year preceding the date on which the decision of the OFT is taken or, if figures are not available for that business year, the one immediately preceding it”.

The object of the amendment is to bring the Penalties Order in line with Council Regulation (EC) No. 1/2003 0J 2003 L1/1.

> for the business year preceding that identified under paragraphs (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".

12. By virtue of Article 2, 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 of 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."

13. 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.

14. The statutory maximum penalty for JJB under the Penalties Order as then in force was £96.413 million. That figure is calculated on the basis of JJB's applicable turnover for the financial year ended 31 January 2001 (£659.169 million) plus 50 per cent of JJB's applicable turnover in the financial year ended 31 January 2000 (£609.923 million), on the basis that the infringement lasted for eighteen months in total. The statutory maximum under Article 3(1) and (2) of the Penalties Order is 10 per cent of the resulting figure i.e. £65.917 million + £30.496 million = £96.413 million (paragraph 679 of the Decision).

15. In the case of Allsports, the statutory maximum penalty under the Penalties Order was £13.955 million, i.e. 10 per cent of Allsports' turnover in the financial year ended 31 January 2000 (Decision, paragraph 619).

16. In the case of MU, the statutory maximum penalty under the Penalties Order was £11.383 million, i.e. 10 per cent of MU's turnover in the financial year ended 31 July 2000 (Decision, paragraph 720).

17. In the case of Umbro, the statutory maximum penalty under the Penalties Order as then in force was £14.897 million. That figure is calculated on the basis of Umbro's applicable turnover for the financial year ending 31 December 2000 (£83.763 million) plus 50 per cent of Umbro's applicable turnover in the financial year ending 31 December 1999 (£130.417 million)[3] on the basis that the infringement lasted for eighteen months in total. The statutory maximum under Article 3(1) and (2) of the Penalties Order is 10 per cent of the resulting figure, i.e. £8.376 million + £6.521 million = £14.897 million (paragraph 559 of the Decision).

Section 38: the OFT's duty as to guidance

18. 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 alteration 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 Guidance as to Penalties

19. 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*

[3] According to paragraph 599 of the Decision, since Umbro as a holding company did not trade throughout this financial year, this is a grossed up figure in accordance with Article 2 of the Penalties Order.

Amount of a Penalty, OFT 423, March 2000 ("the *Guidance*").[4] That was approved by the Secretary of State on 29 January 2000 (*Guidance*, paragraph 1.6).

20. Although the OFT may alter the *Guidance* at any time (section 38 (2)), it appears that it 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)).

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

22. The policy objectives of the *Guidance* are explained 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."

23. The *Guidance* is effectively divided into two parts, namely "Steps for determining the level of penalty" and "lenient treatment for undertakings coming forward with information". The parts relating to lenient treatment are relevant only to Umbro and are dealt with later in the part of this judgment dealing with Umbro.

The Steps for determining the level of penalty

24. 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 by applying a

[4] The *Guidance* has since been replaced with the *OFT's guidance as to the appropriate amount of a penalty*, OFT 423, December 2004.

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

25. 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.

"[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."

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

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 …".

The powers of the Tribunal

26. 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."

27. In *Napp Pharmaceutical Holdings Limited v. Director General of Fair Trading* [2002] CAT 1, [2002] CompAR 9 ("*Napp*") the Tribunal said, at [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.

28. In *Napp* the Tribunal commented on the Director's application of the *Guidance* (in that case as regards Steps 3 and 4): see [504] to [516] of that judgment. The Tribunal then went on to set out its own views on the seriousness of the infringement, at [517] to [534]. The Tribunal then made its own assessment of the penalty, on the basis of a "broad brush" approach, taking the case as a whole ([535] to [541]). At [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.

29. 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. Accordingly the Tribunal reduced the penalty: [489] to [500] of that judgment. The Tribunal followed the same approach in *Genzyme v. OFT* [2004] CAT 4 (see [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 than two, was found to be proved.

III THE OFT'S DECISION AS REGARDS THE PENALTY

30. The OFT deals with the imposition of penalties at paragraphs 536 to 789 of the Decision. The issue of the relevant product market for replica kit is dealt with at paragraphs 540 to 555. The penalties with which this appeal is concerned are dealt with

to paragraphs 572 to 602 (Umbro) 603 to 622 (Allsports) 664 to 682 (JJB) and 669 to 723 (MU). We follow the order used in the Decision.

RELEVANT PRODUCT MARKET

31. The OFT considers that the first product market relevant for present purposes is each club's or national team's replica kit (paragraphs 540 to 555). The second relevant product market dealt by the OFT, which in these appeals affects only MU, is that of intellectual property licences for replica kit (paragraphs 557 to 569).

32. As regards the relevant product market consisting of each club or team's replica kit , the OFT concluded at paragraphs 553 to 554 of the Decision:

> "553. First, the OFT is satisfied that all but one of the agreements covered by this decision had as their object the price-fixing of various Umbro licensed Replica Shirts. The England Direct Agreements went wider than this and extended to other FA Licensed Merchandise. In each case, sales of Replica Shirts are the most important item of Replica Kit and drive sales of replica shorts and socks. Therefore, whilst a Replica Kit is comprised of several products (adult and junior shirt, shorts, socks and infant kits) which are sold separately and whilst a fan who wants to wear a pair of shorts cannot substitute this for a Replica Shirt, this does not necessarily mean that each kind of product is a distinct relevant product market. A Replica Kit is designed and marketed at launch as a single product and with the same purpose of showing visible support for a particular club or team by distinguishing itself from the Replica Kits of other clubs or teams. The home, away, third and goalkeeper's Replica Kits have the same characteristics, prices and intended use as each other.
>
> 554. Secondly, a manufacturer is normally exclusively licensed to manufacture all these items together and, in the case of Umbro during the period of the infringement, to distribute and sell all products comprising a club or team's Replica Kit. The OFT therefore remains satisfied that the most appropriate market definition in the present case, for the purposes of the imposition of a penalty, is each club or team's Replica Kit and in particular that the relevant product market is not narrower than this."

THE PENALTY FOR UMBRO

Step 1

33. The first stage in Step 1 of the calculation of penalty is to arrive at the appropriate percentage rate to be applied to the relevant turnover. At paragraphs 575 to 576 of the Decision the OFT took into account the following considerations:

> "575. Umbro was engaged in resale price maintenance or vertical price-fixing of Replica Shirts. It also encouraged or facilitated horizontal price-fixing between certain retailers. The infringements were aimed at key selling periods i.e. immediately following the launch of a Replica Kit or in the run-up to and during the major international tournament at the time. In addition, the price-fixing on Replica Shirts was effective during these times despite the fact that Sports Soccer discounted other elements of Replica Kit generally or outside the key selling periods when it could. The pricing of Replica Shirts during the period of the infringement is to be contrasted with more recent evidence since the OFT investigation began. The OFT therefore does not accept that the infringements were not implemented or had no or limited effect on the market.
>
> 576. Replica Shirts are consumer goods sold to mass market. Football is one of the UK's most important national sports and pastimes. Many consumers of Replica Shirts are children or parents who are asked by their children to purchase the latest Replica Shirt. In addition, fan loyalty creates further demand particularly when there are regular changes of Replica Kit. Two flagship Replica Shirts were involved in two of the infringements: MU and England Replica Shirts are very strong selling products. In addition, the Replica Shirts Agreements coincided with MU's launch of a Replica Kit with a new corporate sponsor in 2000, the centenary Replica Kit in 2001 and considerable success on the pitch. The Replica Shirts Agreements and the England Direct Agreements also coincided with England playing in Euro 2000. If sold at RRPs, Replica Shirts allow significant mark-up of 60 per cent or more."

34. In addition, the OFT pointed out that since clubs grant manufacturers exclusive licences, no other undertaking can manufacture replica kit for the team in question. However, the OFT concluded that although Umbro was an important manufacturer it was not one

of the world's biggest, being much smaller than Adidas and Nike in terms of worldwide turnover. At the time Umbro had retained only the England and Chelsea replica kit licences. The infringements affected around 35 per cent of Umbro's business. The infringements were limited to replica shirts but, according to the OFT

> "this is the largest selling element of Replica Kit with approximately five shirts sold for every pair of shorts and pair of socks"
>
> (paragraph 578 of the Decision).

35. According to the OFT, although Umbro was smaller relative to its competitors, England and MU are key brands and those replica kits may have acted as price leaders. The effect of the infringements on third parties was held to be significant since, according to the OFT, Sports Soccer and others were coerced by Umbro into retailing at High Street prices, thus supporting the agreement reached between the major retailers. A substantial proportion of total sales of the replica shirts in question was affected by the infringement, and consumer's interests were damaged (paragraphs 579 to 580).

36. The OFT concluded that Umbro had engaged in vertical price-fixing, which is amongst the most serious types of infringement, and was aware of and facilitated horizontal price-fixing between retailers. However, although the relevant market definition was relatively narrow, the Replica Shirts Agreements and the Umbro/Sports Connection Agreement did not include all the products in the relevant markets. In those circumstances the percentage rated applied in the Decision by the OFT as the starting point under Step 1 for determining the level of penalty imposed on Umbro was 8 per cent of the relevant turnover, that is to say £2.330 million (paragraph 581).

Step 2

37. In view of the fact that Umbro's participation in the Replica Shirts Agreements lasted for up to one year and five months, the Umbro/Sports Connection Agreement lasted for three months and Umbro's participation in the England Direct Agreement lasted for one year six months, the starting point under Step 1 was multiplied by 1.5 by the OFT by way of an adjustment for duration under Step 2. That gave a revised figure of £3.495 million under Step 2 (paragraphs 582 to 584).

Step 3

38. As regards Step 3, the OFT held that, in the light of the non-statutory assurances given to the OFT in 1999, deterrence is a very important policy objective in this sector. Notwithstanding the non-statutory assurances given in 1999 to the OFT, Umbro had engaged in serious vertical price-fixing shortly thereafter. However, in view of the relatively high percentage of Umbro's total turnover taken into account in Step 1, the OFT decided that a multiplier of 2 produced a sufficient deterrent for Umbro. This gave a further revised figure of £6.991 million (paragraphs 586 and 587).

Step 4

39. As regards Step 4, the OFT considered that Umbro was an instigator in the infringements and played an essential role. Notwithstanding the pressure exerted on Umbro by JJB and MU, this was an aggravating factor. Accordingly the basic amount of the penalty was increased by 10 per cent. The fact that Umbro "punished" undertakings that did not co-operate, and that senior managers were involved in the infringements, were further aggravating factors that attracted further increases in the basic amount of the penalty by 10 per cent and 20 per cent respectively (paragraphs 589 to 591).

40. Although the OFT regarded the Replica Shirts Agreements as distinct infringements, there was a good deal of overlap between them. Accordingly, they were counted together when assessing whether the parties to the decision had engaged in repeated infringements. However, the Umbro/Sports Connection Agreement and the England Direct Agreement were counted by the OFT as additional heads of infringement. Umbro's involvement in those repeated infringements was treated as an aggravating factor. Consequently, the basic penalty was increased by a further 15 per cent under that head (paragraphs 592 and 593).

41. As to mitigating factors, although it was an instigator of the infringements because of its key role, the OFT considered that Umbro was acting under commercial pressure from JJB and MU. Regarding Umbro's role as predominantly reactive, the OFT decreased the basic amount of the penalty by 15 per cent for that reason (paragraph 594).

42. Although Umbro did not have a compliance programme in place during the period of the infringement, the basic amount of the penalty was decreased by a further 5 per cent to take account of the mitigating factor that Umbro's General Counsel introduced measures to avoid future infringements (paragraph 595).

43. Finally Umbro had co-operated with the OFT's investigation principally in its responses to section 26 Notices and in its written and oral representations on the Rule 14 and Supplemental Rule 14 Notices, although according to the OFT "no significant admissions or co-operation were given until Umbro submitted its written and oral representations on the Rule 14 Notice." As the admissions at the stage of the Rule 14 Notice assisted the OFT, the OFT considered that this was a mitigating factor. The amount of the penalty was therefore decreased by 40 per cent (paragraph 596 of the Decision).

44. The net result of Step 4 was that that the OFT decreased the basic amount of the financial penalty by five per cent (paragraph 597 of the Decision).

45. The penalty for Umbro was therefore set at £6.641 million, below the statutory maximum at that time of £14.897 million.

PENALTY FOR ALLSPORTS

Step 1

46. Paragraph 605 of the Decision states:

> "Allsports was engaged in resale price maintenance or vertical price-fixing on Replica Shirts and in horizontal price-fixing between certain retailers. The infringements were aimed at key selling periods immediately following the launch of a Replica Kit or in the run up to and during the major international tournament at the time. The price-fixing was also effective during these times although Sports Soccer discounted elements of the Replica Kits either outside the key selling periods or otherwise when it could. The pricing of Replica Shirts during the period of the infringements is to be contrasted with more recent evidence of competitive pricing since the OFT investigation began."

47. As with Umbro, the OFT relies on the facts that the infringements concerned consumer goods sold to the mass market, were connected with a major national sport or pastime, namely football, and involved products often sold to children. The shirts involved were flagship products, and the MU shirts in particular were the subject of a major launch (paragraph 606 of the Decision, referring back to paragraph 576).

48. Allsports is not a discounter, and was by turnover the fifth largest sports goods retailer. The infringement affected only around 3 per cent of Allsports' business. However, the agreements to which Allsports was a party had a significant effect on competition because of the price fixing with other retailers, and involved the key England and MU brands (paragraphs 607 to 609).

49. The OFT concludes that Allsports had engaged in horizontal price-fixing, which the OFT considers to be the most serious type of infringement. However, the infringements by Allsports did not include all the products in the relevant markets. Accordingly, the starting point for determining the level of penalty imposed on Allsports was 9 per cent of the relevant turnover, namely £0.346 million (paragraph 611).

Step 2

50. Allsports' participation in the relevant Replica Shirts Agreement lasted for five months and included the key selling period for the England and MU home shirt in 2000. No adjustment under Step 2 was made for duration (paragraph 612).

Step 3

51. Paragraph 613 of the Decision states:

> "Particularly in the light of the non-statutory assurances given to the OFT in 1999, the OFT takes the view that deterrence is a very important policy objective in this sector. There can have been no doubt about the seriousness of the infringements. Therefore, the figure from step 2 is multiplied by 3 giving a revised figure of £1.038m. This multiplier is used for Allsports and all other Parties other than Sports Soccer, the FA and Umbro in order to create an adequate deterrence for the undertakings involved and others.

52. A multiplier of 3 was thus applied for Allsports in order to create an adequate deterrence to give a penalty at Step 3 of £1.038 million (paragraph 613).

Step 4

53. The OFT found that Allsports was the primary organiser of the price-fixing meeting on 8 June 2000 in relation to the MU home shirt and that the meeting was organised with anti-competitive intent. In addition, Allsports rang Blacks to inform it of the outcome of that meeting, having previously contacted Blacks about JD's "hat trick promotion". The OFT found those to be aggravating factors and increased the basic amount of the penalty by 15 per cent. The involvement of management at the very highest level in the infringement was a further aggravating factor and the basic amount of the penalty was further increased by 20 per cent for that reason (paragraphs 614 to 615).

54. The OFT found that as Allsports' compliance programme was only put into place in January 2003, it was too late to be taken into account as a mitigating factor. However, Allsports' admission that it organised the meeting on 8 June 2000 with anti-competitive intent, was viewed by the OFT as a mitigating factor because it went beyond the standard ordinarily expected of an undertaking subject to an investigation. Accordingly, the OFT decreased the basic amount of the penalty by 5 per cent on that account (paragraphs 616 to 617).

55. The net result of Step 4 was that that the OFT increased the basic amount of the financial penalty by thirty per cent, to a figure of £1.350 million (paragraph 618 of the Decision).

56. The penalty for Allsports was therefore set at £1.350 million, below the statutory maximum of £13.955 million.

PENALTY FOR JJB

Step 1

57. The OFT relies in relation to JJB on the facts and matters set out earlier in the Decision, particularly at paragraphs 576 and 605, cited above. In particular, JJB was engaged in

vertical price fixing on replica shirts and in horizontal price fixing between retailers. The infringements related to key selling periods. The goods concerned are mass market consumer goods, often sold to children, and involved the flagship England and MU products during very important tournament or launch periods.

58. In addition JJB is the biggest sports retailer in the United Kingdom, four times larger than Allsports by turnover. Although the infringements affected only about 2 per cent of JJB's turnover, according to the OFT, JJB had a reasonable degree of buyer power vis-à-vis Umbro, which contributed to the establishment of the Replica Shirts Agreements and the England Direct Agreement. The replica shirts agreements to which JJB was a party with other retailers had a significant effect on competition. JJB's actions also had a significant anti-competitive effect on consumers and on Sportsetail (paragraphs 666 to 668).

59. The OFT concluded that JJB had engaged in horizontal price-fixing, which is the most serious type of infringement. However, the infringements by JJB did not include all the products in the relevant markets. Accordingly, the starting point for determining the level of penalty imposed on JJB was 9 per cent of relevant turnover, namely £1.329 million (paragraph 669).

Step 2

60. The OFT found that JJB'S participation in the Replica Shirts Agreements lasted for up to one year and five months and JJB'S participation in the England Direct Agreement lasted for one year and six months. Accordingly the starting point turnover was multiplied by the OFT by 1.5 by way of an adjustment for duration under Step 2, to give a figure of £1.99 million (paragraph 670).

Step 3

61. For the reasons already given in relation to Allsports, the OFT applied a multiplier of 3 to that figure, to give a revised figure of £5.981 million (paragraph 672).

Step 4

62. The OFT found that JJB pressurised Umbro into securing resale price maintenance because of its buyer power. Accordingly, the OFT considered that JJB was an instigator in the infringements. This was treated as an aggravating factor by the OFT and consequently the basic amount of the penalty was increased by 10 per cent. The fact that senior management were involved in the infringement was treated as a further aggravating factor and the basic amount of the penalty was further increased by 20 per cent (paragraphs 673 to 675).

