

Competition Act 1998 ('CA98') and

Treaty on the Functioning of the European Union ('TFEU')

Decision of the Office of Fair Trading:

**Infringement of Chapter I of the CA98 and Article 101 of the
TFEU by Royal Bank of Scotland Group plc and Barclays
Bank plc**

Decision No. CA98/01/2011

Case CE/8950/08

20 January 2011

OFT 1405

Please note that [...] indicates figures or text which have been deleted, amended or replaced for reasons of confidentiality.

COMPETITION ACT 1998

DECISION

Case CE/8950-08

Loans to large professional services firms

20 January 2011

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SECTION I – INTRODUCTION

A. The purpose of this document

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

- Royal Bank of Scotland Group plc (‘RBS’); and
- Barclays Bank plc (‘Barclays’),

(each a ‘Party’, together ‘the Parties’) have infringed the prohibition imposed by section 2(1) (the ‘Chapter I prohibition’) of the Competition Act 1998 (the ‘Act’) and/or Article 101(1) (‘Article 101’) of the Treaty on the Functioning of the European Union (the ‘TFEU’).

2. The Chapter I prohibition provides that agreements between undertakings, decisions by associations of undertakings and/or concerted practices which may affect trade within the United Kingdom¹ (the ‘UK’) and which have as their object or effect the prevention, restriction or distortion of competition within the UK are prohibited. The Chapter I prohibition is modelled on Article 101, which prohibits agreements between undertakings, decisions by associations of undertakings and/or concerted practices which may affect trade between Member States of the European Union² (the ‘EU’) and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.³

B. Summary of the Infringement and the OFT's enforcement action

3. The OFT has concluded that between October 2007 and at least February or March 2008⁴ the Parties infringed the Chapter I prohibition

¹ Section 2(7) of the Act provides that ‘the United Kingdom’ means, in relation to an agreement which operates or is intended to operate only in a part of the United Kingdom, that part.

² Previously the European Community.

³ Previously the Common Market.

⁴ Barclays reported the conduct to the OFT and was granted a marker under the OFT’s leniency policy on 17 March 2008 (see paragraph 25 of this Decision). The last contact between RBS and Barclays prior to that date on which the OFT relies in this Decision was on 27 February 2008. There was further contact between RBS and Barclays in April 2008; however, the OFT is of the view that this does not form part of the infringing conduct since it post-dates the leniency application and was dealt with in accordance with the terms under which the leniency marker was granted.

and/or Article 101 by participating in an agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of loan products to large professional services firms (the 'Infringement'). The Infringement took the form of the provision of confidential, commercially sensitive pricing information, by RBS to Barclays, during the course of a number of contacts over a period of months. The information provided was comprised of both generic and customer-specific information, in each case with the object of facilitating the co-ordination of the Parties' respective pricing on loans supplied to large professional services firms. By the contacts between them, the Parties substituted practical co-operation for the risks of competition.

4. The OFT is imposing on RBS financial penalties under section 36 of the Act in respect of the Infringement. The amount to be imposed on RBS was agreed by way of early resolution on 29 March 2010.⁵ Barclays is a successful immunity applicant and therefore benefits from total immunity from financial penalties under the OFT's leniency policy.⁶ Barclays is not therefore required by this Decision to pay a penalty under section 36 of the Act.

⁵ See paragraph 34 of this Decision; and the Letter of agreement between the OFT and RBS dated 29 March 2010, paragraph 5(b)(i) (OFT Document Reference 1054, page 4).

⁶ See OFT Guidance 423, *OFT's guidance as to the appropriate amount of a penalty* (December 2004) (the 'Penalty Guidance'), paragraphs 3.1 to 3.18.