63. Although the OFT regarded the Replica Shirts Agreements as distinct infringements, there was a good deal of overlap between them. Accordingly, they were counted together when assessing whether the parties to the decision had engaged in repeated infringements. JJB's involvement in the England Direct Agreement was however counted by the OFT as a separate and repeated infringement and thus as an aggravating factor. Consequently, the basic penalty was increased by 10 per cent (paragraph 676).

64. The OFT found that there were no relevant mitigating factors to take into account when considering the penalty to be imposed on JJB. Accordingly the net result of Step 4 was that the OFT increased the basic amount of the financial penalty by 40 per cent (paragraph 677 of the Decision).

65. The penalty imposed on JJB was therefore £8.373 million, below the statutory maximum at that time of £96.413 million.

PENALTY FOR MU

Step 1

66. The OFT refers to the matters already set out, notably at paragraphs 576 and 605 of the Decision, cited above. MU had a double interest in the infringement, both as a licensor of the trademark rights and as a retailer in its own right. MU was the second largest purchaser of MU replica kit from Umbro after JJB. The relevant Replica Shirt Agreement affected around 4 per cent of MU's business. MU's actions had a

significant effect on Umbro in the period until the licence was transferred to Nike in September 2000. Consumers suffered from MU's actions (paragraphs 699 to 709).

67. The OFT states that the infringements found, horizontal and vertical price fixing were the most serious types of infringements. However, the infringements did not include all products in the relevant markets. The starting point applied by the OFT for determining the level of penalty imposed on MU was 9 per cent of the relevant turnover, namely £0.408 million (paragraph 710)[5].

Step 2

68. Insofar as MU's participation in the relevant Replica Shirts Agreement lasted for five months and included the key selling period for the MU home Replica Shirt in 2000, no adjustment under Step 2 was made for duration (paragraph 711).

Step 3

69. For the reasons already given in relation to Allsports, the OFT applied a multiplier of 3. That gives a figure at Step 3 of £1.224 million (paragraph 712).

Step 4

70. MU's pressure on Umbro, the involvement of management at the highest level in the infringement, and MU's non-adherence to the company's compliance policy were all found by the OFT to be aggravating factors. Consequently, the OFT increased the basic amount of the penalty by 10 per cent, 20 per cent and 10 per cent respectively. However, because MU belatedly admitted to unlawfully seeking and receiving information about competitors' prices, and otherwise generally co-operated with the OFT during its investigation, the OFT decreased the basic amount of the penalty by 5 per cent by way of mitigation (paragraphs 713 to 718).

71. The net result of Step 4 was that that the OFT increased the basic amount of the financial penalty by thirty five per cent.

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[5] In the case of the appeal MU submitted revised turnover figures which would lead to a slight increase in the penalty at Step 1.

72. MU's financial penalty was thus set at £1.652 million, below the statutory maximum of £11.383 million (paragraph 719).

IV THE COMMON ARGUMENTS OF JJB, ALLSPORTS AND MU

73. JJB, Allsports and MU advance a number of common arguments relating to the OFT's calculations, relating to (1) the relevant market used by the OFT (2) the starting percentage rate (3) the duration of the infringements and (4) the multiplier at Step 3.

(1) THE RELEVANT MARKET

74. Those appellants submit, first, that the OFT was wrong to base the "relevant turnover" used at Step 1 of the calculation on the parties' turnover in replica kit: the relevant market is at most for replica shirts only. All three appellants submit that the OFT should have excluded the turnover in socks and shorts, which are plainly not substitutable for shirts. They are therefore not part of the relevant market: see OFT 403, *Market Definition*. Shirts are sold in greater numbers than socks and shorts, in the ratio of 5:1:1, trends in sales of shirts do not follow trends in sales of socks and shorts, and shirts, unlike socks and shorts, are also worn as items of leisurewear. The Lexecon data shows little similarity in price movements. There is insufficient evidence in the Decision, or otherwise, to justify the inclusion of socks and shorts in the relevant market. The OFT's argument that the price of shirts has a "spill over" effect on the prices of shorts and socks is not in the Decision, and is contrary to or at least unsupported by the evidence.

75. The appellants submit in particular that the OFT was obliged to follow the *Guidance* unless, as MU submits, it gives reasons for not doing so: see section 38 of the Act and Case 236/01 *Tokai Carbon v. Commission*, judgment of 29 April 2004 at paragraph 231. However, the matters set out at paragraphs 540 to 555 of the Decision do not constitute a sufficient analysis of the relevant market: *Aberdeen Journals v. Director General of Fair Trading* [2002] CAT 4, [2002] Comp AR 167 at paragraphs 91 to 97. The analysis should be the same whether it is liability or the penalty that is in issue. Case T-19/92 *LeClerc v. Commission* [1996] ECR II-1851 at paragraphs 184-185 supports the appellants.

76. JJB considers in addition that goalkeeper's shirts should also be excluded from the relevant market, since those are not substitutable for the other shirts, because they are in different colours and not generally sold as leisurewear.

77. Allsports submits that junior shirts and infant kits should also be excluded because those are not substitutable for adult shirts.

78. According to the appellants, the fact that the OFT said in the Decision that it had applied a percentage rate of 9% because the infringements "did not apply to all the products in the relevant market" is irrelevant to the issue of market definition. In any event the OFT's meaning is obscure. It is not open to the OFT to contend that, had it excluded shorts and socks, it would have applied a percentage rate of 10%.

79. MU stresses in particular that there are other replica shirts (e.g. away or third shirts) included in its turnover which according to MU were not affected by the infringement. The only infringement it committed related to one shirt, the adult home shirt launched in August 2000. Moreover, according to MU, the OFT's approach to market definition would logically have led to the inclusion of hats, scarves and other products.

80. The OFT submits that it acted reasonably in taking the relevant market to be replica kit, rather than replica shirts, as a starting point, thus sending an effective deterrent message to the industry. The OFT's *Guidance* is not to be followed mechanically. When dealing with penalty, the competition analysis does not have to be as detailed as when dealing with liability.

81. The OFT points out that the starting point of relevant turnover under Step 1 is directed to the activity "affected by the infringement". A replica kit is designed and marketed at launch as a single product and part of an integrated uniform, with the purpose of showing visible support for the team. That reflects commercial realities: see *US v. Grinell* 384 US 563. The Decision finds that sales of the shirts drive sales of shorts and socks. The maintenance of prices for the shirts is likely to have had a spill over effect on prices to consumers for the shirts and socks, as is shown by a number of Tables in the Lexecon data. In any event, the OFT chose a percentage rate of 9% because the

infringement did not cover all products in the relevant market. If the OFT had defined the market as just shirts, it would have applied a rate of 10 per cent.

82. As regards MU, the OFT submits that any excessive turnover taken into account by the OFT on replica kit is counterbalanced by the fact that the OFT could have justifiably taken a higher figure for MU's turnover as a trademark licensor.

83. MU replies that the latter argument is not open to the OFT, and is unfounded.

(2) THE STARTING POINT OF 9%

84. Allsports and MU argue that the starting percentage of 9% applied to them was unfair and discriminatory given that Umbro received a starting percentage of only 8%. Umbro's role was at least as serious, since it both engaged in retail price fixing and encouraged and facilitated horizontal price fixing, whereas on the OFT's findings the appellants only engaged in the latter.

85. Allsports points out that it is not a discounter, and that its role had little material effect on other parties. MU adds that a starting percentage of 9% is unfair since, unlike the other parties, MU's infringement concerned only one product, the MU adult home shirt launched in 2000. Most of its turnover in replica shirts was unaffected by the infringement.

86. JJB submits that it has been punished twice, in that the percentage of 9% has been chosen for deterrence, but the multiplier of 3 applied under Step 3 has also been imposed for deterrence. In addition, the multiplier of 9% also took account of JJB's infringement regarding Sportsetail, which has been quashed by the Tribunal. The starting percentage should therefore be reduced.

87. The OFT considers that 9% was fully justified as a starting point under Step 1, given the seriousness of the infringements. Allsports is equally culpable, as set out in the Liability Judgment. As to MU, the new home shirt was by far the largest seller and the agreement concerned a particularly significant event, being the first launch for many years under a new sponsor.

88. Umbro and the FA are not in a comparable position to Allsports and MU, since the former did not engage directly in horizontal price fixing with competitors. MU is not in a comparable position to the FA since it is both a licensor and a retailer.

89. As to JJB, the OFT considers that the fact that the England Direct Agreement was not found proved is a minor matter in the context and should not affect the percentage rate applied to JJB.

(3) DURATION

90. JJB, Allsports and MU submit that their infringements lasted less than one year. To reflect that, the OFT should have applied a multiplier of (say) 0.5 to the figures arrived at under Step 1. The logic of Step 2 of the *Guidance* in increasing the penalty by a factor where the infringement lasts for more than one year applies equally in reverse: parties should be encouraged to terminate infringements early. That is also the logic behind the OFT's practice of rounding up to the nearest quarter, rather than the nearest whole year, in cases where Step 2 applies.

91. MU points out that its infringement lasted at most for 5 months and covered only half the key selling period, which lasts until Christmas.

92. Allsports considers that its infringement lasted for only three months. Allsports penalty at Step 1 should be reduced by 75% to reflect that.

93. JJB contends that the original multiplier of 1.5 applied in the Decision under Step 2 cannot stand, since the Tribunal quashed the OFT's findings in relation to the England Direct Agreement and the Continuation Agreement, except for the MU Centenary Shirt Agreement which lasted for only about a month. According to JJB, the three agreements represent a single overall infringement, but the duration is less than one year. Both the England Agreement and the MU Agreement each lasted for only 2 months. The total duration was, therefore, less than six months, and a multiplier of 0.5 per cent should be applied. Even if the relevant date is when the agreement was made, the duration is only nine months, which would give rise to a multiplier of 0.75.

94. The OFT submits that there is no reason for any reduction for duration. The infringements covered the lead up to, and the key selling periods of, the products in question. MU understates the significance of the period immediately after the launch.

95. The fact that under Step 2 participants in cartels lasting more than one year are subject to a multiplier for duration is no reason to apply the principle in reverse to cartels of a shorter duration. There are policy reasons for imposing a minimum "floor" sanction in the first year: this discourages parties from entering into cartels, and encourages whistleblowers.

96. As to JJB, the OFT submits that the infringement commences at the date when the agreement is made, not when it comes into effect. The OFT continues to maintain that JJB was party to a single infringement regarding replica shirts from April/May 2000 to August 2001, with the consequence that the multiplier of 1.5 should stand. If the infringements are not regarded as continuous, the Tribunal would be entitled to impose separate penalties for each infringement, which would put JJB in a worse position.

(4) THE MULTIPLIER UNDER STEP 3

97. JJB, Allsports and MU submit that the multiplier of 3 applied under Step 3 for deterrence was too high and discriminatory. A multiplier of only 2 was applied to Umbro, even though Umbro was actively involved in many infringements, and had given the non-statutory assurances in 1999. It is illogical, submits JJB, to reduce the multiplier on the grounds that the infringements accounted for a high proportion of Umbro's turnover in replica shirts: that factor should point to a higher multiplier, not a lower one. Moreover, a factor of 2 was applied to the FA, even though the FA had given the non-statutory assurances in 1999.

98. Both Allsports and JJB emphasise that they were not party to the non-statutory assurances in 1999. Hence no increase for them is justified on that account.

99. MU submits that it should not be treated differently from the FA which also gave the assurances. MU emphasises that its infringement terminated long before the OFT intervened, that it has already suffered damage to its reputation, and in the eyes of its

supporters, and that it has since disposed of its retail business. A factor of 3 is not therefore justified in the case of MU.

100. According to the OFT, the multiplier of 3 is justified by the need to ensure deterrence. That need is highlighted by the assurances about resale price maintenance given in 1999 by the FA and the Premier League Clubs. The retailers were well aware of the illegality of the activities in question. The multiplier of 3 is not discriminatory since in Umbro's case sales of replica kit accounted for a preponderant part of its turnover and a lower multiplier is accordingly justified. The position of the FA is explained at paragraph 779 of the Decision. The various points put forward by MU do not justify any reduction in the multiplier in MU's case either.

V THE TRIBUNAL'S ANALYSIS OF THE COMMON ARGUMENTS OF JJB, ALLSPORTS AND MU

GENERAL OBSERVATIONS

101. 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)).

102. 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.

103. As pointed out in Napp, cited above at [497], the Tribunal is not bound by the *Guidance*. 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 conclusion as to what the penalty should be: *Napp* at [500].

104. We add that in our view it is not appropriate to seek to analyse each individual "Step" of the *Guidance* in isolation from the other Steps. For example, the starting percentage rate used under Step 1, and the multiplier used under Step 3, involve the exercise of judgment, it being open to the OFT to adopt various figures within a range to give rise to an amount which, in the OFT's view, is appropriate to the gravity of the infringement and the need for deterrence. However, it is the combined effect of the Step 1 and Step 3 calculation which determines the order of magnitude of the penalty. In addition, 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.

105. 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 series of mechanical calculations 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 and interrelated areas of judgment which necessarily play a part in fixing the final penalty.

106. In our view in 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.

THE RELEVANT MARKET ISSUE

General observations

107. Against that background, we turn to the issue of the relevant market used 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."

108. 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."

109. 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 Case T-62/98 *Volkswagen v. Commission*, [2000] ECR II-2207.

110. As is apparent from the OFT's 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 to establishing the infringement 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.

111. 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.

112. We therefore reject the appellants' 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.

113. 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.

114. 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 572). In this case for example, the infringement committed by Allsports occurred between April and October 2000, but the OFT has based its calculation of Allsports' penalty on Allsports' turnover in the financial year ended 31 January 2000. Accordingly, "the relevant turnover" under Step 1 of the *Guidance* is Allsports' turnover in the relevant product market in the whole of the year ended 31 January 2000. However, in this example there is no direct connection between "the relevant turnover" and the turnover directly relating to the infringement, which took place over a shorter period and at a later date. A similar consideration applies to MU, whose "relevant turnover" is based on the year ended 31 July 2000, although the principal part of the infringement occurred in the two month period following the launch of the new home shirt on 1 August 2000.

115. 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 penalty resulting from the totality of the calculation is appropriate to the infringement in question.

116. We further accept that when considering the turnover "in the relevant product market… affected by the infringement" under paragraph 2.3 of *Guidance*, the OFT is entitled to take into account not only the turnover in the products or markets directly affected by the infringement, but also the turnover in neighbouring products or markets which may reasonably be considered to have been "affected by" the infringement, for example as to the prices charged.

The relevant market in the present case

117. In the present case, the OFT's conclusion is essentially contained in paragraphs 553 to 554 of the Decision, cited above. The OFT there recognises that different items of replica kit are sold separately and are not substitutable for each other (e.g. shorts for shirts). Nonetheless the OFT considers that the correct relevant product market is replica kit, on the basis that (i) sales of replica shirts "drive sales of replica shorts and socks" (ii) a replica kit is "designed and marketed at launch as a single product", each item having the visible purpose of supporting a particular club or team and (iii) manufacturers are normally licensed to manufacture and distribute all items of the kit under an exclusive licence.

118. The definition of a relevant product market classically depends primarily on how far the products concerned are substitutable for each other according to their characteristics, price, and use (Decision, paragraph 541, and OFT 403, *Market Definition*). To determine substitutability, various techniques may be used, including the so-called SSNIP test (see *Market Definition* at paragraphs 2.8 to 2.9). In the present case, however, it is common ground that such substitutability does not exist, since shirts, socks and shorts are not substitutable for each other. A consumer who needs a pair of shorts is unlikely to switch his purchase to a pair of socks as a result of a change in the prices of shorts and socks relative to each other.

119. However, in the present context, lack of physical substitutability between different items does not in our view preclude the OFT from grouping certain items together as a

relevant product market (or perhaps, technically speaking, a series of closely associated or neighbouring product markets) if such a grouping reflects commercial reality and it can reasonably be shown that the products so grouped were "affected by" the infringement.

120. We also accept that in a case involving many parties with multiple infringements of various kinds it is reasonable for the OFT to use the same relevant product market across the board for calculating the penalty on all the parties to the infringement unless there are strong reasons for not doing so, even though there may be some differences of detail between the scope of the agreements in relation to the various related products at different periods of time.

121. We therefore deal briefly with the various submissions that the relevant market should exclude (a) junior shirts (Allsports) (b) infants kits (Allsports) (c) goalkeeper's shirts (JJB) and (d) shorts and socks (all three appellants).

Junior shirts

122. It is apparent from the Tables annexed to the Decision that the normal High Street price of an adult shirt at launch in the period of the infringement was £39.99 and that of a junior shirt was £29.99. Indeed, those were recognised price points, as the OFT finds at paragraphs 119 and 143 of the Decision. In our view it is reasonable in those circumstances to suppose that, if the adult shirt had been at a lower price at launch, that would have had an effect on the launch price of the junior shirt. The only difference between the two products is the relative sizes, and it is likely that the prices for different sizes of the same product will remain in proportion to each other. For example, if an adult shirt is launched at £30, we find it hard to imagine that the junior shirt would still be launched at £29.99.

123. More importantly, in the present context, it seems to us reasonable to suppose that if an agreement is reached to sell a principal product in a range (here the adult shirt) at the recognised High Street price it is more likely that other products in the range (here the junior shirt) would also be sold at the recognised High Street price in question. To discount the junior shirt in such circumstances would tend to undermine the agreement

not to discount the adult shirt, and be contrary to the spirit of the agreement made. That applies particularly in the launch period, or other key periods such as the Euro 2000 tournament, with which this case is concerned.

124. That common sense view is supported by the fact that Tables 1 to 6 of the Decision appear to contain no examples where the junior shirt was sold at less than £29.99 in the 60 day selling period after launch, or during the Euro 2000 tournament, in circumstances where the adult shirt was selling at £39.99.

125. To give a further example, when as a result of Umbro's pressure Sports Soccer, Blacks and JD were prevailed upon to raise their prices for the England shirt for Euro 2000 in late May/early June 2000, those prices were raised to £39.99 and £29.99 respectively for both the adult and junior sizes. Allsports and JJB were already selling at those prices.

126. Similarly, at paragraph 370 of the Decision, the OFT made an express finding that the MU Agreement extended by necessary implication to both the adult and junior shirts. We see no reason to disagree with that finding, which is supported by Tables 1 to 6.

127. In addition, there is a great deal of other evidence in the Decision that various agreements explicitly extended to the junior shirts: see e.g. paragraphs 344, 346, 350, 352, 377 to 379, 382, and 383.

128. In those circumstances in our view it was reasonable for the OFT to include the turnover in junior shirts in calculating the penalty.

Infant kits

129. A similar analysis applies to the infant kits, which are sold as a kit, including the shirt, socks, and shorts. The manufacturer's recommended retail price of infant kits was consistently £29.99, as shown in Tables 1 to 6. It may reasonably be inferred that there was at the time a conventional pricing relationship between infant kits (£29.99) junior shirts (£29.99) and adult shirts (£39.99), those all being recognised price points. In those circumstances it seems to us reasonable to assume further that, when the parties in these proceedings reached agreement not to discount the adult shirt below £39.99 (and

by implication the junior shirt below £29.99) during the key selling periods, that agreement made it more likely that they would not discount infant kits either during those periods. Tables 1 to 6 show that such was in fact the case. With one exception, no such discounting occurred.

130. The only example of the discounting of infant kit during a launch period occurring is in relation to the launch of the new home England replica kit in 2001. That example supports the inclusion of infant kits in the relevant market. Sports Soccer apparently launched the infant kit at £22.00, but within three days was required by pressure from Umbro raise the price back to the recommended retail price of £29.99 (Decision, paragraph 484) (d)). That in our view demonstrates Umbro's concern that discounting on the infant kit would lead to discounting by retailers on other items of replica kit and in particular undermine the agreement reached between Umbro and Sports Soccer that the latter would not discount the England home shirt launched at that time.

131. It is moreover notable that Sports Soccer did not discount infant kits at the launch of the new MU home kit in August 2000, nor at the launch of the MU Centenary kit in July 2001. There are also several references in the evidence to the agreements with Sports Soccer extending to infants kits: see e.g. paragraphs 352, 359, 360, 383 of the Decision.

132. In those circumstances it seems to us reasonable for the OFT to have brought into account, for the purposes of the penalty calculation, the parties' turnover in infant kits.

Goalkeeper's shirts

133. JJB's submission that goalkeeper's shirts should be excluded from the relevant market on the grounds that, being in a different colour they are not physically substitutable for the shirts worn by other members of the team, is not raised in its notice of appeal. JJB has produced no evidence about goalkeepers' shirts. There is evidence in the Decision that the arrangements between Umbro and Sports Soccer extended to goalkeeper's shirts see e.g. paragraphs 352, 376, 383, 385. In our view, other things being equal, there is likely to be a relationship between the price of the normal replica shirt and the goalkeeper shirt in the sense that the one is unlikely to be out of proportion to the other.

We see no reason to exclude goalkeepers' shirts from the relevant market for the purposes of the penalty calculation.

Shorts and socks

134. Shorts and socks appear to constitute between 10 and 16 per cent of sales by value of replica kit by Allsports, MU and JJB. The following table gives some idea of the difference made to the overall penalty, based on the figures supplied by the parties, if one excludes shorts and socks from the calculations.

	£ million Total relevant turnover	£ million Turnover in shorts and socks	£ million Step 1 in the Decision	£ million Step 1[2] excluding shorts and socks
MU	3.217[1]	0.375	0.281[1]	0.256
Allsports	3.846	0.367	0.346	0.313
JJB	14.769	2.340[3]	1.329	1.119

1 As adjusted by the inclusion of infant kits omitted in error by MU from the OFT calculations (excluding turnover in the market for granting IP licences)

2 Calculated by excluding shorts and socks from relevant turnover and taking 9 per cent of the resulting figure

3 Includes goalkeepers shorts and socks

135. It can thus be seen that the exclusion of shorts and socks makes, in round figures, a difference to the starting point figure under Step 1 of some £26,000 for MU, £33,000 for Allsports, and £211, 000 for JJB. Assuming a multiplier of 1 for each appellant at Step 2 (see below) the difference that would make to the OFT's Step 3 calculation, applying a multiplier of 3, is some £78,000 for MU, £99,000 for Allsports and £633,000 for JJB. Despite the further adjustments at Step 4, the overall effect on the penalty for MU and Allsports is limited, although there is admittedly a larger impact for JJB.

136. Turning to the analysis, we accept that many more shirts are sold than shorts or socks. We also accept that the Lexecon data does not show that, over the life of a kit, the prices of the shirt, shorts and socks necessarily always change at the same time or by proportionate amounts, although there are a significant number of occasions where such is the case.

137. However, these proceedings are concerned with the pricing of products during key selling periods, principally the Euro 2000 tournament and the period of 60 days following the launch of new replica kit, particularly the MU home kit in 2000 and the MU Centenary kit in 2001. Although no express agreements have been found as regards shorts and socks, it is nonetheless relevant to consider whether the shorts and the socks are to be regarded as "affected by" the infringements during those key selling periods.

138. As we have said, the shirt, shorts and socks together make up a replica kit which is designed and launched as a set. A new such launch takes place every year, home launches alternating with away launches. Although the central feature of the launch is the shirt, the shorts and socks play a supporting role. The replica kit and each of the items in it are designed to have a premium branded image. The shorts and socks forming part of the kit would not be launched independently of the shirt. It is the launch of a new shirt which creates the occasion for the launch of the shorts and socks associated with that shirt. In that sense at least sales of the shirt "drive" sales of the shorts and socks. Moreover, a single manufacturer (here Umbro) designs and launches the shirts, shorts and socks as a matching ensemble under the same branded image, and sets recommended retail prices for each of those items.

139. Although there is some evidence that shorts and socks are also sold separately, albeit less so in the junior sizes, at least a proportion of customers will purchase replica kit as a set. On the basis of a sales ratio of 5:1:1 between shirts, shorts and socks, that proportion, even if less than one-fifth, may still be significant. The appellants have not produced evidence to undermine the OFT's finding at paragraph 546 of the Decision that:

> "The on-going success of the market demonstrates to the OFT that a significant number of consumers of Replica Kit must routinely replace their Replica Kit or purchase Replica Kit for the first time when a new season's Replica Kit is released."

140. Tables 4 and 5 of the Decision show that the High Street prices/RRPs in respect of the launch of the MU home replica kit in 2000 and the MU Centenary kit in 2001 were as follows:

	MU home replica kit	£	MU Centenary replica kit 2001
Adult shirt	39.99		39.99
Adult shorts	21.99		19.99
Adult socks	8.99		8.99
Junior shirt	29.99		29.99
Junior shorts	18.99		16.99
Junior socks	7.99		7.99

141. Those prices were respected at the launch of the MU home kit in 2000 by JJB, Allsports, Blacks and JD (where stocked), although Sports Soccer discounted the shorts and socks. The MU Centenary kit prices were respected by all the principal retailers, including Sports Soccer.

142. That evidence supports the conclusion that an agreement between retailers not to discount the shirt below RRPs or High Street prices will tend to have the effect of discouraging the discounting of the other associated products in the kit, for fear of undermining the agreement not to discount the shirt, and because discounting the shorts or socks would not be in accordance with the spirit of the agreement reached with regard to the shirt.

143. The fact that Sports Soccer discounted the MU shorts and socks at the time of the launch of the home kit in August 2000 does not in our view undermine that reasoning. Sports Soccer, by policy a discounter, was in effect coerced into making the MU Agreement, and was determined to avoid its effects as far as possible (e.g. Liability Judgment, paragraph 359). That consideration does not apply to JJB, Allsports, or MU all of whom were doing as much as possible to ensure that discounting did not occur on the occasion of the launch of the new MU home kit on 1 August 2000. Moreover, at the launch of the MU Centenary Kit in 2001 even Sports Soccer, by then under increased pressure from Umbro (e.g. Liability Judgment, 911, 986) did not discount the shorts or the socks.

144. In our view it is reasonable to conclude that the MU Agreement made it less likely that discounting would occur on the shorts and the socks, as well as the shirt, at least as far as JJB, Allsports, MU and Blacks are concerned. The MU Centenary Shirt Agreement appears to have had precisely that effect as regards JJB and Sports Soccer.

145. There is no evidence in the Decision about the prices of shorts and socks at the time of the England Agreement, but discounting by Allsports and JJB on those items would in our view have been unlikely, given the circumstances of the making of the England Agreement set out in sections XI, XII, XIV and XV of the Liability Judgment. Certain documents relating to Umbro and Sports Soccer at that time refer to "kits" rather than shirts; see e.g. paragraphs 153 and 165 of the Decision.

146. We have also found, in the Liability Judgment, that the pressure which JJB exerted on Umbro was in respect of the discounting of replica kit generally, not just in relation to replica shirts: see paragraphs 401 to 403, 417 to 422, and 669 of the Liability Judgment. The same is true of Allsports, who regarded replica kit as a premium product whose image was devalued by discounting: Liability Judgment at paragraph 498, and 677 to 679. Similarly, MU's pressure was not limited to discounting on the shirt, albeit that that was the best selling product, but extended to the protection of the branded image of its replica kit generally: see paragraphs 438 to 449 and 463 to 468 of the Decision.

147. Even though, in the Decision, the infringements found are limited to shirts, it does not seem to us that these appellants can reasonably complain that the OFT has based its calculation on the turnover in replica kit as a whole in circumstances where (a) the pressure from these appellants to eliminate discounting extended to replica kit generally and (b) the aims of the appellants were largely achieved in that, with the one exception of the MU shorts and socks sold by Sports Soccer at the time of the MU launch in 2000, the shirts, the socks and shorts were not discounted by any principal retailer during key selling periods, including JJB, Allsports and MU.

148. In all those circumstances we do not think the OFT acted unreasonably as regards JJB, Allsports and MU in bringing into account the turnover relating to shorts and socks, as well as shirts, as turnover "affected by the infringement" as the starting point for the calculation.

149. As to the *Grinnell* and *LeClerc* cases, cited above, to which the Tribunal itself drew attention, we consider on reflection that those cases were dealing with different issues in different contexts. As regards *LeClerc,* the analogous question would have been whether the selective distribution system for perfumes there in question had the effect of also raising prices for the other branded products such as nail varnish and hand cream sold in the same outlets under the same image. The Court of First Instance was not considering that question, although had it done so there seems little doubt that the answer would have been in the affirmative on the facts of that case.

150. As to MU's argument on hats, scarves and so on, we have little evidence about this. The most directly relevant document, MU's "Kit 2000", handed up during the penalty hearing, appears to relate only to the shirt, shorts and socks. In any event, the fact that the OFT could perhaps have adopted an even wider relevant market does not seem to us to be a good argument for saying that the market should be narrower than the market in fact adopted. Moreover, the distinctions to be drawn between other licensed merchandise and replica kit are set out by the OFT in paragraphs 545 to 548 of the Decision.

151. We do not need to consider the OFT's submission that, had it been wrong in including shorts and socks in the relevant market, that is immaterial because the OFT would have applied a starting percentage of 10%, rather than 9%. However, it seems to us that that argument is unsound, not least because it is difficult to know what the OFT would have done in hypothetical circumstances. Moreover, the references in the Decision to the effect that the infringement "did not cover all the products in the relevant market" do not make it clear what products are being referred to.

152. Finally, we make it clear that the Tribunal would not have been prepared to investigate whether, in the case of MU, the OFT could have "counter-balanced" the exclusion of shorts and socks by making a different calculation of MU's royalty income under its trademark licence.

STEP 1 AND STEP 3

153. It is convenient to deal with the parties' submissions under Step 1 and Step 3 together, not least because it is the interrelationship between these steps which is the major determinant of the penalties imposed.

The starting point of 9%

154. As we have already held, 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.

155. The OFT emphasises that the agreements concerned key selling periods for high profile products; that the products are mass market consumer products; that many consumers are children; and that the parties were exploiting the loyalty of fans in question. We have also found, in the Liability Judgment, that there was a culture of resale price maintenance in the industry despite the 1999 assurances: see paragraphs 369 to 372 of that Judgment. In all those circumstances, we see nothing unreasonable in the OFT selecting a percentage of 9% as the percentage of relevant turnover to be applied as the starting point in this case of price fixing. That is in accordance with paragraphs 1.8 and 2.4 of the *Guidance*.

156. As regards MU, we do not regard such a percentage as inappropriate for a party to price fixing agreement as regards a product as high profile and important as the new MU home shirt launched under its new sponsor Vodafone.

157. As regards Allsports, we have found in detail in the Liability Judgment that Allsports was party to both the England and MU Agreements and maintained pressure on Umbro to ensure that discounting did not occur on replica shirts. Allsports took a central role in organising the MU Agreement. Again, we see no serious argument for taking a different percentage starting point in Allsports' case.

158. As regards JJB, JJB's participation in the England Direct Agreement forms part of the OFT's reasons for using a 9 per cent figure: see paragraph 667 of the Decision. However, we do not consider the fact that that agreement has not been proved to be good grounds for reducing the 9 per cent figure applied to JJB in respect of the serious matters that have been proved, namely JJB's participation in the England, MU and Centenary Shirt Agreements. We deal with the England Direct aspect later in this judgment.

159. As regards the argument advanced by MU and Allsports to the effect that the percentage of 8 per cent applied to Umbro is discriminatory as against them, we have already expressed the view that a percentage of 9 per cent is appropriate as regards MU, Allsports and JJB.

160. As regards Umbro, the OFT's reasoning is that Umbro engaged in vertical price fixing, and only knew of and facilitated, rather than engaging directly in, horizontal price fixing (paragraph 581 of the Decision). However, as regards the England Agreement it seems to us on the evidence difficult to draw that distinction since Umbro was, in effect, the channel through which not only vertical but also horizontal price fixing took place. The Tribunal held, in particular, that it was through the medium of Umbro that JJB, Allsports, Sports Soccer, Blacks and JD came to agree to observe the retail price of £39.99 on the England shirt during Euro 2000, not only with Umbro, but at least indirectly with each other (Liability Judgment, paragraphs 654 to 656, 712, 717). A similar analysis applies to the MU Centenary Shirt Agreement to which JJB, Umbro and Sports Soccer were party (Liability Judgment, paragraphs 984 to 988).

161. On the other hand, it is true that Umbro was less directly involved, albeit still involved, in the horizontal price fixing which took place as regards the MU Agreement and which culminated in the meeting of 8 June 2000. That meeting was organised by Mr. Hughes of Allsports and took place between Mr. Hughes, Mr. Whelan and Mr. Sharpe of JJB, and Mr. Ashley of Sports Soccer. Umbro's less direct participation in the MU Agreement provides some ground for distinguishing Umbro's starting percentage.

162. It is also true that JJB, MU and Allsports put considerable pressure on Umbro, as found in the Liability Judgment. Although that fact is recognised to some extent at

paragraphs 589 and 594 of the Decision, our view following the hearing on liability is that there is insufficient recognition, in the Decision, of the extent to which Umbro found itself under pressure to prevent discounting, both from JJB and Allsports, Umbro's two largest customers for replica kit, and from MU, which profited from an absence of discounting both in its capacity as a retailer, and as a licensor. That pressure seems to us to be an element which distinguishes Umbro from the other appellants.

163. Perhaps more importantly, we agree with MU's submission that the question of discrimination must be judged by looking at the total effect of the various steps of the calculation of penalty. As set out below, the overall penalty imposed on Umbro is much higher than the penalty imposed on Allsports and MU, not only in absolute terms but as a proportion of turnover and as a proportion of the statutory maximum.

164. In those circumstances, we see no grounds for suggesting that the overall penalty imposed on MU or Allsports (or indeed JJB) is discriminatory when compared with the overall penalty imposed on Umbro. Indeed, we consider that the overall penalty imposed on Umbro is too high, rather than too low, for the reasons that we give below.

165. Even if it were arguable that a higher starting percentage could have been justified vis-à-vis Umbro under Step 1, we are satisfied that it would be inequitable to impose on Umbro any higher penalty than it has in fact received. Indeed, had the OFT imposed a higher starting percentage on Umbro, it would in our view have been necessary to reduce the multiplier under Step 3, in order to ensure that the overall penalty imposed on Umbro was not disproportionate.

166. As regards the fact that the OFT also applied a starting percentage of 8 per cent to the FA, it is apparent from paragraphs 765 to 776 of the Decision that the infringements in which the FA was involved relating to Sportsetail were not as serious as the Replica Shirts Agreements and did not involve the FA in direct horizontal price fixing. In those circumstances the lower starting percentage applied to the FA in our view does not assist Allsports and MU. In any event, the FA is in a different position, as set out below.

The multiplier at Step 3

167. The deterrent element is an important aspect of the penalties imposed under the Act, not just as regards the undertakings involved but as regards other undertakings, as paragraphs 1.8 and paragraphs 2.8 to 2.9 of the *Guidance* makes clear. The multipliers imposed in this case are intended to achieve the necessary deterrent effect.

168. We see no grounds for interfering with the OFT's margin of appreciation in deciding that a multiplier of 3 at Step 3 was appropriate for JJB, Allsports and MU.

169. As regards JJB, Allsports and MU, the infringements affected only a relatively small proportion of their total turnover. In such circumstances a penalty that was limited to the "relevant turnover" used at Step 1 would have little significant impact on their business as a whole and thus little, if any, deterrent effect. That is particularly so in relation to JJB, the largest company. For that reason, paragraph 2.11 of the *Guidance* expressly recognises that the effect of Step 3 may well be to increase the penalty substantially above 10 per cent of the relevant turnover used under Step 1. We consider that that approach, severe though it may be, is entirely justified in principle as a deterrent measure.