SECTION II – FACTUAL BACKGROUND⁷

A. The Parties

i. RBS

5. RBS is a public limited company registered in Scotland, with company number SC045551. RBS's registered address is 36 St Andrew Square, Edinburgh EH2 2YB.⁸ RBS's shares are listed on the London Stock Exchange.⁹
6. RBS is the holding company of a large global banking and financial services group, operating, through its subsidiaries, in the United Kingdom, the United States and internationally.¹⁰
7. RBS's activities are organised into a number of business divisions, including Global Banking and Markets, Global Transaction Services, RBS Insurance and UK Retail and Commercial Banking.¹¹
8. Within the UK Retail and Commercial Banking division sits the Professional Practices Coverage ('PPC') team, which is the focus of the Infringement.¹²
9. The PPC team targets customers with an annual turnover of £25 million or more.¹³ The PPC team has overall responsibility for managing the relationships between RBS and such customers which operate as large professional services firms, such as accountancy practices, law firms and property surveyors. It is also responsible for introducing new products and services to such large professional services customers.¹⁴
10. At the time of the Infringement, [RBS Head of Team] was head of the PPC team. [RBS Relationship Director A] and [RBS Relationship Director B] were Relationship Directors in that team.¹⁵

⁷ References in Section II of this Decision to the structure of the groups within RBS and Barclays are to those which applied at the time of the Infringement.

⁸ RBS Annual Return dated 25 January 2010.

⁹ <http://www.londonstockexchange.com/exchange/prices-and-news/stocks/summary/company-summary.html?fourWayKey=GB0007547838GBGBXSET1>

¹⁰ RBS Annual Report and Accounts 2008, page 26.

¹¹ RBS Annual Report and Accounts 2008, page 26.

¹² RBS Response dated 13 May 2009 to the s.26 Notice of 27 April 2009, question 1 response (OFT Document Reference 0851, page 2); and Annexes 3 and 4 of RBS Response dated 13 May 2009 to the s.26 Notice of 27 April 2009 (OFT Document References 0854, page 2; and 0855, page 2).

¹³ RBS Response dated 13 May 2009 to the s.26 Notice of 27 April 2009, question 1 response (OFT Document Reference 0851, page 2).

¹⁴ RBS Response dated 13 May 2009 to the s.26 Notice of 27 April 2009, question 2 response (OFT Document Reference 0851, pages 2 and 3).

¹⁵ RBS Response dated 13 May 2009 to the s.26 Notice of 27 April 2009, question 1 response (OFT Document Reference 0851, page 2); and Annexes 1 and 7 of RBS Response dated 13 May 2009 to the s.26 Notice of 27 April 2009 (OFT Document References 0852, page 2; and 0858, page 4 respectively). Note that this source does not refer to [RBS RD A], since he was no longer employed by RBS at the date the structure chart was produced.

11. RBS's estimated total turnover for the financial year ending 31 December 2009, calculated in accordance with the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 as amended,¹⁶ was £[...]billion.¹⁷ [For ease of reference, the individuals at RBS involved in the overall narrative are as follows:

RBS individual (and position at the relevant time)	Abbreviated Reference in this Decision
RBS Relationship Director A (PPC team).	'RBS RD A'
Head of PPC Team.	'RBS Head of Team'
RBS Relationship Director B (PPC team).	'RBS RD B'
RBS Relationship Director C (PPC Team).	'RBS RD C'

ii. Barclays

12. Barclays is a public limited company registered in England and Wales, with company number 1026167. Barclays' registered address is 1 Churchill Place, London E14 5HP.¹⁸ Barclays' shares are listed on the London Stock Exchange.¹⁹
13. Barclays is a global financial services provider and is active in retail and commercial banking, investment banking, credit cards, wealth management and investment management services. The business is divided into two clusters, namely Global Retail and Commercial Banking ('GRCB') and Investment Banking and Investment Management ('IBIM'), each of which has a number of business units.²⁰
14. The business unit of Barclays Commercial Bank ('BCB') sits in the GRCB. During the period January 2007 to December 2008, BCB implemented a staged restructuring of its sales force. Prior to December 2007, BCB sales teams for larger business and medium

¹⁶ The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 SI 2000/309 (as amended by The Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 SI 2004/1259) (the 'Penalties Order (as amended)').

¹⁷ Email of 6 January 2011 from Linklaters to the OFT. In accordance with the requirements of the Penalties Order (as amended) (n16), Schedule paragraph 5, this data was prepared on a gross basis, that is, including, for example, costs of funding, and it represents several adjustments made against the total revenue in the RBS Annual Report and Accounts 2009. RBS's total net income as reported in its 2009 Annual Report and Accounts was £31.726 billion.

¹⁸ Barclays Annual Return dated 31 August 2009.

¹⁹ <http://www.londonstockexchange.com/exchange/prices-and-news/stocks/summary/company-summary.html?fourWayKey=GB0031348658GBGBXSET0>

²⁰ Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009, question 1 response (OFT Document Reference O860, page 1).

business customers were organised along separate reporting lines.²¹ The denomination 'Larger Business' was used in respect of customers with an annual turnover of £20 million and above.²²

15. Until December 2007, services to Larger Business professional services firms were provided by the Professional Services team within the BCB Larger Business group. [Barclays Former Head of Team] headed this Professional Services team.²³
16. In December 2007, the Professionals and Public Sector Services ('PPSS') group was established, comprising three teams: (i) Professionals – Larger Business ('PLB'); (ii) Public Sector – Larger Business; and (iii) Medium Business – Professionals and Public Sector.²⁴ This remained the structure of the PPSS group for the remainder of the period during which the Infringement took place. [The Barclays Head of Team] headed the PPSS group from its inception until he left Barclays [...].²⁵
17. The PLB team (and its previous incarnation under [Barclays Former Head of Team]) is the team which is the focus of the Infringement. The PLB team provided a relationship banking service to its customers which operate as professional services firms.²⁶
18. Barclays' estimated total turnover for the financial year ending 31 December 2009, calculated in accordance with the Penalties Order (as amended), was Euros [.....] million.²⁷ [For ease of reference, the individuals at Barclays involved in the overall narrative are as follows:

²¹ Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009, question 1 response (OFT Document Reference 0860, page 3).

²² Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009, question 1 response, footnote 4 (OFT Document Reference 0860, page 2); and [...] interview transcript, Tape 1 (OFT Document Reference 0559, page 4).

²³ Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009, question 1 response (OFT Document Reference 0860, page 3); and Annex 5 of Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009 (OFT Document Reference 0866, page 5).

²⁴ Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009, question 1 response (OFT Document Reference 0860, page 2).

²⁵ Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009, question 1 response (OFT Document Reference 0860, page 2); and Annexes 3 and 4 of Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009 (OFT Document References 0864; and 0865, page 3).

²⁶ Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009, question 3 response (OFT Document Reference 0860, page 4).

²⁷ Barclays Response dated 29 November 2010 to the request of 11 November 2010 for revised turnover figures, question 3 response. In accordance with the requirements of the Penalties Order (as amended) (n16), Schedule paragraph 5, this data was prepared on a gross basis, that is, including, for example, costs of funding, and represents several adjustments made against the total revenue in the Barclays Annual Report 2009. Barclays' total net income as reported in its 2009 Annual Report was £30.986 billion.

Barclays individual(s) (and position at the relevant time)	Abbreviated Reference(s) in this Decision
Eight Relationship Directors (PPSS team).	'Barclays RDs A-H.'
Individual who took the minutes at the meeting on 16 October, 2007.	'Individual who took the minutes at the meeting on 16 October, 2007'
Deputy Team Leader of Professional Services Team – Larger Business (PLB – part of PPSS).	'Barclays Deputy Team Leader'
Barclays Head of PPSS Group.	'Barclays Head of Team'
Senior Manager within Barclays Corporate.	'Barclays Senior Manager'
Barclays Senior Colleagues A and B.	'Barclays Senior Colleagues A and B'
Former Head of Professional Services Team (within BCB Larger Business).	'Barclays Former Head of Team'

iii. Market position

19. As summarised above, the focus of the Infringement is the supply of loan products to large professional services firms in the UK. Given that neither Party is aware of the value or volume of the facilities provided by other banks, measuring the overall size of this sector is inherently difficult and neither RBS nor Barclays was able to provide specific data on the overall size of the sector. It is nevertheless clear that the Parties have a strong position in the UK.
20. Barclays estimates [based on publicly available figures from Dun and Bradstreet relating to the number of corporate banking relationships in the UK] that its share of the wider corporate banking market in the UK (of which the supply of loans to large professional services firms forms a part) is approximately 23%, with an estimated share of 32% for RBS.²⁸ According to a witness from Barclays, '*[w]e would say, depending how you measure it, we have 65 per cent of the [professional services] market but if you look at some figures, they, RBS would say the same*'.²⁹ As regards the supply of loans to large professional services firms, it would appear that RBS and Barclays are the main providers. A witness from Barclays has stated that Barclays

²⁸ Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009, questions 20 to 22 responses (OFT Document Reference 0860, pages 20 and 21).