170. In the present case we think that a deterrent measure under Step 3 was fully justified as against JJB. JJB was the largest sports goods retailer, with a relatively high profile and, as the evidence before the Tribunal showed, a strong market position and strong buying power. JJB had no hesitation in seeking to pressurize Umbro to respect its wishes: section XI of the Liability Judgment. In our view, only deterrent penalties on powerful companies such as JJB are likely to secure the objectives of the Act.

171. Allsports, although smaller and less powerful than JJB, was nonetheless the second largest purchaser of replica kit from Umbro and consistently kept Umbro under pressure to prevent discounting, not only by Sports Soccer but also by JD: see sections XII and XV of the Liability Judgment. The evidence of the Golf Day, of Mr. Hughes' conversations with Mr. Ronnie, and of Mr. Hughes' diary showed that Allsports had either no understanding of, or was determined to disregard, the provisions of the Act.

In those circumstances an appropriate deterrent penalty for Allsports was also fully justified.

172. In our view little mitigation arises from the fact that neither JJB nor Allsports, as retailers, gave the voluntary assurances in 1999 referred to by the OFT at paragraphs 1 and 2 of the Decision. Although JJB and Allsports were not formally party to those assurances, the OFT's investigation in 1999 and the fact that assurances had been given was well known in the trade. We find it difficult to accept that JJB and Allsports did not know that agreements or practices fixing retail prices were illegal. Those factors in our view reinforce the need for deterrence.

173. As regards MU, that company was directly party to the 1999 assurances to the OFT. Within a short time, MU acted in violation of the assurances given. Voluntary assurances, which in the experience of this Tribunal are often unsatisfactory, plainly failed to have any effect on MU in this case. In those circumstances, we do not think MU can complain that the penalty imposed on it has a significant deterrent element. We also bear in mind that MU is an extremely successful and high profile football club, commanding a high degree of loyalty from fans. That loyalty was exploited in this case. A club in MU's position must expect a significant deterrent penalty if it acts in breach of the law.

174. As to the submission that it is unfair to the other appellants that the OFT imposed only a multiplier of 2 on Umbro at Step 3, the Tribunal is concerned by Umbro's penalty in this case, but for a reason opposite to that advanced by the appellants. The situation in the present case is that Umbro's business is to a large extent concerned with replica kit, with the consequence that the infringements related to a far larger proportion of Umbro's total turnover than was the case with the other appellants. In those circumstances the calculation based on relevant turnover envisaged by the *Guidance* is likely to result in a penalty on Umbro which is much higher, when expressed as a proportion of total turnover, or as a proportion of the statutory maximum, than the penalty imposed on other parties such as JJB, Allsports or MU.

175. Thus, for illustrative purposes, the situation can be seen in the following Table, on the basis of the penalties imposed in the Decision:

	Penalty	Penalty as % of UK turnover	Penalty as % of statutory maximum
Umbro	£6.641	7.9	44.6
JJB	£8.373	1.3	8.7
Allsports	£1.350	1.0	9.7
MU	£1.652	1.5	14.5

176. In our view, a penalty which represents 8 per cent of a company's United Kingdom turnover is significantly more severe than a penalty which represents only around 1 per cent per cent of a company's United Kingdom turnover. A company whose penalty is over 40 per cent of the statutory maximum has a heavier penalty to bear than a company whose penalty is only 8 to 14 per cent of the statutory maximum. In our view the solely turnover-based approach of the *Guidance* gives rise to a risk that a company which is no more culpable than another company may find itself facing a penalty which in practice more severe, simply because of differences in the "mix" of turnover between the two companies. In our view this potentially gives rise to a risk of unfairness, which the OFT should guard against.

177. At this stage of the judgment it suffices to say that in our view the OFT was entirely correct to decide to apply a lower multiplier to Umbro for deterrence, on the ground that the resulting penalty, expressed as a proportion of Umbro's turnover, was sufficiently high to have a deterrent effect. As it is, Umbro's penalty as a proportion of turnover and as a proportion of the statutory maximum is significantly more severe than the penalty imposed on the other appellants, which is a matter to which we revert later in this judgment.

178. As regards the multiplier of 2 imposed on the FA, we regard the position of the FA as quite distinct from that of JJB, Allsports or MU. Notwithstanding that the FA was also a party to voluntary assurances given in 1999, the FA is a non-profit making body which invests heavily in the grass roots of football. The OFT rightly took into account, in our view, the need to strike a balance between harming the FA's ability to invest in football, on the one hand, and ensuring that the FA observed high standards on the other hand: see paragraph 779 of the Decision. In our view, the appellants' position is quite different from that of the FA.

179. In those circumstances we find that the multiplier of 3 applied to JJB, Allsports and MU was neither excessive nor discriminatory.

DURATION

180. The essential argument advanced by MU and Allsports is that since the duration of their infringements was less than a year they should have a multiplier of (say) 0.5 applied at Step 2 to the figure derived from the calculations at Step 1.

181. We accept that, at some point in the assessment of a penalty, the fact that an infringement was of a relatively short duration may, depending on the circumstances, be taken into account: see *Aberdeen Journals (No. 2)*, cited above, at paragraph 498 of the judgment. Thus, we do not accept that a short duration can never be taken into account, for example as a mitigating factor.

182. We do not, however, accept that there should, in effect, be built into Step 2 of the *Guidance* an automatic rule that agreements of less than a year should attract a multiplier of less than one. Apart from the unduly mechanistic nature of such a rule, there are at least two objections. First, as the OFT points out, an important element of the infringement committed is the fact that the agreement was made in the first place, rather than how long it lasted. Secondly, depending on the circumstances, an agreement of short duration of a serious nature may be a more serious infringement than one which lasts longer but has less serious effects. For example, in the present case the England and MU Agreements were both of relatively short duration because they both related to events which were themselves of limited duration, namely Euro 2000 and the launch period for the new MU home shirt. But both infringements were extremely serious, affecting high profile products and causing significant detriments to consumers. One can imagine other infringements which may have lasted longer but had less impact.

183. In the circumstances our approach is to consider whether there are any grounds for reducing the penalties having regard to duration, but without applying any mathematical formula as suggested by the appellants.

184. In that connection, we take the duration of the infringement to run from the date of making the agreement, not the date when it was put into effect. First, as already stated, the making of the agreement in itself constitutes an infringement. Secondly, if duration ran only from the date when the agreement came into effect, it would be difficult to sanction an agreement which never took effect. The Chapter I prohibition, however, applies to agreements which have as their object a restriction or distortion of competition, as well as an effect. Thirdly, it is from the date of making the agreement, at the latest, that the parties are aware of each others' future intentions, and can plan their commercial policies accordingly. It is the making of the agreement that reduces uncertainty about a competitor's intentions, not just the putting of the agreement into effect. Lastly, in a typical case many preparatory steps take place between the making of an agreement and its putting into effect. In this case, for example, there was significant advertising and promotion, and pre-ordering by customers, prior to the launch of the new MU home shirt on 1 August 2000.

185. In the case of MU, the MU Agreement lasted effectively from the end of May 2000 (see Mr. Draper's fax of 25 May 2000) to the beginning of October 2000. That was a duration of at least four months. Although Sports Soccer discounted the MU home shirt from 1 October 2000, JJB and Allsports did not do so, and MU has not suggested that it did so. At least some of the effects of the MU Agreement thus carried over after 1 October 2000, although we accept that the Agreement ended on that date. Of more significance is the fact that the MU Agreement affected what was one of the most important ever launches of a replica kit, an event surrounded by high publicity which attracted great interest from fans.

186. Although, as MU and Allsports submit, the selling period for a new kit launched in August continues to Christmas, the evidence before the Tribunal is that it is the 60 day period following the launch that is the critical period. In addition, significant sales of the new MU home shirt were made prior to launch. In all these circumstances we see no good reasons for reducing the penalty on MU on grounds of short duration, given the seriousness of the infringement involved.

187. In our view, the same considerations apply to Allsports. The submission that the infringements represented "only two weeks of Mr Hughes' life" between the Golf Day

on 25 May and the meeting on 8 June 2000 understates Allsports' involvement. Allsports was party to both the England and MU Agreements from at least April/May to October 2000. Both were serious infringements affecting key events. The duration of the infringement in this case is relatively short only because events such as a tournament or a launch are in themselves limited in time. Again we see no grounds for reducing Allsports' penalty on grounds of short duration.

188. As far as JJB is concerned, the Liability Judgment showed that JJB was party to the following Agreements:

The England Agreement	April/May 2000 to 21 June 2000
The MU Agreement	May/June 2000 to 1 October 2000
The MU Centenary Shirt Agreement	8 June 2001 to end August 2001

189. That, in the aggregate, gives rise to periods of infringement lasting some eight to nine months. On the evidence found in the Liability Judgment (see paragraphs 904 and 924 to 932) we do not think we can proceed on the basis that a continuing period of infringement has been proved against JJB from May 2000 to August 2001, since there is a significant gap in the evidence between October 2000 and June 2001. In those circumstances we accept that the multiplier of 1.5 used by the OFT at Step 2 for JJB cannot stand.

190. However, for the reasons already given in relation to MU and Allsports, we see no reason for applying a multiplier of less than one to JJB's penalty on the grounds that the aggregate period of infringement is less than a year. In any event, periods of infringement aggregating the best part of nine months are considerable periods. The seriousness of the infringements is such that we see no grounds for further reducing the penalty on JJB on grounds of short duration.

191. It follows from the foregoing that we reject the submissions made by JJB, Allsports and MU as regards the OFT's calculations at Step 1 of the *Guidance* save as to the multiplier of 1.5 applied to JJB. As regards JJB in our view the correct multiplier is 1.0, applying the OFT's methodology.

VI ASSESSMENT OF THE PENALTY: JJB

Further submissions of the parties

192. In addition to the matters already dealt with, JJB submits that there is an element of double counting in its penalty, since "deterrence" is taken into account several times; that the MU Centenary Shirt Agreement was part of the same infringement as the England and MU Agreement, so there is no justification for increasing the penalty for repeat infringements; that the Tribunal has no power to increase the penalty, and no basis for doing so, contrary to the suggestions of the OFT; and that, viewed in the round, the penalty is too high and should be reduced.

193. The OFT maintains that JJB's penalty was entirely appropriate. If the MU Centenary Shirt Agreement is to be treated as part of a continuous infringement, the multiplier of 1.5 for duration should be maintained. If it is to be treated as a separate infringement, there should be an uplift on the penalty for a repeated infringement. The same applies if the England and MU Agreements are treated as separate infringements. In addition, there are in any event grounds for increasing JJB's penalty since (a) the Tribunal found that JJB was party to a wider agreement affecting "replica shirts" and (b) JJB provided inaccurate information to the OFT over its prices and discounts, and in a letter of 13 March 2003 regarding the evidence of Mr Whelan.

194. JJB apparently introduced a compliance programme only in March 2004, but did not produce a copy until the hearing on penalties before the Tribunal in January 2005. We see no mitigation there.

The Tribunal's analysis

195. For the reasons given below in relation to Allsports, we accept that the Tribunal has jurisdiction to increase the penalty. However, we do not propose to do so as regards JJB. Although the Tribunal found in the Liability Judgment that what the OFT characterised as the England Agreement extended to replica shirts generally, it was essentially the England Agreement (i.e. the agreement relating to the price of the England home shirt during Euro 2000) which was the subject of evidence and argument before the Tribunal, and not any wider agreement. Nor do we consider that JJB's

penalty should (or even could) be increased on the ground of the various matters relating to JJB's conduct in the proceedings which the OFT have drawn to our attention.

196. In making our own assessment of JJB's penalty, we first apply a broad brush approach. We do not need to repeat what we have already said about the serious nature of these infringements and the need for a deterrent penalty. We consider that JJB was, at the time, the most powerful influence in the market. For the reasons set out above, we have in substance upheld the OFT's approach to penalties set out in the Decision. On that basis, the original penalty of £8.37 million, on the basis of the infringements as found in the Decision, was in our view fully justified.

197. In our judgment, the only matter that could now result in a decrease in the penalty for JJB is the fact that the Tribunal found that certain matters were not proved as infringements, namely (1) part of the Continuation Agreement relating mainly to the launch of the new England home shirt in April 2001 and (2) The England Direct Agreement. On the other hand, that is counterbalanced by the fact that it is apparent to us, after hearing extensive cross-examination of the relevant witnesses, that JJB's role in the infringements was greater than suggested in the Decision because of the pressure which JJB was in a position to bring to bear on Umbro.

198. We also bear in mind that the principal focus of these proceedings has been on the England and MU Agreements, and the circumstances surrounding the making of the MU Centenary Shirt Agreement. Little attention was focussed, in the evidence, on the launch of the new England home shirt in April 2001. Of the four principal launches or events in issue, namely the pricing of the England home shirt during Euro 2000, the launch of the MU home shirt in August 2000, the launch of the new England home shirt in April 2001 and the launch of the MU Centenary shirt in July 2001, JJB has been found to have committed infringements in three out of the four cases. As regards the one launch where an infringement was found not proved, the new England home shirt in 2001, there is no evidence that that event was as high profile as, for example Euro 2000 or the launch of the MU home shirt in 2000. Moreover that alleged agreement concerned only JJB, Umbro and Sports Soccer whereas the England Agreement involved co-ordinated action affecting substantially the whole of the multiple retail

trade, namely JJB, Allsports, Blacks, JD and Sports Soccer. The MU Agreement involved a meeting between the most senior executives of JJB, Allsports and Sports Soccer and related to one of the most high profile launches ever for a replica shirt. That Agreement also involved MU, one of the best known football clubs in the country, and also Blacks.

199. The England Direct Agreement was in our view a less serious infringement, even on the facts as found by the OFT, than any of the other infringements that have been established against JJB.

200. In all these circumstances, our assessment is that the penalty on JJB should be reduced from £8.373 million to £6.70 million, a reduction of approximately 20 per cent, on the ground that certain infringements, namely part of the Continuation Agreement and the England Direct Agreement, were not proved. That penalty of £6.70 million represents approximately 1 per cent of JJB's United Kingdom turnover in the year ending 31 January 2001. On the basis that the infringements did not exceed one year, the penalty represents some 10 per cent of the then statutory maximum under the Penalties Order.

201. We have also borne in mind that JJB has not accepted any responsibility for the infringements proved, and has made no offer to make amends. No mitigation therefore arises in that regard: see *Argos and Littlewoods v. OFT* [2002] CAT 13 at paragraphs 237 to 238. Having regard to JJB's United Kingdom turnover of £659 million in the year to 31 January 2001, we do not think a penalty of around 1 per cent of turnover is at all excessive in the circumstances, bearing in mind the objectives, including deterrence, set out in paragraph 1.8 of the *Guidance*. Indeed the penalty imposed on JJB could be regarded as moderate when compared, in relative terms, to the penalty imposed on Umbro.

202. As a cross-check, we consider the matter as if we were applying the methodology of the OFT, which we have broadly upheld. The OFT calculated a penalty for JJB of £1.329 million at Step 1. On the basis that no multiplier is applied at Step 2, but a multiplier of 3 is applied at Step 3, the penalty at Step 3 would be, in broad terms, £4.0 million on the OFT's methodology.

203. At Step 4, the OFT first increased that penalty by 10 per cent on the ground that JJB had pressurised Umbro and was thus an instigator, and by a further 20 per cent because senior management were involved. These adjustments would give a penalty of £5.2 million. However, in our judgment the evidence set out in the Liability Judgment at section XI shows that the pressure on Umbro from JJB was greater than the OFT has allowed for. In our judgment, the OFT would have been entitled to factor in an uplift of at least 20 per cent, rather than 10 per cent, for this element. That would give a penalty at this stage of Step 4 of £5.6 million.

204. In addition, our view is that the MU Centenary Shirts Agreement (technically a concerted practice) is to be treated as a separate infringement. JJB cannot, in our view, argue that the total duration of its infringement is less than one year, and at the same time maintain that the period of the infringement "was not unbroken as between April 2000 and August 2001" (skeleton, paragraph 27). If the latter contention were correct, the multiplier of 1.5 for duration applied by the OFT would be justifiable. On the basis of the Liability Judgment, in our view the correct analysis is that there is a break in the infringement proved, that break being from October 2000 to June 2001. In those circumstances, the MU Centenary Shirt Agreement should logically be treated as a new, or repeated, infringement. Although we are prepared to treat the England and MU Agreements as one continuous agreement for penalty purposes, the MU Centenary Shirt Agreement should be separately sanctioned, in our view.

205. The MU Centenary Shirt Agreement is in itself a serious price fixing infringement. We do not consider the fact that the Tribunal found a concerted practice, rather than an agreement to be a mitigating factor (Liability Judgment, paragraph 988). In our view on the OFT's methodology it would be appropriate to uplift the penalty thus so far calculated by 20 per cent to sanction the MU Centenary Shirt Agreement as a further infringement. That uplift would have the effect of neutralising the effect of the 10 per cent uplift applied by the OFT in respect of the England Direct Agreement which, as JJB submits, must be disregarded.

206. Applying a 20 percent uplift for the MU Centenary Shirt Agreement, would on the OFT's methodology give rise to a total penalty at Step 4 of £6.72 million, which is broadly in line with our broad brush assessment set out above.

207. We therefore propose to fix JJB's penalty at £6.70 million.

VII ASSESSMENT OF THE PENALTY: ALLSPORTS

208. For the reasons already given in section V above, we see no good grounds for reducing the penalty of £1.350 million imposed on Allsports. That represents just under 1 per cent of Allsports' United Kingdom turnover in the year to 31 January 2000 and just under 10 per cent of the statutory maximum then applicable under the Penalties Order.

209. Allsports did introduce a compliance programme in 2003, but too late to get any credit for that in the Decision. Allsports takes no point in relation to its compliance programme. Allsports has not accepted responsibility for the infringements, so no mitigation arises there.