²⁹ [...] interview transcript, Tape 1 (OFT Document Reference 0597, page 5). Also, [RBS RD A] estimated that RBS had 40% of the loans to professionals market in the UK; see [...] interview transcript, Tape 1 (OFT Document Reference 0534, page 13). The OFT notes that this information is made up of estimates from witnesses for the Parties, based on their involvement in and knowledge of the industry, rather than formal market share analysis.

views RBS as its major competitor in this sector,³⁰ albeit that RBS has stated that it views its principal competitors in this area as also including Lloyds/HBOS, HSBC and Citibank UK.³¹ The concentration in this sector is a result of a combination of factors, including the Parties being the first two financial institutions to focus on the professional practices sector and to develop specific teams.³²

21. It is, therefore, clear that the Parties are strong and close competitors, particularly in the sector forming the focus of the Infringement.

iv. International context

22. The OFT notes that there is also an international dimension to the Parties' activities in this sector.
23. There are examples in the information submitted by the Parties of debt finance being sought from them by UK-based large professional services firms for use outside the UK.³³ In connection with this, the evidence suggests, for example, that Barclays denominates some of its loans in Euros.³⁴
24. In addition, several of the Parties' customers sampled by the OFT during this investigation have international aspects to their business.³⁵

B. The OFT's investigation

25. On 17 March 2008 Barclays approached the OFT for immunity under the OFT's leniency policy in respect of the disclosure, by RBS to Barclays, of confidential, commercially sensitive pricing information affecting the provision of loans to large professional services firms. The OFT granted Barclays an immunity marker and Barclays signed an immunity agreement with the OFT on 27 August 2009.
26. In April 2008, the OFT began a formal investigation under the Act, having determined that there were reasonable grounds for suspecting that RBS and Barclays were or had been engaged in one or more agreements and/or concerted practices relating to the disclosure of confidential, commercially sensitive pricing information affecting the

³⁰ [...] interview transcript, Tape 1 (OFT Document Reference 0559, page 9); and [...] interview transcript, Tape 4 (OFT Document Reference 0586, pages 15 and 16).

³¹ RBS Response dated 27 May 2009 to the s.26 Notice of 27 April 2009, question 22 response (OFT Document Reference 0872, pages 11 and 12).

³² RBS Response dated 27 May 2009 to the s.26 Notice of 27 April 2009, question 24 response (OFT Document Reference 0872, page 13).

³³ Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009, question 16 response (OFT Document Reference 0860, page 18); and Annex 8 of Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009 (OFT Document Reference 0869).

³⁴ Email of 9 January 2008 from [Barclays RD G] to [Barclays RD E] (OFT Document Reference 0116.25, page 3). ([Barclays RD G] and [Barclays RD E] are both Relationship Directors at Barclays.)

³⁵ For example, see the Responses to the s.26 Notice of 27 August 2009 from [a selection of RBS and Barclays customers], question 2 response (OFT Document References 0953, page 1; 0967, pages 1 and 8; and 0970, pages 1 and 4 respectively).

provision of loan products to professional services businesses and/or practices, which may affect or have affected trade within the UK and between EU Member States.

27. On 16 May 2008, the OFT obtained a warrant from the High Court to enter and search the premises of RBS under section 28 of the Act. An unannounced visit to the premises of RBS was carried out by OFT officials on 21 and 22 May 2008. A limited amount of hard copy documentary material was taken from RBS's premises; the business' IT server and hard drives of certain key personnel were forensically imaged.
28. A visit on notice was carried out by OFT officials under section 27 of the Act at the premises of Barclays on 21 May 2008. This visit was without prejudice to Barclays' wider and more general duty to maintain continuous and complete co-operation under the OFT's leniency policy and involved the provision by Barclays of forensic images of the laptops of key personnel.
29. RBS voluntarily made key members of staff available for interview. The OFT carried out a first round of interviews in June 2008, followed by a second round in November 2008. The members of RBS staff interviewed by the OFT were as follows:

RBS Individual [and Position (at the relevant time)]	Position (at the relevant time)	Date of interview
[RBS Head of Team]	Head of PPC Team	25 June and 13 November 2008
[RBS Relationship Director B]	Relationship Director	24 June and 11 November 2008
[RBS Relationship Director A]	Relationship Director	25 June, 14 and 19 November 2008

30. The OFT carried out a forensic search of the Personal Storage Table ('PST')³⁶ of a number of RBS individuals against a set of key words. The OFT also analysed telephone records of a number of individuals at RBS and Barclays.
31. The OFT also interviewed relevant Barclays employees. These interviews, which were facilitated by the immunity applicant's continuing duty of co-operation, took place between July and October 2008. The following Barclays employees were interviewed during this period:

³⁶ In computing, a PST is a file which is used to store copies of messages, calendar events and other items within Microsoft software such as Microsoft Outlook.

Barclays Individual	Position (at the relevant time)	Date of interview
[Barclays Former Head of Team]	[Former Head of Professional Services Team (within BCB Larger Business)]	27 October 2008
[Barclays Head of Team)]	[Barclays Head of PPSS Group]	28 July 2008
[Barclays Deputy Team Leader]	[Deputy Team Leader of Professional Services Team – Larger Business (PLB – part of PPSS)]	15 August 2008
[Barclays Relationship Director A]	Relationship Director	14 August 2008
[Barclays Relationship Director D]	Relationship Director [..]	13 August 2008
[Barclays Relationship Director F]	Relationship Director	5 August 2008
[Barclays Relationship Director C]	Relationship Director	12 August 2008
[Barclays Relationship Director E]	Relationship Director	4 August 2008
[Barclays Relationship Director G]	Relationship Director	2 September 2008
[Barclays Relationship Director B]	Relationship Director	11 August 2008
[Team Administrator]	Team Administrator	5 August 2008

32. During the course of its investigation, the OFT identified two specific customer loan transactions in respect of which confidential, commercially sensitive pricing information may have been disclosed between the Parties.³⁷ These transactions involved Savills plc ('Savills') and Knight Frank LLP ('Knight Frank'), both large international property consultancies. In March 2009 the OFT carried out inspections on notice under section 27 of the Act at the premises of Savills, Knight Frank and PricewaterhouseCoopers LLP ('PwC') (which acted as agent for Savills in relation to the relevant loan transaction) in order to obtain further evidence in relation to these transactions. Interviews

³⁷ Three further customer transactions were also considered by the OFT but were subsequently discounted from the OFT's investigation.

subsequently took place with key individuals at each of Savills and Knight Frank. The details of those interviews are as follows:

Individual	Position (at the relevant time)	Date of interview
[Knight Frank Senior Manager A]	[.....]	31 March 2009
[Knight Frank Senior Manager B]	[.....]	2 April 2009
[Savills Senior Manager A]	[.....]	16 April 2009
[Savills Senior Manager B]	[.....]	19 August 2009

33. The OFT also made a number of requests for information to both RBS and Barclays in the form of section 26 information requests during the course of the investigation.³⁸ Section 26 information requests were also sent to a selection of RBS's and Barclays' customers during August 2009.³⁹

34. On 29 March 2010, RBS agreed to an early resolution to the investigation by admitting it had infringed competition law and agreeing to co-operate in the expedition of the process for concluding the investigation. The letter of agreement between the OFT and RBS dated 29 March 2010 sets out all the conditions of the agreement with RBS to reach an early resolution.⁴⁰ The key terms of the agreed resolution are as follows:

- (a) RBS admitted that it had infringed the Chapter I prohibition and/or Article 101 by participating in an agreement and/or concerted practice with Barclays which had as its object the prevention, restriction or distortion of competition in relation to the supply of loan products to professional services firms. Specifically, the infringement took the form of the provision of both generic and, in a number of instances, contract-specific confidential, commercially sensitive pricing information by RBS to Barclays during the course of a number of contacts over a period of months with the object of preventing, restricting or distorting competition in relation to the supply of loan products to large professional services firms;

³⁸ s.26 Notices of 27 April 2009 and 7 August 2009 sent to RBS (OFT Document References 1080 and 1081 respectively); and s.26 Notices of 24 April 2009 and 7 August 2009 sent to Barclays (OFT Document References 1078 and 1079 respectively).