210. In our view, Allsports' infringement was more serious than as found by the OFT, first because what the OFT characterized as the England Agreement extended to replica shirts generally (paragraphs 755 to 758 of the Liability Judgment); secondly because Allsports' pressure on Umbro was greater than the OFT may previously have supposed (section XII of the Liability Judgment); thirdly because Allsports played an important role in provoking Umbro to suppress JD's "hat trick" promotion, as well as putting pressure on Umbro as regards Sports Soccer (paragraphs 718 and 719 of the Liability Judgment); and fourthly because of Allsports' contacts with Blacks (paragraphs 716 to 720 of the Liability Judgment). We have borne those points in mind when making our broad assessment of the penalty to be paid by Allsports. Allsports' penalty could, in our view, have been higher.

Increasing the penalty

211. The only remaining live issue in Allsports' appeal is whether, as the OFT submits, we should increase the penalty on Allsports by, in effect, withdrawing the reduction of 5 per cent for cooperation which the OFT allowed Allsports at paragraph 617 of the Decision on the basis that Allsports had admitted organising the meeting of 8 June 2000 with anti-competitive intent. The OFT submits that the non-disclosure by Allsports of Mr. Hughes' diary was a matter of fault. First, according to the OFT, the admission

made by Allsports was extremely limited, accompanied as it was by a strong denial of any agreement, and was intended to put the OFT off the scent. Secondly, Mr. Hughes' diary was relied on positively for exculpatory purposes, but Allsports did not tell the whole story because the diary contained other, highly incriminating entries, that were not referred to. Allsports' submissions to the OFT were thus misleading. The OFT leaves it to the Tribunal to decide whether the additional fact that parts of Mr. Hughes' diary, when eventually disclosed, were "blacked out," and thus concealed further relevant evidence, should be taken into account when deciding Allsports' penalty.

212. Allsports submits essentially that its admission was helpful to the OFT; that it was under no obligation to produce the diary or further incriminate itself: that its failure to do so is neutral as regards penalty; and that events occurring in the proceedings before the Tribunal are not relevant to Allsports' penalty for the infringement.

Jurisdiction to increase the penalty

213. We consider first that, as a matter of jurisdiction, the Tribunal does have jurisdiction to increase the penalty. Schedule 8, paragraph 3 of the Act provides:

> (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) …
>
> (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.

214. As a matter of construction, it seems to us that the word "vary" in sub-paragraph (2)(b) of Schedule 8, paragraph 3, includes on its ordinary meaning the power to vary upwards, as well as downwards. We also bear in mind that, in the course of an appeal to the Tribunal, a great deal of new material may well come to light, as has occurred in this case. It would seem consistent with the scheme of the Act for the Tribunal to have

jurisdiction, when assessing the penalty, to be able to take into account all the facts and matters before it. In some cases new facts might show that the infringement was more serious than was first thought. It is true that in those circumstances one option for the Tribunal would be to remit the matter to the OFT to reassess the penalty. On the other hand, the Tribunal is expressly empowered "to make any other decision which the OFT could have made" under sub-paragraph 2(c). Provided that the Tribunal has all the necessary facts and matters before it, and that a fair procedure has been followed, there does not appear to be any jurisdictional bar to the Tribunal increasing the penalty in a proper case. That would also be consistent with the Tribunal's power "to impose… a penalty" under sub-paragraph 2(b), if necessary having first set aside that part of the OFT's decision concerned with the penalty.

215. JJB (but not Allsports) submitted that such a course is however precluded by the Tribunal's obligation to decide the appeal "by reference to the grounds of appeal set out in the notice of appeal" under sub paragraph (1) of paragraph 3 of Schedule 8. Since no notice of appeal ever seeks an increase in penalty, the jurisdiction to increase the penalty cannot arise.

216. In our view, paragraph 3(1) of Schedule 8 reflects the fact that under paragraph 2(2) of Schedule 8 the appellant is required to set out his grounds of appeal in the detail there specified. The Tribunal is then required, under paragraph 3(1), to adjudicate on those grounds of appeal "on the merits". The words "by reference to the grounds of appeal" are in our view intended to indicate that the appellant may not rely on grounds other than those set out in the notice of appeal. The appellant cannot advance new grounds of appeal without permission, and the Tribunal cannot dismiss the appeal without dealing with the grounds put forward. However, paragraph 3(1) does not, it seems to us, necessarily preclude the Tribunal from taking into account other matters raised by the OFT in response to the notice of appeal. In particular, we do not read paragraph 3(1) as limiting the wide scope of the wording of paragraph 3(2). Accordingly we reject JJB's submission based on paragraph 3(1) of Schedule 8.

217. JJB (but not Allsports) advanced the further argument that the Tribunal could not rely on new matters that had not been the subject of a Rule 14 notice, now called a statement of objections. That submission does not in our view go to jurisdiction but to procedural

fairness. It seems to us if any question of an increase in penalty arises, the Tribunal may either remit the matter to the OFT, or deal with it itself if it can fairly do so.

218. However, in our judgment, any jurisdiction to increase the overall penalty as a result of new facts found about an appellant's conduct should not be exercised lightly. Appellants before the Tribunal should not normally be at risk of an increase in the overall amount of the penalty imposed by the OFT, on the ground of new facts, in the absence of exceptional circumstances, and only then if it is appropriate for the Tribunal to decide the matter itself rather than remitting to the OFT.

219. We accept that nothing prevents the Tribunal from giving greater or lesser weight to the various factors identified by the OFT, or even referring to new factors, in arriving at a penalty that is no higher than that imposed by the OFT. If, however, it is submitted by the OFT that a penalty in excess of the existing penalty should be imposed, then exceptional circumstances would normally need to be shown.

The present case

220. In the course of the administrative procedure Allsports submitted written representations dated 8 July 2002 in response to the Rule 14 Notice of 16 March 2002. At pages 1 and 14 to 15 of the those representations Allsports admitted that Mr. Hughes had sought a meeting with JJB and Sports Soccer in June 2000, for the purpose of discussing "the state of the market for replica kit including the crippling price war" between Allsports, JJB and Sports Soccer. However, Allsports strongly denied that any agreement was made at the meeting of 8 June 2000. In its representations dated 8 January 2003 to the Supplementary Rule 14 Notice dated 26 November 2002, Allsports continued to deny that any agreement had been reached at the meeting of 8 June 2000. In response to an allegation made at paragraph 46 of the Supplementary Rule 14 Notice that Mr. Hughes had referred to the possibility of a further meeting, Allsports also said

> "David Hughes believes that a broad, general reference to meeting more often would at most have been part of the initial exchange of pleasantries and was not a serious comment. Allsports would point out that no follow-up meeting was discussed. Any such meeting would have been recorded in David Hughes' diary – he is a man who lives by his diary – and there is no such record. Allsports would reiterate that this

> meeting was a unique and isolated event, no other such meeting took place and the OFT has not alleged that there was any other such meeting or contact between those parties."

221. In its representations by counsel on 3 March 2003 Allsports continued to deny that any agreement was reached at the meeting of 8 June 2000, although it was accepted that Allsports had organised the meeting and that Mr. Hughes "wanted to discuss the market for replica kits and the price war that was going on" (transcript, page 21). Allsports submitted no witness statements to the OFT.

222. In the Decision the OFT found at paragraph 614:

> "Allsports was the primary organiser of the price-fixing meeting on 8 June 2000 in relation to the MU home Replica Shirt. Allsports organised that meeting with anti-competitive intent. Further, it also rang Blacks to inform it of the outcome of that meeting, having earlier contacted it about JD's 'hat trick' promotion. The OFT regards this as a serious aggravating factor and increases the basic amount of the penalty by 15 per cent."

223. The finding that Allsports organised the meeting with anti-competitive intent was made in reliance on Allsports' written representations of 8 July 2002, at pp. 14-15: see footnote 183 to the Decision.

224. At paragraph 617 of the Decision the OFT held:

> "Allsports has never accepted that it infringed the Act. However, it did admit to organising the meeting on 8 June 2000 with anti-competitive intent and otherwise fully co-operated with the OFT. The OFT regards this admission as a mitigating factor because it went beyond the standard ordinarily expected of an undertaking subject to an investigation. The OFT therefore decreases the basic amount of the penalty by 5 per cent."

225. In the course of its appeal to the Tribunal Mr. Hughes produced two witness statements and gave evidence. In certain respects the Tribunal did not accept Mr. Hughes' evidence. Mr. Hughes' first witness statement of 30 September 2003 referred to his diary, which was produced to the OFT and later the Tribunal.

226. The Tribunal said the following in the Liability Judgment as regards Mr. Hughes' diary:

"313. It transpires that, although Allsports purported to rely on Mr. Hughes' diary for 2000 for exculpatory purposes during the administrative proceedings (see Allsports' written representations dated 8 January 2002 in response to the Supplemental Rule 14 Notice, point 46, and Day 10, pages 113 to 114) that diary was not produced to Allsports' solicitors until after the decision. Once Allsports decided to appeal, the production of Mr. Hughes' diary to the OFT and the Tribunal was in our view inevitable. We thus find it difficult to give Allsports credit for producing the diary at this late stage.

314. Mr. Hughes' diary entries for 5, 6, 7 and 8 June 2000 are heavily scored out in three different colours of biro, although it is possible to decipher the underlying entries. In our view, those entries constitute material evidence that was not disclosed by Mr. Hughes to the OFT during the administrative procedure. In particular Mr. Hughes' diary for 5 June 2000 states:

'Agree Man United and England prices with everyone including Mike Ashley … Sports trade cartel – arrange a meeting regularly … Visit David Whelan'

That entry is plainly evidence of Mr. Hughes' willingness to contemplate action to restrict competition, and in particular to enter into an agreement with his competitors, including at least JJB and Sports Soccer, on the prices of the MU and England shirts and his intention to do so. It is also evidence of Mr. Hughes' intention to form a "sports trade cartel".

315. While the entries for 5, 6, 7 and 8 June 2000 were scored out in Mr. Hughes' diary in biro, further entries were scored out in black felt tip marker pen and cannot be read by the naked eye. As we understand it, this scoring out was done just before the diary was handed over. It is admitted that Mr. Hughes intended to conceal these entries, including from his own legal advisers. However, the OFT sent Mr. Hughes' diary for forensic examination, as a result of which the entry for 14 August 2000 was revealed. That reads:

"Phone Mike Ashley to review Man United launch and other issues"

316. Between 24 August and 23 September 2000 there are 11 further diary entries, all scored out with black marker pen, which state in one way or another "phone Mike Ashley". These entries were equally revealed by the OFT as a result of forensic examination.

317. Mr. Hughes' explanation is that the entry for 14 August 2000 was a coded entry intended to disguise the fact that

> he was intending to call Mr. Ashley with a view to selling the Allsports business. The entries between 24 August and 23 September 2000 equally refer to Mr. Hughes' intention to ring Mr. Ashley for this purpose. However he, Mr. Hughes, could never bring himself to call Mr. Ashley. Mr. Hughes told us that he scored out those entries – together with certain others not material – because he regarded this as a private matter. It is common ground that Mr. Hughes never did ring Mr. Ashley.
>
> 318. We do not accept that the entry for 14 August 2000 in Mr. Hughes' private diary
>
> "Phone Mike Ashley to review Man United launch and other issues"
>
> is merely "code" for an intended phone call limited only to the possible sale of Allsports to Mr. Ashley. It seems to us that this entry is evidence that in Mr. Hughes' mind the meeting of 8 June had ended amicably, such as to make a "review" of the MU launch a plausible reason for Mr. Hughes to ring Mr. Ashley, even if Mr. Hughes also intended to discuss "other issues". This entry, in particular, supports the OFT's case that a consensus was in fact reached at the meeting of 8 June. Similarly, the other entries relating to phoning Mr. Ashley are at least consistent with Mr. Hughes wishing to contact Mr. Ashley for the purpose of discussing market related matters.
>
> 319. Had the OFT not sent the diary for forensic examination, the effect of Mr. Hughes' applying black marker to those diary entries would have been to conceal from the Tribunal potentially relevant evidence. We find it difficult to believe that Mr. Hughes, an obviously intelligent man, did not realise this."

227. The Tribunal relied on Mr. Hughes' diary as highly relevant evidence in establishing the making of the MU Agreement, which Allsports had consistently denied before the OFT, and continued to deny before the Tribunal: see e.g. paragraphs 763, 771, 773 and 869 of the Liability Judgment.

228. It is in those circumstances that the OFT submits that the Tribunal should revoke the five per cent discount for co-operation granted at paragraph 617 of the Decision, in effect on the grounds that Allsports acted disingenuously in admitting that it was the organiser of the meeting of 8 June 2000 without revealing Mr. Hughes' diary entries; that the exculpatory reference to Mr. Hughes' diary not containing any reference to a

further meeting, although true, was misleading in that the diary in fact contained other incriminating evidence to which Allsports chose to make no reference; and that when the diary was finally made available relevant evidence was "blacked out" and only revealed by forensic examination.

229. Allsports resists the OFT's suggestion on the grounds that the admission was correct and assisted the OFT; that Allsports was within its rights; that the diary was available and the OFT never asked for it; and that the diary has now been produced rather than being destroyed by Allsports.

230. We regard the suppression, with black marker pen, of various relevant passages in the diary during the appeal stage before the Tribunal as a serious matter, to say the least. However, we do not think that matter has a direct bearing on the penalty to be imposed on Allsports for the infringement which has been found proved against it. It would not be correct to increase the penalty for an infringement which occurred some years ago on that account alone. Steps taken to tamper with documents which contain potentially relevant evidence in proceedings before the Tribunal should in our view be dealt with by other legal procedures.

231. In our judgment, however, Allsports' conduct during the administrative procedure before the OFT is open to severe criticism. It is true that an undertaking which has received a Rule 14 notice is not required to make any admissions or to incriminate itself. However, it seems to us that to be entitled to a discount for "co-operation" the co-operation that is forthcoming should be frank. In this case the admission was that Allsports organised the meeting of 8 June 2000 "to discuss the market for replica kit and the crippling price war". That admission was made against the background of a diary entry of 5 June 2000 which reads:

> "Agree Man United and England prices with everyone including Mike Ashley … Sports trade cartel – arrange a meeting regularly … phone David Whelan".

232. In our judgment, the admission made glosses over and fails to disclose the existence of evidence in the diary – not disclosed to Allsports' lawyers at that stage – which tends to show that Allsports' intention was in fact much more concrete and specific than the "admission" suggests. In addition the diary entry gives colour and background to the

context of the meeting of 8 June and is highly material evidence. In those circumstances in our judgment Allsports' "admission" was disingenuous. In our view a disingenuous admission of that kind should not be regarded as "co-operation" for the purpose of mitigation of penalty.

233. The reference, for exculpatory purposes, to the fact that no further meeting was recorded in Mr. Hughes' diary ("a man who lives by his diary") was in our view extremely foolish at the very least since, had the OFT asked for the diary referred to at the administrative stage, the incriminatory evidence contained in it would have been revealed. Again it seems to us to be disingenuous to rely positively on a diary for one purpose without revealing that the contents of the diary would throw seriously adverse light on other allegations being made. In particular, Allsports' submission to the OFT that Mr. Hughes' alleged reference to meeting more regularly "was at most part of an initial exchange of pleasantries" and "not a serious comment" was hardly consistent with a virtually contemporaneous diary entry which reads "Sports trade cartel – arrange a meeting regularly".

234. In those circumstances, we take the view that it is appropriate to revoke the five per cent reduction for co-operation accorded to Allsports by the OFT, on the ground that Allsports' conduct, and in particular its "admission", cannot in the circumstances reasonably be regarded as "co-operation" giving rise to any mitigation of penalty.

235. We therefore propose to increase Allsports' penalty to £1.42 million. That penalty is still just 1 per cent of Allsports' UK turnover, and just over 10 per cent of the statutory maximum.

VIII ASSESSMENT OF THE PENALTY: MU

Further submissions of the parties

236. As already set out, MU emphasizes that its penalty is too high. According to MU, the combination of the high percentage at Step 1, the multiplier of one at Step 2, and the multiplier of 3 at Step 3 lead cumulatively to a penalty that is discriminatory and

excessive. MU was party to only one agreement, relating to one shirt. MU is no longer involved in retailing.

237. MU also argues (i) that it should not have been penalized at Step 4 for disregarding the compliance programme which it was then in the course of introducing, but had not yet implemented (ii) MU should receive credit for having introduced a compliance programme, as Umbro did (iii) MU should also receive credit for co-operation, as did Umbro. Finally MU has apologised for its part in the infringement.

238. The OFT submits that the penalty on MU is fully justified for the reasons set out above. As regards the compliance programme, the OFT considers that Mr. Kenyon of MU must have been aware of the provisions of the Act at the time of the Board meeting on 26 May 2000, and that Mr. Richards and Mr. Draper must have been also aware by 30 June 2000. Nonetheless MU executives continued to take part in price-fixing communications such as the letter of 13 July 2000, and failed to disclose the MU Agreement in the course of compliance meetings held during August 2000. As to MU's compliance programme itself, the OFT contends that it is limited to senior executives and that the document on whistle blowing does not define "anti-competitive practices". According to the OFT, MU's co-operation does not merit any further discount.

The Tribunal's analysis

239. MU's existing penalty is £1.652 million, which represents some 1.5 per cent of its United Kingdom turnover in the year ended 31 July 2000, and some 14.5 per cent of the statutory maximum.

240. We have already dealt with and rejected MU's arguments regarding Steps 1 to 3.

241. As to MU's submission that it was involved in only one infringement relating to one shirt, we take the view that the launch of the MU home kit in August 2000 was an event of exceptional importance in the football context and that the infringement was therefore very serious. The duration of the infringement was similar to the duration of

the infringements committed by JJB and Allsports in relation to the England and MU Agreements, since those Agreements overlapped in time.