³⁹ s.26 Notice of 27 August 2009 sent to [a selection of customers of RBS and Barclays] (OFT Document References 0941; 0939; 0938; 0940; 0942; 0933; 0935; 0934; 0936; and 0937 respectively); and corresponding Responses (OFT Document References 0965; 0953; 0954; 0967; 0970; 1023; 0958; 0962; 0950; and 0968 respectively).

⁴⁰ Letter of agreement between the OFT and RBS dated 29 March 2010 (OFT Document Reference 1054).

- (b) RBS would pay a penalty of £28.59 million, which includes a reduction of 15 per cent in recognition of the early resolution agreement;
 - (c) the OFT would issue a Statement of Objections in respect of the Infringement setting out the evidence and findings in support of the OFT's proposed infringement decision;
 - (d) RBS would refrain from seeking access to documents on the OFT's file relevant to the matters contained in the Statement of Objections, other than those documents directly relied on and referred to in the Statement of Objections;
 - (e) RBS would submit a concise memorandum indicating any material factual inaccuracies in the Statement of Objections; and
 - (f) the OFT would adopt a decision in respect of the Infringement which would set out the OFT's findings of the facts which had taken place in materially the same form as set out in the Statement of Objections, subject to any amendments deemed necessary and appropriate by the OFT as a result of representations referred to in (e) above or equivalent representations from the other recipient of the Statement of Objections.
35. On 29 September 2010, the OFT issued a Statement of Objections, giving the Parties notice under section 31(1)(a) of the Act and rules 4 and 5 of the OFT's procedural rules (the 'OFT's Rules')⁴¹ of its proposed infringement decision.
36. Under the OFT's Rules, the OFT is required to give each Party a reasonable opportunity to inspect the documents on the OFT's file that relate to the matters referred to in the Statement of Objections, excluding '*internal documents*' and documents to the extent that they contain '*confidential information*', as those terms are defined in the OFT's Rules.⁴² In accordance with the agreements reached with the Parties regarding access to the OFT's file in this matter,⁴³ the OFT did not make available a full set of all the documents on its case file. Instead, Parties were sent on 29 September 2010 a CD-ROM containing electronic copies of the documents on its file which were directly relied on and referred to in the Statement of Objections.
37. As required by the OFT's Rules,⁴⁴ the Parties were also notified of the period within which they may make written representations to the OFT on the matters referred to in the Statement of Objections and of the possibility of making oral representations to the OFT on such matters.

⁴¹ The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751).

⁴² OFT's Rules (n41), Rules 5(3) and 1(1).

⁴³ Letter of agreement between the OFT and RBS dated 29 March 2010, paragraph 3 (OFT Document Reference 1054, page 3); and Letter from the OFT to Barclays dated 24 March 2010, paragraph headed 'Access to file' (OFT Document Reference 1055, pages 3 and 4).

⁴⁴ OFT's Rules (n41), Rules 5(2)(c) and 5(4).

Written representations were restricted to the scope agreed between the OFT and RBS and Barclays in the contexts of early resolution and leniency respectively.⁴⁵

38. The Parties provided written representations in response to the Statement of Objections on the following dates:

(a) RBS: 27 October 2010 and 3 November 2010;⁴⁶

(b) Barclays: 5 November 2010.⁴⁷

39. Neither Party took the opportunity to make oral representations.

C. Definition of relevant market

i. Introduction – purpose of assessing the relevant market

40. In this Part C, the OFT sets out its conclusions as regards the definition of the relevant market.

41. The OFT is not obliged to define the relevant market for the purposes of deciding whether there has been an infringement of the Chapter I prohibition or Article 101 unless it is impossible without such a definition to determine whether the agreement and/or concerted practice was liable to affect trade in the UK and/or between Member States, and had as its object or effect the prevention, restriction or distortion of competition.⁴⁸

42. No such obligation arises in this case because, as explained in paragraphs 329 and 332 below, the Infringement involves an agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition which the OFT considers by its nature liable to affect trade in the UK and/or between Member States.⁴⁹

43. Nevertheless, the OFT does define the relevant market(s) for the purposes of assessing the appropriate level of financial penalties.⁵⁰

⁴⁵ Letter of agreement between the OFT and RBS dated 29 March 2010, paragraph 4 (OFT Document Reference 1054, page 3); and Letter from the OFT to Barclays dated 24 March 2010, paragraph headed 'Representations in response to the SO' (OFT Document Reference 1055, page 3).

⁴⁶ RBS's representations on factual inaccuracies submitted on 27 October 2010 have been addressed in paragraphs 9, 20, 34, 65, 66, 69 to 70, 121, 179, 186 to 188 and 200 of this Decision. RBS's representations on effect on trade submitted on 3 November 2010 have been addressed in paragraphs 332 to 342 of this Decision.

⁴⁷ Barclays' representations submitted on 5 November 2010 have been addressed in paragraphs 49, 51, 52, 56 to 58, 62, 67, 79, 80, 90, 93, 94, 100, 181 and 338 of this Decision.

⁴⁸ Case T-62/98 *Volkswagen AG v European Commission* [2000] ECR II-2707, paragraph 230.

⁴⁹ *Argos Limited and Littlewoods Limited v The Office of Fair Trading* [2005] CAT 13 ('*Argos/Littlewoods (Penalty)*'), paragraphs 176 to 178.

⁵⁰ Penalty Guidance (n6), paragraph 2.7.

44. In this respect, the Competition Appeal Tribunal (the 'CAT') and the Court of Appeal have accepted that it is not necessary for the OFT to carry out a formal analysis of the relevant product market in order to assess the appropriate level of the penalty, and nor has the OFT done so in this case.⁵¹ Rather, the OFT must be '*satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement*'.⁵² As the Court of Appeal has stated:

'the market which is taken for calculation of the turnover relevant for Step 1 on a penalty assessment may properly be assessed on a broad view of the particular trade which has been affected by the proved infringement, rather than by a relatively exact application of principles that would be relevant for a formal analysis, such as substitutability or, on the other hand, by limiting the turnover in question to sales of the very products or services which were the direct subject of the price-fixing arrangement or other anti-competitive practice'.⁵³

45. The OFT has approached the question of market definition in the present case on this basis, rather than on the basis of any more formal analysis.

ii. Framework for assessing the relevant market

46. A market definition will normally comprise two dimensions: a product and a geographic area.

iii. Scope of the relevant market in this case

(a) Product market

47. The Infringement concerns the disclosure of information relating to the provision of loan products by teams within Barclays and RBS dedicated to professional services firms generating an annual turnover in excess of £20 million and £25 million respectively.
48. In this Part, the OFT first addresses whether, for present purposes, the market should be regarded as including other industry sectors and, if not, smaller professional services firms (see paragraphs 50 to 63 below). It then considers 'customer grouping' (see paragraphs 64 to 72 below) and 'product grouping' (see paragraphs 73 to 91 below).
49. In its response to the Statement of Objections, Barclays argues that the OFT must first consider which products or services are to be regarded as being in the same market as the 'loan products' in question, before turning to consider other questions, such as industry sectors and the size of customer. Barclays does not say why it considers this approach to be necessary. The OFT does not consider that the order in which it

⁵¹ *Argos Limited, Littlewoods Limited and JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318 ('*Argos, Littlewoods and JJB (EWCA)*'), paragraphs 169 to 173 and 189; and *Argos/Littlewoods (Penalty)* (n49), paragraph 178.

⁵² *Argos, Littlewoods and JJB (EWCA)* (n51), paragraph 170.

⁵³ *Argos, Littlewoods and JJB (EWCA)* (n51), paragraph 173.

has addressed these questions has affected its conclusions on the relevant market; and notes that if it were to take the approach advocated by Barclays it would be defining the product without having identified the customers buying the product. In any event, the OFT considers that it has sufficiently addressed all the relevant questions for the purposes of defining the market in this case.