242. We also bear in mind that although MU is not alleged to have been a party to the England Agreement, MU's actions are part of the factual matrix which led to the making of that Agreement. In outline, the course of events is as follows.

243. On 24 May 2000 Umbro reached an agreement with Sports Soccer that the latter would raise its prices on the England shirt at the start of the Euro 2000 tournament. That agreement was preceded and followed by telephone conversations between Umbro and the other retailers concerned, particularly JJB and Allsports. Sports Soccer did not however implement that agreement immediately.

244. Mr. Draper of MU sent his fax of 25 May 2000 referred to at paragraph 170 of the Decision, following a meeting between Umbro and MU which had also taken place on 24 May. That fax, described by counsel for Allsports as "not very subtle", was copied to Mr. Kenyon and Mr. Richards and contained the following:

> "Further to our conversation at your offices yesterday and my telephone conversation with Martin [Prothero of Umbro] we would ask for written confirmation of the circumstances surrounding the recent pricing and promotions practices of some of your customers as it relates to replica shirts.
>
> We are clearly concerned about the effect such activities may have on our own abilities to re-sell our premium product when launched in August and would welcome, specifically, knowing the following:
>
> …
>
> **Sport Soccer** Whilst we accept that the Liverpool product has nothing to do with Umbro can you please advise what you understand Sports Soccer's position is with regard to pricing new product on the replica category.
>
> To date Manchester United has maintained a price in line with market conditions for shirts and had promotional practices regarded as the norm. We have turned down literally dozens of requests to use MU product, shirts included, as loss leaders in major promotions with a view that this is in the best long term interests of the club, you as a major sponsor partner and the traditional sports retail distribution base. What assurances can you now give us that our stance is still the best one to adopt in light of the activities highlighted?

We look forward to your earliest reply."

245. Also on 25 May 2000, the Allsports Golf Day took place. In the course of the dinner that evening Mr. Hughes, in the presence of Mr. Draper of MU, put pressure on Umbro to stop retailers from discounting replica kit. Mr. Draper expressed agreement with the thrust of Mr. Hughes' remarks.

246. On 2 June 2000, Mr. Ronnie met Mr. Hughes. Among other things Mr. Hughes said that he had discussed pricing with MU and that he thought that Umbro would lose the MU contract if Umbro was not in a position to ensure that the MU home shirt would not be discounted. Mr. Ronnie, now under intense pressure, notably regarding the possible loss of the MU contract, put pressure on Sports Soccer during 2 June 2000 to raise its prices on the England shirt. Sports Soccer did so with effect from 3 June 2000. Blacks and JD did the same, having had conversations with Mr. Fellone, who was putting pressure on them.

247. On 6 June 2000 Mr. Marsh of Umbro replied to Mr. Draper's fax of 25 May 2000. That reply, copied also to Mr. Kenyon and Mr. Richards of MU, contained the following:

> "Following receipt of your fax, I am able to confirm that no discussions have taken place regarding the utilisation of the Club's new home jersey in any such promotions.
>
> As you know, our policy has always been, and will continue to be, that we do not utilise premium products such as replica jerseys for promotions of this nature. In essence, we have always managed to use alternative items from either within the product portfolio or by developing 'exclusive' merchandise.
>
> As stated during our conversation, discussions had already commenced regarding the issue of pricing with both Debenhams and Sport[s]…Soccer. We have subsequently received assurances from Sport[s]…Soccer and JJB that they will revise their current pricing of jerseys to reflect a price point which falls in line with market conditions.
>
> Our discussions with Debenhams are ongoing and as they form part of your retail partner strategy, I would appreciate any assistance you can lend to assist us in resolving this issue.
>
> I trust this provides you with the assurances you are seeking."

248. The fax of 6 June 2000 that Umbro sent to MU was highly material evidence in proving the England Agreement: Liability Judgment at 522 to 525.

249. We conclude on the basis of the evidence that the pressure exerted on Umbro by MU to prevent discounting of replica kit was a material factor in Umbro's actions to put pressure on Sports Soccer, in particular to implement the price rises on the England shirt on 2/3 June 2000: see in particular paragraphs 426, 469 to 474, 479, 483 to 484, 522 to 524, 525 and 754 of the Liability Judgment. Against that background and sequence of events, we see little or no mitigation arising in MU's favour from the fact that MU was not alleged in the Decision to be a direct party to the England Agreement.

250. In all those circumstances we see no grounds for reducing MU's penalty on the basis of MU's submissions so far. That leaves, in effect, MU's points about its compliance programme, MU's co-operation, and MU's apology.

The compliance programme issues

251. At paragraph 715 of the Decision, the OFT said:

> "Although MU was in the process of setting up a compliance programme in the summer of 2000, the programme was not followed by the personnel involved. The OFT notes that the board of MU discussed its compliance policy under the Act the day after Mr Draper's fax of 25 May 2000 crossed Mr Kenyon's desk, and less than two weeks before Mr Marsh of Umbro sent his fax of 6 June 2000 describing express price-fixing arrangements with major retailers in respect of MU Replica Shirts. Particularly in the light of the non-statutory assurances given to the OFT in 1999 in relation to Replica Kit, the OFT regards the fact that MU's compliance policy was not being adhered to as an aggravating factor and increases the basic amount of the penalty by 10 per cent."

252. It now appears that the Board of MU decided on 26 May 2000 that a compliance policy should be introduced. Following that meeting the late Sir Roland Smith, MU's then Chairman, gave Mr. Kenyon, the Chief Executive, a sheaf of press cuttings about the Act. Mr. Kenyon passed those on to Mr. Beswitherick, the Company Secretary. At a subsequent Board meeting on 30 June 2000, the Board had a memorandum about the Act from Mr. Beswitherick, and approved a compliance letter to senior executives. That letter made clear the responsibility of senior managers, and that they should

inform the Chairman or Mr. Beswitherick of any matters of which they should be aware, or of any doubts they might have. Mr. Draper, then MU's Marketing Director, returned a signed copy of that letter shortly afterwards. Compliance briefings by MU's solicitors took place with individual senior executives during August 2000, including Mr. Draper and Mr. Richards, then Managing Director of MU's merchandising. Nothing was apparently said by Mr. Draper or Mr. Richards about the pricing of the MU home shirt, although replica kit was apparently discussed with Mr. Richards at least, with reference also to the 1999 assurances (James Draper & Co.'s letter of 30 August 2000).

253. In his statement of 28 August 2002 Mr. Draper says at paragraph 41 that he was aware that competition law prevented discussions about retail prices with a view to creating any agreement or developing any concerted practice. He reiterates that point in his second statement of 10 January 2003 where he states that he did not consider his fax to Mr. Marsh of 25 May 2000 to be price-fixing, but merely information gathering.

254. It appears from the evidence that between May and August 2000 MU was taking steps to introduce a compliance programme. During that period, however, MU was and remained a party to the MU Agreement. While, of course, the introduction of compliance programmes is desirable, to continue to be party to an infringement while simultaneously introducing a compliance programme is in our view capable of being an aggravating factor. It is capable of being an aggravating factor because the circumstances may show that the executives of the company continued to infringe the Act notwithstanding that their attention had been specifically drawn to its provisions.

255. We accept that, at the level of Sir Roland Smith, the Chairman, and Mr. Beswitherick, the Company Secretary, MU was making a bona fide effort to introduce a compliance programme as from the Board discussion on 25 May 2000.

256. Mr. Kenyon, the Chief Executive, in his statement of 17 January 2003 accepts that he was aware of MU's obligations not to fix resale prices or enforce resale price maintenance, and of the 1999 assurances, which were incorporated into the rules of the Premier League. He also accepts that he was copied in on Mr. Draper's fax of 25 May 2000 and Mr. Marsh's reply on 6 June 2000 which he must have seen. In those circumstances, it is unfortunate that the references in that correspondence to assurances

about pricing, particularly Mr. Marsh's reference to "assurances from Sports Soccer and JJB that they will revise their current pricing of jerseys" did not trigger any reaction from Mr. Kenyon. Despite the Act having been raised at the Board meeting of 25 May, and discussed again on 30 June, it did not apparently occur to Mr. Kenyon to mention the matter to Mr. Beswitherick or MU's solicitors.

257. As regards Mr. Draper, MU's Marketing Director, although he states that he saw his fax of 25 May 2000 as "seeking information", he must have been aware from Mr. Marsh's reply of 6 June 2000 that JJB and Sports Soccer had given "assurances" about the pricing of jerseys. Notwithstanding that knowledge, he signed the compliance letter at some point after 30 June 2000. Mr. Draper did not alert Mr. Beswitherick or the Chairman of MU to the correspondence between Umbro and MU. Nor did Mr. Draper apparently say anything about that correspondence during his individual briefing about the Act by MU's solicitors in August 2000.

258. As regards Mr. Richards, who at the time was responsible for MU's merchandising activities, he too was aware of the exchange of correspondence between Mr. Draper and Mr. Marsh. In addition, he received a letter of 11 July 2000 from Mr. Prothero of Umbro which reads as follows:

> "[I]… wished to drop you a line to get your view on a specific issue.
>
> As you know Umbro have worked very hard in agreeing a consensus to the price of the new Manchester United jersey. At one stage we even managed to get Messrs Hughes, Ashley and Whelan in the same room to agree this issue.
>
> It therefore causes me real concern that I am led to believe that the Manchester United jersey is being sold by the Club via "Open" at effectively a discounted price because of the inclusion of certain premium items such as free autographed balls etc.
>
> I guarantee that if any of the aforementioned gentlemen see this, which I am sure they will, we will have the makings of a price war on our hands.
>
> I look forward to discussing this with you later in the day."

259. Ms. Quinn of MU replied promptly to the effect that the MU shirt would not be discounted and that the offer of a free football had been withdrawn (paragraphs 197 and 198 of the Decision).

260. Mr. Richards subsequently had an individual briefing with MU's solicitors about the Act during August 2000, during which reference was made to the 1999 assurances and the pricing of replica kit. However Mr. Richards apparently did not draw attention to the above correspondence, which expressly refers to an agreement on prices regarding the new MU home shirt, or seek any advice about it.

261. In our view, the OFT was justified in finding that the above course of events constituted an aggravating circumstance in that, having had the provisions of the Act expressly drawn to their attention, the relevant executives, for whatever reason, said nothing at all about what had been going on, and did not alert the Company Secretary, or MU's solicitors, to matters of which they must have had knowledge. As a result of the failure of the relevant executives to act in accordance with the compliance programme, or even to seek advice, MU remained in breach of the Act until the end of September 2000. The compliance programme that MU purported to introduce in the summer of 2000 was thus wholly ineffective in this respect.

262. As to MU's argument that it should not be "worse off" for having sought to introduce a compliance programme, in this case MU's executives had been told specially about the Act and asked to report any possibly relevant matters. However, they did not inform a compliance officer that they knew about certain assurances about pricing of jerseys or the meeting that had taken place between JJB, Allsports and Sports Soccer. Nor did they seek advice. That in our view is an aggravating circumstance, because it shows that the relevant executives had every opportunity to terminate MU's infringement, or distance MU from the matters in question. Instead they kept silent and allowed MU's infringement to continue despite having been expressly reminded of the provisions of the Act.

263. However, it does appear from the information supplied at the Tribunal's request by MU in its letter of 3 December 2004 that MU has since taken further steps to strengthen its compliance policy, including the introduction of a Competition Compliance Manual and a whistle-blowing policy. We are prepared to give some credit for that.

Co-operation

264. We agree with the OFT that MU's co-operation during the administrative proceedings did not warrant any further credit beyond the 5 per cent allowance accorded in the Decision. The position of Umbro is quite different, as seen below. Moreover, until a very late stage of its appeal, MU's position was that it had merely taken "a commercial decision" not to contest liability, and that it did not accept that it had infringed the Act (see e.g. transcript of 23 October 2003, p. 32)

MU's acceptance of responsibility

265. At the final penalty hearing MU did, however, accept its responsibility for infringing the Act, and apologised. We would have given much greater credit had that been done earlier in the proceedings, and had it been accompanied by a preparedness to recompense consumers, either directly or by contributing to causes likely to benefit relevant consumer interests, particularly disadvantaged consumers. However, we do give some credit for MU's acceptance of responsibility, however belated.

266. In our view the strengthening of MU's compliance programme, coupled with MU's acceptance of responsibility, could justify a reduction in MU's penalty in the range of 5 to 10 per cent. Although the penalty imposed on MU, viewed in the round, does not appear to us to be too high, having regard to those factors we propose to make a small reduction in MU's penalty from £1.61 million to £1.5 million (a reduction of some 7 per cent). The resulting penalty is just over 1.3 per cent of MU's United Kingdom turnover in the year ending 31 July 2000, and 13 per cent of the statutory maximum.

267. Relative to the other appellants in this case we see no basis for reducing MU's penalty any further, not least because MU was directly party to, but entirely disregarded, the voluntary assurances to abstain from seeking to maintain retail prices on replica kit which the Premier League clubs had given the OFT only a few months before.

268. We therefore propose to set MU's penalty at £1.50 million.

IX ASSESSMENT OF PENALTY: UMBRO

269. Umbro's penalty is £6.641 million, around 8 per cent of Umbro's United Kingdom turnover in the year ended 31 December 2000, and some 44 per cent of the statutory maximum as calculated by the OFT on the basis of the then Penalties Order.

UMBRO'S DISCOUNT FOR CO-OPERATION: THE PARTIES' SUBMISSIONS

270. In its notice of appeal, Umbro raised only one point, namely that the OFT was incorrect in stating, at paragraph 596 of the Decision, that Umbro had not made any significant admissions or co-operation until its written representations in respect to the Rule 14 Notice in July 2002. On that basis Umbro submits that it should be accorded a greater discount than the 40 per cent allowance for co-operation that the OFT gave Umbro under Step 4.

271. Paragraph 596 of the Decision states:

> "596 Umbro has co-operated with the OFT's investigation principally in its responses to section 26 Notices and in its written and oral representations on the Rule 14 Notice and Supplemental Rule 14 Notice. No significant admissions or co-operation were given until Umbro submitted its written representations on the Rule 14 Notice. The admissions at this stage did assist the OFT by enabling the enforcement process to be concluded more effectively in respect of the Replica Shirts Agreements. It gave the OFT a more complete picture of events and this led partly to the issue of the Supplemental Rule 14 Notice as a result. The OFT relies on the admissions made as set out in detail in Part III above particularly in relation to the Replica Agreements. This is a mitigating factor and the OFT therefore decreases the basic amount of the penalty by 40 per cent."

272. According to Umbro, it made an application to the OFT for leniency under section 3 of the *Guidance* on 23 November 2001. A meeting took place of 4 December 2001, followed by a letter from Umbro on 5 December 2001, during which Umbro gave information, notably about the meeting of 8 June 2000. Thereafter Umbro sent the OFT draft witness statements on 17 January 2002 by Messrs. Ronnie ("Ronnie I"), Fellone, Prothero, Marsh and McGuigan. When the OFT queried the accuracy of some of those statements, Umbro submitted revised statements, including Ronnie II and Fellone II, on 4 February 2002, in accordance with the short deadline imposed by the OFT in its letter

of 1 February 2002. According to Umbro, a great deal of the evidence contained in those witness statements was ultimately relied on in the Decision.

273. There was then a leniency meeting on 26 February 2002, which was brought to a premature end by the OFT. According to Umbro, the OFT has never properly explained why it terminated that meeting. While there may have been some inaccuracies in the witness statements, it is unreasonable to expect a company to present material that is concrete and accurate in every aspect as the price of being accorded leniency. The OFT should be prepared to work with the company to obtain a full picture. In any event, the OFT was wrong to judge that the Umbro witnesses were being un-cooperative. A great deal of what they said was later accepted in the Decision, and the OFT itself relied on the notes of the meeting in the proceedings before the Tribunal.

274. Following the leniency meeting, Umbro made it clear in a letter of 13 March 2002 that it wished to continue to co-operate with the OFT, thus making it clear that its witnesses were available for interview. Umbro also expressly asked that the witness statements be treated as if submitted as part of the OFT's ongoing investigation.

275. According to Umbro, it never agreed that the witness statements could not be used by the OFT, only that the fact of the leniency application could remain confidential. Umbro was simply told that the OFT would not use the statements. A telephone call between Ms. Roseveare of Umbro and Ms. Kent of the OFT on 14 March 2002 gave Umbro the impression that the OFT would prefer the witness evidence to be resubmitted in response to the Rule 14 Notice, then imminent, which was why the witness statements were not resubmitted at that stage.

276. In any event on 21 March 2002 Umbro sent the OFT a number of documents, including Mr. Fellone's faxes to Debenham's of 2 and 8 June 2000, Mr. Marsh's fax to MU of 6 June 2000 and the exchange of faxes between Umbro and MU of 13 July 2000 which were all used in the Rule 14 Notice. That represented significant co-operation, and paragraph 596 of the Decision is plainly wrong in that respect at least.

277. Finally, according to Umbro, it is wrong for the OFT to treat "leniency" and "co-operation" as mutually exclusive, and to disregard, for the purposes of assessing "co-operation", everything that has been submitted in a leniency application which is rejected by the OFT. Nor is it right that Umbro's leniency application was "separate" from the OFT's investigation. The information supplied was relevant to the investigation and seen by the case officers. Furthermore, it is wrong to consider that the maximum discount for "co-operation" cannot be more than 40 per cent on the ground that a higher discount would undermine the leniency programme. No such rule is contained in the *Guidance*. According to Umbro, leniency applies to the penalty which would "otherwise be imposed" under paragraph 3.8 of the *Guidance*. The penalty that would "otherwise be imposed" would include downward adjustments for co-operation.

The OFT's submissions

278. The OFT submits that Umbro's discount of 40 per cent for co-operation was the maximum that Umbro could reasonably have obtained under paragraph 2.12 of the *Guidance*, and well above the initial discount of 20 per cent that the OFT would have been prepared to offer Umbro in the context of the leniency programme under paragraph 3.8 of the *Guidance*.

279. The OFT accepts that there is one inaccuracy in paragraph 596 of the Decision, in that the documents submitted by Umbro on 21 March 2002 were of material assistance. However, that should not affect Umbro's discount for co-operation which is already over-generous. Indeed, the Tribunal would be entitled to reduce the discount to 35 per cent, on the ground that it is now apparent that Umbro gave a misleading answer to the OFT's questions of 13 September 2002: Liability Judgment at paragraphs 302 and 535.

280. In addition the OFT submits as follows: (i) With the exception of the documents, all the material provided by Umbro was in the context of its application for leniency, which failed. That context is separate from the OFT's investigation and does not constitute "co-operation" in that investigation. The OFT's letters to Umbro of 7 January, 9 January, 12 February and 28 February, as well as Umbro's note of the meeting of 4 December 2001 and Umbro's letter of 5 December 2001, make it quite

clear that material submitted in the context of the leniency application would not be used in the investigation without Umbro's consent; (ii) The witness statements submitted by Umbro in the context of the leniency application were not used by the OFT for the purposes of the investigation or the Rule 14 Notice, and hence did not advance the OFT's investigation; (iii) It is not disputed that in the telephone conversation of 14 March 2002 Ms. Kent told Ms. Roseveare that, if Umbro wished the witness statements to be included in the OFT's investigation, they would have to be resubmitted in order to keep the leniency application confidential. In fact Umbro did not re-submit those statements, but instead submitted modified statements (particularly Ronnie III) in response to the Rule 14 Notice in July 2002. It was up to Umbro to decide what to submit; (iv) The material emanating from Umbro relied on in the Decision was based on the witness statements resubmitted in July 2002 in response to Rule 14 Notice, and not on the original statements. Even though there is some overlap between them, the July witness statements such as Ronnie III were fuller and more consistent with the contemporaneous documents; (v) The material submitted by Umbro up to and including the meeting of 28 February 2002 was in any event, vague, selective and inaccurate; (vi) Under the leniency programme Umbro could not have qualified for more than 50 per cent leniency because it had coerced others into price-fixing. There should be "clear blue water" between successful applicants for leniency who co-operate with the OFT under paragraph 3.8 of the *Guidance* and failed leniency applicants such as Umbro. Any other approach would be unfair to Sports Soccer, the whistle blower, who qualified for a discount of 50 per cent.

THE TRIBUNAL'S ANALYSIS OF THE CO-OPERATION ISSUE

The provisions of the Guidance

281. Paragraph 2.8 of the *Guidance*, cited above, provides that mitigating factors under Step 4 of the calculation of penalty include:

> "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…"

282. However, section 3 of the *Guidance* contains a number of separate and self-standing provisions which govern the circumstances in which the OFT may grant leniency to undertakings who come forward in good time and give information about cartels. 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]."

283. Under paragraph 3.4 of the *Guidance,* undertakings who are the first to come forward with evidence of the existence and activities of a cartel *before* the OFT has commenced an investigation may benefit from total immunity from penalty if they fulfil the conditions there set out. That provision does not apply in this case, since the OFT's investigation had already commenced when Umbro came forward.

284. Under paragraphs 3.5 and 3.6 of the *Guidance* 100 per cent immunity is available to undertakings who are the first to come forward *after* the OFT has commenced an investigation, but in that case the grant of total immunity is discretionary. The conditions which apply to the grant of such immunity are that 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 or played the leading role in the cartel; and
>
> d) refrain from further participation in the cartel from the time it discloses the cartel.

Umbro did not qualify under those provisions because in the OFT's view it had compelled other undertakings to take part in the cartel, contrary to paragraph (c) of the conditions. That is not contested by Umbro.

285. However, paragraph 3.8 of the *Guidance* provides:

> "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."

286. Accordingly, under the leniency programme the most that Umbro could have hoped to receive was leniency up to 50 per cent under paragraph 3.8 of the *Guidance*, provided notably that Umbro maintained "continuous and complete co-operation throughout the investigation".

The events in this case

287. Umbro applied for leniency on 23 November 2001. A meeting took place with the OFT on 4 December 2001, which was followed by Umbro's letter to the OFT on 5 December 2001. At that meeting, the OFT pointed out that Umbro had taken some time to apply for leniency and stated that any leniency "was likely to be closer to 20% than 50%" (see Umbro's note of that meeting).

288. Pausing there, it is apparent from Umbro's note of 4 December 2001 and letter of 5 December 2001 that Umbro at that stage was referring only to an agreement about the MU home shirt reached at the retailer's meeting of 8 June 2000. Umbro said nothing at all about any wider arrangements, as the OFT pointed out in a letter to Umbro dated 17 December 2001. Moreover Umbro asserted that it had not been involved in setting up the meeting of 8 June. That was not a wholly candid response, given the Tribunal's findings at paragraphs 762 to 770 and 810 of the Liability Judgment. Any "credit" to

which Umbro might have been entitled for giving information about the meeting of 8 June is in our view neutralised by the fact that Umbro did not vouchsafe the whole story.

289. According to the note of the meeting of 4 December 2001 the OFT said it would treat any information supplied in the course of the meeting as confidential, and would not disclose it to the case officer if Umbro decided not to proceed with its leniency application. Umbro's letter of 5 December 2001 makes clear that Umbro was aware of "the confidentiality obligations placed on the OFT as part of the leniency programme".

290. By letter of 17 December 2001, the OFT indicated that it was considering offering Umbro leniency in the region of 20 per cent, on the basis that the information so far supplied by Umbro did not materially advance the OFT's case beyond the stage it had already reached. However, the OFT gave Umbro an opportunity to submit further information by 3 January, while emphasising that Umbro would also have to satisfy the conditions set out in the *Guidance*.

291. In a letter to Umbro dated 7 January 2002, the OFT pointed out that Umbro had not provided any further information. However, the OFT sent Umbro a draft leniency agreement offering Umbro 20 per cent leniency, and left open the possibility of that percentage being increased if Umbro's further information, to be supplied by way of witness statements, materially advanced the OFT's investigation.

292. The draft leniency agreement sent to Umbro on 7 January 2002 specifically required Umbro to "maintain continuous and complete co-operation throughout the investigation". This included but was not limited to Umbro:

> "(i) voluntarily and without prompting, providing the Director General with all the facts that become known to the Applicant and all the information, documents and evidence that become available to it relating to the reported possible infringement in addition to any such information etc already provided;
>
> (ii) providing promptly, and without the Director General using his powers under any of sections 26 to 28 of the Act, all the information, documents, evidence or other items in its possession, custody or control, wherever located, requested by the Director General, to the extent that they have not already been provided;

(iii) 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 Director General with any information relevant to the reported possible infringement;

(iv) facilitating the ability of current and former directors, officers, employees and agents to appear for such interviews as the Director General may reasonably require at the times and places reasonably designated by the Director General;

(v) using its best efforts to ensure that current and former directors, officers, employees and agents who provide information to the Director General respond completely and truthfully to all questions asked in interviews;

(vi) using its best efforts to ensure that current and former directors, officers, employees and agents who provide information to the Directory General make no attempt either falsely to protect or falsely to implicate any undertaking in any infringement of the Act."

293. Following a reply from Umbro of 7 January 2001, in which Umbro indicated that it would like to provide any further information only after an offer of 20 per cent leniency had been formally received, the OFT wrote to Umbro on 9 January 2002 emphasising that it was up to Umbro to decide what information it intended to provide, and in what form. Once the information was provided, the OFT would consider whether to make a formal offer of leniency, and whether any such offer would be greater than 20 per cent.

294. The OFT's letter of 9 January 2002 also stated:

> "Before the formal leniency letter is signed, Umbro will of course remain free at any time to withdraw its application including any draft witness statements. If it did so, the Director would not then be able to rely on such witness statements against Umbro, although obviously the Director would be able to rely on evidence already obtained as part of the investigation".

295. On 17 January 2002 Umbro sent draft witness statements by Messrs. Ronnie, Fellone, Prothero, Marsh and McGuigan to the OFT. In its covering letter Umbro offered to clarify anything the case officers required. Umbro's covering letter also emphasised that it was extremely important to Umbro that the statements remained confidential, and asked for an assurance that the statements would not be disclosed to third parties.

296. The OFT replied to Umbro by letter dated 29 January 2002. The OFT's Director of Cartel Investigations stated that the matter had been discussed with the case officers and that:

> "The draft witness statements do not materially advance the Director's case beyond the stage it has already reached…
>
> We have noted that the draft witness statements contain a number of material inaccuracies and inconsistencies as well as being in many instances extremely vague as to the nature of and/or outcome of discussions. In addition, Umbro has copies of the documents the Director obtained on 29th August [during the course of the dawn raid]. In many instances these documents are not considered in the statements…
>
> On the basis of the current draft witness statements which you have sent to me, I am minded to take the view that Umbro does not satisfy the conditions for leniency which are set out in the Director General's Guidance and at paragraph 3 of the draft lenience letter attached to my letter of 7 January. I would therefore be grateful if Umbro could confirm by 5 p.m. on 4th February whether the draft witness statements provided reflected the full extent of the information Umbro will be providing in respect of its application for leniency. If not, final witness statements and supporting evidence should be submitted by the same date."

297. The OFT's letter of 29 January 2002 also identified various specific inaccuracies in the Umbro statements, particularly relating to Ronnie I.

298. By letter of 31 January 2002 Umbro expressed surprise at the OFT's response, but stated its willingness to continue to co-operate with the OFT and to serve further witness statements dealing with the inaccuracies identified by the OFT. Umbro asked for an extension of time until 11 February.

299. By letter of 1 February 2002 the OFT refused Umbro any further extension of time.

300. On 4 February 2002 Umbro submitted revised witness statements, including new statements by Mr. Ronnie (Ronnie II) and Mr. Fellone (Fellone II). Umbro also expressed its willingness to continue to co-operate with the OFT, and to give any further explanations the OFT required. Umbro considered that it would be useful to discuss matters at a meeting, particularly as regards Mr. Ronnie's witness statement.

301. The OFT replied to Umbro on 12 February 2002. In that letter the OFT stated that they were not yet ready to offer leniency, and wished to take up Umbro's offer of a meeting. The OFT identified various respects in which it considered that Mr. Ronnie's revised evidence was still inaccurate. If it were not possible to resolve those issues at the meeting, leniency would not be available. The OFT also said:

> "If… leniency were not available, the Director General would not be able to rely on the information provided by Umbro as part of its application for leniency. This would include any information which had been provided by Umbro at the meeting…"

302. A meeting then took place on 26 February 2002 between the OFT and representatives of Umbro, including Messrs. Ronnie, Marsh and McGuigan. The Tribunal has been provided with several notes of that meeting. At this stage of the narrative it suffices to say that the OFT brought the meeting to a premature end. The OFT did so because it believed that the Umbro witnesses were holding information back (see Ms. Kent's witness statement of 1 December 2003, at paragraphs 4 to 6).

303. Following that meeting of 26 February, the OFT wrote to Umbro on 28 February 2002. That letter stated:

> "As you are aware from the Director General's Guidance as to the Appropriate Amount of a Penalty and as explained in our previous correspondence and at the meeting there are certain conditions which must be satisfied in order for a company to be able to benefit from leniency. These are also set out in the letter which any company would be expected to sign in order to obtain any level of immunity from financial penalty, a draft of which was enclosed with my letter of 7 January, at Umbro's request. These include the provision of all information available to the company and the maintenance of continuous and complete co-operation. On the basis of the information which you have provided, including the discussions at the meeting yesterday, we do not consider that Umbro has complied with these conditions for leniency. I cannot therefore offer you any level of immunity from any financial penalty which may be imposed.

304. The letter of 28 February 2002 went on:

> "… As we discussed at the meeting, the Director will not use the witness statements which Umbro has provided to support any case the Director may bring for any infringement of the Chapter I prohibition of the Competition Act … Any

> information which has been otherwise obtained as part of the investigation, however, and which may also be referred to in the witness statements can be relied on by the Director…As we discussed, it is open to Umbro to co-operate voluntarily at any time with the investigation, outside the context of the leniency programme. Such co-operation, depending on its timing and its nature, may be material in determining the level of any financial penalty that my subsequently be imposed."

305. By letter of 7 March 2002 the OFT asked Umbro to submit any further information it wished as soon as possible.

306. On 13 March 2002 Umbro wrote to the OFT in these terms:

> "Following our meeting on 26th February 2002 I have been reviewing the comments made by you and your colleagues during the meeting.
>
> As I mentioned during the meeting and also in previous correspondence, despite the fact that Umbro can no longer continue with the leniency programme, Umbro still wants to co-operate fully with the Office of Fair Trading ("the OFT").
>
> Accordingly, I should be grateful if you would treat the witness statements that were submitted during the leniency application as still having been submitted as part of the ongoing investigation…".

307. In the letter of 13 March 2002 Umbro also expressed its continuing concern about the confidentiality of the information to be supplied to the OFT.

308. Ms. Kent of the OFT telephoned Ms. Roseveare of Umbro the following day, 14 March 2002. According to Ms. Kent:

> "After [the meeting of 28 February], Ms Roseveare of Umbro wrote to me on 13 March 20002 emphasising her concerns about the confidentiality of the material which had been submitted in the context of the leniency application, but saying that we could use the witness statements provided for the purposes of the investigation. I called her to discuss this issue. I made clear that to keep leniency confidential, Umbro would have to resubmit evidence. The choice of evidence was entirely up to Umbro."

309. According to Ms. Roseveare in her witness statement of 30 January 2004:

> "Ms Kent called me the following day, stating that we would have to resubmit the evidence to the OFT in order to keep the leniency application confidential. I was left with the

> impression following that conversation, however, that the OFT considered it more appropriate for us to wait and resubmit the witness evidence *after* we had received the Rule 14 Notice, which we knew by then was imminent. That was the reason why, on 21 March 2002, I sent the OFT only the contemporaneous documents which had been attached to the witness statements; and why we did not submit the witness statements themselves until our response to the Rule 14 Notice."

310. On 14 March 2002 Ms. Kent wrote to Umbro to confirm that any additional material Umbro wished to provide should be supplied by the end of the following week, with confidential items identified as appropriate.

311. On 21 March 2002 Umbro supplied the OFT with various documents, with confidential material blocked. No witness statements were supplied. The documents supplied included the various letters and faxes of 2 June, 6 June, and 8 June 2000, and the exchange with MU on 11 July 2000, already referred to above.

312. The first Rule 14 Notice was served on 16 May 2002. In reply to that notice Umbro served further revised witness statements by Mr. Ronnie (Ronnie III), Mr. Fellone (Fellone III) and Messrs. Marsh, Prothero, and McGuigan. The Umbro evidence referred to in the Decision is based on those statements served in reply to the Rule 14 Notice. It is common ground that the OFT did not in fact use any of the witness evidence submitted during Umbro's failed leniency application.

313. Ms. Roseveare, Umbro's General Counsel, in her witness statement of 30 January 2004, emphasises that Umbro always wanted to co-operate fully with the OFT. However, it was not able immediately to supply a full and comprehensive picture of the events under investigation, because of the complexity of those events, the fact that much turned on telephone calls of which there was no record, witness' difficulties of recollection, and the fact that Umbro had not seen any of the information supplied by other parties.

Legal analysis

314. We accept first the OFT's submission that there is an important distinction between "co-operation" as a mitigating factor under paragraph 2.8 of the *Guidance*, on the one hand, and steps taken to obtain leniency under section 3 of the *Guidance*, on the other hand. An application for leniency is a discrete and self-contained step whereby, in return for giving information about the existence or activities of a cartel, and accepting certain conditions, an undertaking may obtain immunity from a penalty, either wholly or partially. We see the force of the OFT's submission that an undertaking which fails to qualify for leniency, for example by failing to give complete and continuous co-operation in breach of the conditions for leniency, should not be able to obtain an equivalent discount through the guise of "co-operation". Otherwise, the incentive to apply for leniency, and to observe the conditions of the leniency agreement, would be reduced.

315. We also find that the OFT indicated to Umbro that if its application for leniency did not proceed, the OFT would not use the information supplied by Umbro for the purposes of its investigation: see e.g. the OFT's letters of 9 January, 12 and 28 February 2002. Indeed, it would, it seems to us, be highly invidious if an undertaking were to give the OFT information in the hope of obtaining leniency, but then found that the OFT declined to enter into a leniency agreement, but proposed to use the information anyway to the detriment of the undertaking providing it. Any such approach would not encourage undertakings to come forward. Moreover, leniency applications will usually need to be protected, at least initially, by confidentiality. If the leniency application is not proceeded with, it is reasonable for the undertaking concerned to expect that confidentiality would continue to be respected by the OFT, as far as possible, and subject to any overriding requirements that may later arise in proceedings before the Tribunal: see e.g. *Umbro v. OFT (request for confidential treatment)* [2003] CAT 26 at paragraph 34 and *Argos & Littlewoods v. OFT* (*disclosure*) [2004] CAT 5.

316. It is true that on 13 March 2002 Umbro wrote to the OFT a letter which asked the OFT to treat the witness statements submitted in the leniency application "as having been

submitted as part of the ongoing investigation", albeit that Umbro was still concerned about confidentiality.

317. Following that letter, however, there was the telephone conversation between Ms. Kent of the OFT and Ms. Roseveare of Umbro referred to above. We accept that Ms. Kent pointed out to Umbro that if the statements were simply treated as part of the investigation, third parties would become aware of them and would be able to deduce that Umbro had applied for leniency. Accordingly, the witness statements would need to be re-submitted in order to keep the leniency application confidential. Ms. Roseveare does not disagree with Ms. Kent on that point, but she states that she got the impression that the OFT's view was that it would be more appropriate for Umbro to wait and re-submit the witness statements in the context of Umbro's reply to the Rule 14 Notice which was then thought to be imminent. Ms. Kent's position is that she left it entirely up to Umbro to decide what to submit: see the respective witness statements set out above.

318. It is common ground that the witness statements submitted during the leniency application were never re-submitted by Umbro, and were in consequence not used by the OFT in its investigation. Those witness statements were kept in a separate file, and the OFT did not refer to them. In fact what Umbro did was to submit new witness statements, including Ronnie III dated 12 July 2002, in response to the Rule 14 Notice. Although parts of the witness statements submitted in reply to the Rule 14 Notice were the same as the previous statements, there were also significant changes, as is seen by comparing Ronnie III with Ronnie I and II.

319. Whatever the precise tenor of the conversation between Ms. Roseveare and Ms. Kent on 14 March 2002, which is not recorded in writing, we do not think that Umbro can credibly claim that it was in some way "put off" from resubmitting the leniency statements at that stage as a result of that conversation. Umbro was advised by external advisers and must in our view be assumed to have taken an independent decision as to what should or should not be submitted to the OFT, when, and subject to what conditions. As Ms. Kent says, it was up to Umbro to decide what to submit.

320. In fact, all that was submitted to the OFT in "open" form prior to the Rule 14 Notice of 16 May 2002 were the documents submitted by Umbro on 22 March 2002.

321. In those circumstances we do not think Umbro can claim additional credit for "co-operation" on the basis that it submitted witness statements in the course of its failed leniency application. Those witness statements were, in fact, rejected by the OFT and never became part of the administrative file, as the OFT had indicated to Umbro at the outset. They were not used in the investigation and hence did not advance the OFT's case prior to the issue of the Rule 14 Notice.

322. In so far as the OFT, in the Decision, relied on material that was contained in the original leniency statements, the source of the material used in the Decision was the revised witness statements submitted by Umbro in reply to the Rule 14 Notice in July 2002, and not the witness statements originally submitted during the leniency application. Those revised witness statements submitted in reply to the Rule 14 Notice did become part of the OFT's file, and were referred to extensively in the Decision. Umbro rightly received credit for co-operation on the basis of the contents of *those* witness statements, which did materially advance the OFT's investigation. However, we find it very difficult to see that Umbro is entitled to any credit in respect of the *earlier* witness statements which were not used in the investigation.

323. As to whether the OFT was right to reject Umbro's leniency application, and the earlier witness statements supporting it, it suffices to say that the differences between Ronnie I, Ronnie II, and Ronnie III, in particular, gave rise to several days of cross-examination and argument during the hearing of the liability appeals before the Tribunal. For the reasons given in the Liability Judgment, the Tribunal held that Ronnie I and Ronnie II were incomplete and unreliable in important respects: see paragraphs 298, 301, 303, 549 to 551, 554, 563, 565, 588 and 589 of the judgment. In particular those statements did not deal fully or accurately with the England Agreement, or Umbro's May MMR. In the light of those findings by the Tribunal, we do not think there is any basis on which Umbro could claim further credit for "co-operation" in reliance on those witness statements.

324. As regards the meeting of 26 February 2002, it is true that the OFT relied during the liability appeals on certain statements by Mr. Ronnie in the course of that meeting, so as to rebut an allegation of recent invention. However, in our view the general tenor of the notes of the meeting produced to the Tribunal supports the OFT's view that in the course of the meeting the Umbro witnesses were, for whatever reason, holding back information.

325. On the basis of the evidence given to the Tribunal, Umbro's answers on at least the following matters, as recorded in Lovell's note of the meeting, seem to us to have been incomplete or incorrect as regards e.g. whether the agreement with Sports Soccer in March/April 2000 extended to England kit or all replica kits supplied by Umbro (Lovell's note, p. 4); or whether there was any such agreement (p. 6, bottom, p. 7 top); how the MU Agreement came to be extended to JD and Blacks (p. 8); whether Umbro had contact with retailers about MU shirts (p. 9), or was just "going through the motions" without responding to MU's pressure (p. 9), and had no contact with retailers (p. 9); whose writing was on the fax of 25 May 2000 (p. 10); and whether Umbro's fax of 6 June 2000 was "make believe" as asserted by Mr. Marsh (p. 10).

326. In those circumstances we have no reason to doubt the genuineness of the conclusion of the OFT's Director of Cartel Investigations when he stopped the meeting on the basis that "the OFT was having some difficulty in believing Umbro's explanations of the documents".

327. As the Tribunal has recently held in *Argos and Littlewoods v. OFT* [2005] CAT 13 at paragraphs 107 and 128, the OFT has a margin of appreciation in deciding whether or not to grant leniency. In this case there is nothing to suggest that the OFT exceeded its margin of appreciation when it refused Umbro's leniency application. In our judgment the notes of the meeting of 26 February 2002, the contents of Ronnie I and Ronnie II, and the evidence during the liability hearing all support the view that, at that stage, Umbro was not offering "complete and continuous co-operation" as paragraph 3.8 (b) of the *Guidance* requires.

328. Umbro submits, however, that Umbro was doing its best, that it is impossible to expect 100 per cent accuracy from witnesses in a matter such as this, that it takes time to

establish the full facts, and that it is for the OFT "to work with" the undertaking in question to ascertain the facts, if necessary by interviewing the witnesses. As to those submissions, we do not accept that the OFT has an obligation to "work with" an undertaking which is applying for leniency in order to establish the facts or resolve inaccuracies in the evidence that undertaking puts forward. It is up to a company that is seeking leniency to do the work necessary to get to the bottom of the story and present the facts to the OFT in as complete a way as possible. In this case in our judgment Umbro had ample time from August 2001 to February 2002 to put its house in order and make the necessary investigations, employing external advisers as necessary.

329. It is true that the Tribunal declined to find, in the Liability Judgment, that Umbro was acting in bad faith (paragraph 301). We are also satisfied that Ms. Roseveare, Umbro's General Counsel, was doing her best to ensure that Umbro would fully co-operate with the OFT. Unfortunately, however, the material presented in Ronnie I and Ronnie II did not, as the OFT suspected at the time, tell the whole story, as the much fuller accounts set out in Ronnie III, in Ronnie IV, and in Mr. Ronnie's evidence to the Tribunal, show. Similarly, the answers given by the Umbro witnesses during the meeting of 26 February 2002, as recorded in Lovell's note, seem to us to leave much to be desired.

330. Indeed, it seems to us that, had Ronnie I and/or Ronnie II been submitted as part of the OFT's administrative file prior to the Rule 14 notice, the inevitable result would have been to cause considerable confusion and to complicate and delay the OFT's investigation. The Tribunal's own experience in determining where the truth lay in the light of the conflicting statements in Ronnie I, Ronnie II and Ronnie III, in particular in relation to the England Agreement and Umbro's May MMR, illustrates the problems that Ronnie I and Ronnie II would have caused had they been placed in unrevised form in the OFT's administrative file: see e.g. the Liability Judgment at paragraphs 298 to 305.

331. In all those circumstances, we see no basis for according Umbro any additional credit for "co-operation" prior to the issue of the Rule 14 Notice on the basis of the contents of the leniency witness statements. The leniency witness statements were rightly not used by the OFT. In so far as those witness statements did contain material and accurate information, that information was incorporated into the later Umbro witness

statements, served in response to the Rule 14 Notice. In that respect, credit of up to 40 per cent for co-operation has already been accorded. We see no respect in which anything in Umbro's earlier witness statements, including Ronnie I or Ronnie II, could entitle Umbro to any greater credit than has already been given on the basis of Ronnie III and the other Umbro statements served in July 2002.

332. It is true, however, that paragraph 592 of the Decision is inaccurate to the extent that in its letter of 21 March 2002, Umbro did submit certain material documents which were later relied on by the OFT in the Rule 14 Notice.

333. However, we do not think that the submission of those documents in March, rather than July, 2002 should give rise to any further credit for co-operation in Umbro's favour. In our view, the discount of 40 per cent allowed is already generous. Moreover, as the OFT points out, Umbro's co-operation was in fact less than the OFT had supposed at the time. The Tribunal found that Umbro had not given an accurate answer to the OFT's questions of 13 September 2002: see paragraphs 302 and 353 of the Liability Judgment. Any additional credit to which Umbro might have been entitled for submitting the documents in March rather than July is in our view counterbalanced by Umbro's misleading answer to the OFT's questions of 13 September 2002.

CO-OPERATION DURING THE APPEAL

334. Umbro next submits that it has co-operated with the OFT and the Tribunal during the hearing of the appeal and should receive credit on that account. Two Umbro employees, Messrs. Fellone and Prothero gave evidence for the OFT, as did two ex-Umbro employees, Messrs. Ronnie and May. Umbro also responded to numerous requests for documents and explanations, mainly about its relationship with Sports Soccer, from other appellants and from the Tribunal. Umbro presented as limited an appeal as possible.

335. The OFT contests Umbro's submission, principally on the grounds that Umbro's co-operation during the appeal went no further than the protection of its own interests.

336. In *Aberdeen Journals v. Director General of Fair Trading (No. 2)* [2003] CAT 11 at paragraph 496 the Tribunal accepted that mitigation can arise from the way in which an appeal is conducted. In our view examples could include a frank acceptance of responsibility, an offer to make amends, or fresh evidence of extenuating circumstances.

337. In the present case, two Umbro employees (Messrs. Fellone and Prothero) were made available for cross-examination without the Tribunal having to make orders. The principal OFT witness, Mr. Ronnie, was however made available by Sports Soccer, by whom he is now employed. Mr. May, another ex-employee, had left Umbro about a year previously. Umbro also had to deal with numerous requests for documents and information, mainly from the other appellants. However, Umbro resisted disclosure whenever it could generally, although not invariably, without success: see the Tribunal's various rulings in [2003] CAT 26, [2003] CAT 29, [2004] CAT 3, [2004] CAT 10 and [2004] CAT 11. In some respects, the information supplied by Umbro was unsatisfactory: see the Tribunal's letter to Umbro of 26 March 2004.

338. We see these various matters as incidents of litigation, which do not go to reduce the amount of the penalty for infringement which Umbro has to pay. Nor do such matters in our view amount to "co-operation" over and above what might reasonably be expected from a company in Umbro's position.

339. In the result, we make no change in Umbro's penalty on the basis of Umbro's submissions about "co-operation", either as regards the administrative stage before the OFT or as regards the appeal to the Tribunal.

THE EFFECT OF THE LIABILITY JUDGMENT

340. Finally Umbro submits that its penalty should be reduced in the light of the Tribunal's findings in the Liability Judgment, in particular the fact that certain infringements were found not proved against JJB, which shows that the infringements were less serious than considered by the OFT.

341. The OFT resists Umbro's submission, pointing to the fact that Umbro has not contested its participation in any of the infringements.

342. In our judgment, the infringements committed by Umbro were extremely serious. Umbro was a party to the England, MU and MU Centenary Shirt Agreements discussed in the Liability Judgment. In addition Umbro was party to the Umbro/Sports Soccer Agreement which lasted from around April 2000 to August 2001. That Agreement extended not only to the England, MU and MU Centenary shirts, but also to the England home shirt launched in April 2001, and to a number of launches of Chelsea, Celtic and Nottingham Forest shirts. Although there is apparently a short gap in October 2000 at the time of the launch of the MU away and third shirts, it is difficult to detect any real break in the continuity of the Umbro/Sports Soccer Agreement. Umbro was also party to the Umbro/Sports Connection agreement relating to the Celtic shirt between March and May 2001, as well as to the England Direct Agreement involving Sportsetail.

343. On the other hand, following the hearing on liability the Tribunal is now able to make an informed assessment of Umbro's overall responsibility for the infringements relative to the other appellants in the case. Although Umbro must accept an important share of responsibility for the infringements that occurred, our general view is that to a considerable extent Umbro was placed under commercial pressure by JJB, MU (up to September 2000) and Allsports. In that respect, we are of the view that for most of the period concerned the most significant pressure on Umbro was from JJB: see e.g. paragraphs 395 to 399, 415 to 424, and 429 of the Liability Judgment.

344. However, in the Liability Judgment no infringement of the Act was found to be proved against JJB in the period after October 2000, apart from the MU Centenary Shirt Agreement from June to August 2001. The duration of the infringement found against JJB is thus significantly less than the duration of infringement found against Umbro. On the other hand, the evidence suggests that the agreements between Umbro and Sports Soccer were to a significant and material extent the result of pressure from JJB on Umbro, even though other factors were also material (Liability Judgment, paragraphs 425 to 429).

345. Our conclusion in the Liability Judgment was that although there was little or no evidence of overt pressure from JJB after October 2000, in the period after October 2000 Umbro still feared pressure from JJB if Sports Soccer were to discount: see e.g.

the Liability Judgment at paragraphs 910, 921, 924 (c) (d) and (e) and 925. Moreover, in relation to the MU Centenary Shirt Agreement, there was a great deal of background evidence as to the pressure which JJB was generally exercising on Umbro at that time in relation to discounting on the MU home shirt (e.g. Liability Judgment at 945, 948 and 961 to 963) and specifically of pressure from JJB to obtain an assurance from Umbro that Sports Soccer would not discount the MU Centenary shirt at launch (Liability Judgment at paragraphs 975, 978, 981 to 982 and 986). We concluded that Umbro's agreement with Sports Soccer that the latter would not discount the MU Centenary shirt was to a material extent due to pressure from JJB: Liability Judgment at paragraph 987.

346. In this case the Tribunal has reduced the penalty on JJB. If the Tribunal did not make an equivalent reduction in the penalty vis-à-vis Umbro, the result would be that Umbro would continue to be penalised by actions that in Umbro's mind were to a material extent conditioned by fear of pressure from JJB, even though there was insufficient evidence for the Tribunal to find that JJB had actually exerted such pressure during the period in question. Such a result would in our view leave Umbro with a penalty that was disproportionately high, relative to JJB.

347. Similar considerations apply to the England Direct Agreement. One of the objects of that Agreement was, according to the OFT, to protect JJB's High Street prices. But, on the footing that it is not sufficiently proved that JJB was a party to that Agreement, at least after the coming into force of the Act, it would seem anomalous to maintain the same penalty on Umbro as regards the England Direct Agreement.

348. In all those circumstances we have come to the conclusion that, in order to reflect the relative culpability of Umbro and JJB for all the various infringements, assessed in the round on the basis of all the evidence, it would be appropriate to reduce Umbro's penalty by the same overall amount that we have reduced JJB's penalty, namely 20 per cent. That reduces Umbro's penalty from £6.641 million to £5.30 million in round figures. We make that reduction independently of the somewhat elaborate calculations set out at paragraphs 572 to 597 of the Decision.

349. We note that, even with that reduction, Umbro's penalty is relatively high as a proportion of its then United Kingdom turnover (about 6.3 per cent) as compared to the other appellants (1 to 1.3 per cent). Similarly Umbro's revised penalty is high relative to the statutory maximum compared to the other appellants. Furthermore, that proportion of Umbro's turnover expressed as a percentage of the statutory maximum in our view understates the difference between Umbro and the other appellants, since on the view we take Umbro is the only appellant whose statutory maximum is increased by the somewhat draconian calculations envisaged by Article 3 of the Penalties Order as then in force (paragraph 17 above).

350. It is true that any turnover-based calculation is likely to produce some anomalies where the proportion of turnover to which the infringements relate varies between the different parties. However, in a case where, as here, a manufacturer has a limited range of products, and comes under pressure from retailers selling a wide range of products, with the result that infringements are committed, a penalty based on the turnover affected is likely to be, proportionately speaking, heavier for the manufacturer as a percentage of turnover than for the retailers. The situation is exacerbated in the present case by the fact that the penalty imposed on Umbro was in excess of its operating profit for the year in question.

351. In the present case, the OFT recognised this anomaly, at least to some extent, by reducing the multiplier for Umbro at Step 2. Nonetheless, expressed as a proportion of turnover, or as a proportion of profits, Umbro's penalty remains in particular higher than that imposed on JJB. However Umbro, which is expertly represented, has taken no point on this, even after the OFT's detailed calculations became publicly available as a result of the Tribunal's disclosure order of 18 November 2003: [2003] CAT 29. Umbro took a considered decision to pursue its appeal on a very limited basis. That is also the basis on which the OFT has responded to Umbro's appeal.

352. We also bear in mind that aspects of Umbro's conduct in this case have been particularly serious, whatever pressures it may have been under. The more egregious examples of Umbro's conduct include the flagrant disregard of the letter Umbro wrote in September 1999 to its dealers informing them that they were free to sell at any price they chose, following the giving of the 1999 assurances to the OFT by the Premier

League and the FA; the consistent pressure brought to bear on Sports Soccer to raise its prices, or maintain High Street prices, of which the incidents relating to Euro 2000, the launch of the MU home shirt in 2000, the launch of the new England home kit in 2001 and the launch of the MU Centenary shirt are particularly glaring examples; the pressure to raise prices brought to bear on Blacks and JD and, although unsuccessfully, on Debenhams and John Lewis, including threats to withhold supplies, at the time of Euro 2000; cutting off supplies to JD as a result of JD's perfectly legitimate "hat trick promotion" at the time of Euro 2000; and making similar threats to Sports Connection. Unlike the other appellants, Umbro was party to agreements involving a number of shirts for a period of eighteen months. In all those circumstances we do not consider it appropriate for the Tribunal to make any further adjustment in Umbro's penalty.

353. We therefore propose to set Umbro's penalty at £5.30 million.

X CONCLUSIONS

354. For the above reasons we unanimously reach the conclusion that the penalties imposed upon the appellants should be varied and the Decision to that extent set aside. We fix the penalties imposed on the appellants as follows:

(1) JJB will pay a penalty of £6.7 million.
(2) Allsports will pay a penalty of £1.42 million.
(3) MU will pay a penalty of £1.5 million.
(4) Umbro will pay a penalty of £5.3 million.

Save as aforesaid, the appeals are dismissed.

355. 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 the dates when the respective appeals were lodged with the Registry until payment or judgment under section 37(1) of the Act.

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

Christopher Bellamy Barry Colgate Richard Prosser

Charles Dhanowa
Registrar

19 May 2005