Industry sectors

50. There is evidence that from a demand-side perspective, industry knowledge and established bank-to-customer relationships are significant in the professional services sector. The majority of professional services firms sampled by the OFT in this investigation considered a dedicated professional services team to be valuable.⁵⁴ As Barclays puts it, *'a business is more inclined to work with a sales team specifically designated to and versed in their industry'*.⁵⁵
51. In its response to the Statement of Objections, Barclays argues that the range of products and services that customers require from their bank is comprehensive and involves every aspect of their business needs, but that this perspective is not unique to professional services customers. Barclays considers that, whilst a customer's relationship with a bank (based on the bank having a good understanding of the customer's particular business needs) is important, this does not provide a basis for defining the relevant market along industry lines. Barclays argues that the evidence demonstrates that sector expertise is valuable but by no means a pre-requisite to winning customers' business. As a result, Barclays argues that the OFT is wrong to limit the market to a particular industry sector.
52. Barclays does not take issue with the OFT's view that industry knowledge and customer relationships are important and valuable in this sector. Indeed, in putting forward its arguments, Barclays cites evidence which would suggest that professional services firms' needs are, in some respects, different from those of other corporate customers⁵⁶ and that firms consider it important that a bank should have the necessary expertise to understand their business.⁵⁷ This evidence suggests that (although not essential) the existence of a

⁵⁴ Seven out of ten of the professional services firms sampled by the OFT stated that they regard the availability of a specialist team as an important factor in choosing a bank. See Responses to the s.26 Notice of 27 August 2009 [sent to a selection of customers of RBS and Barclays]. (OFT Document References 0965, page 2; 0967, page 2; 1023, page 2; 0958, page 2; 0962, page 2; 0950, page 3; and 0968, page 2 respectively).

⁵⁵ For example, Barclays Response dated 1 September 2009 to the s.26 Notice of 7 August 2009, questions 1 to 3 responses (OFT Document Reference 0995, page 1). Barclays made this point in describing the 'full service relationships' between its professional services team and its customers, also stating that 'the sales teams do not go out to sell particular products or services'. Barclays' arguments in relation to the relevant product grouping are addressed below.

⁵⁶ Barclays Response dated 1 September 2009 to the s.26 Notice of 7 August 2009, questions 1 to 3 responses (OFT Document Reference 0995, page 3).

⁵⁷ See Responses to the s.26 Notice of 27 August 2009 [sent to a selection of customers of RBS and Barclays], question 5 response (OFT Document References 0965, page 3; 0967, page 4; 1023, page 2; 0958, page 2; 0962, page 3; and 0968, page 3 respectively).

dedicated professional services team serves as an indicator that the bank has that expertise. For the purposes of defining the market in this case, the OFT therefore remains of the view that it is relevant that, on the demand side, large professional services firms form a distinct group of customers, requiring a particular product or service (which is provided at a particular cost).

53. From a supply-side perspective the evidence suggests that specific knowledge and expertise is necessary, or at least highly desirable, for a bank to serve professional services firms effectively. For example, this includes an understanding of relevant regulatory rules, deposit-taking for both office and client accounts, lending on an unsecured basis and an appreciation of a generally lower appetite for risk.⁵⁸ In interview, [the Barclays Head of Team] [...], stated that, '*[t]his is about relationship and understanding the business. ... [W]e need to understand how those businesses operate because one size doesn't fit all*'.⁵⁹
54. The strategic significance of sectoral knowledge is supported by the fact that both RBS and Barclays had dedicated professional services teams at the time of the Infringement.
55. The OFT also considers sector expertise and the banks' customer relationships to be important for the purposes of considering the particular trade which has been affected by the Infringement.⁶⁰ These factors drive the mainstay of the offerings of RBS's PPC team and Barclays' PLB team (see paragraphs 81 to 91 below).
56. In its response to the Statement of Objections, Barclays argues that the OFT is wrong to narrow the market definition based on the existence of the internal business groupings of the Parties and the focus of those internal teams. However, this is not the OFT's approach. The OFT does not simply base its analysis on the Parties' business groupings. Rather, the OFT's approach reflects the strategic significance of sectoral knowledge (as referred to in paragraphs 53 and 54), which is in turn reflected in the existence of dedicated teams (albeit that the existence of such teams may not be essential).
57. Barclays argues that the strategic significance of sectoral knowledge and expertise is overstated by the OFT, and that it says nothing about the products and services *bought* by professional services firms, which are generally no different to the products and services bought by other corporate customers. Nor does it say anything about the products and services *sold* by banks with sector teams.
58. However, the OFT considers that the fact that a bank is able to provide a particular product is not, in itself, sufficient to establish supply-side substitutability. In order for a different bank division to provide a supply

⁵⁸ RBS Response dated 25 September 2009 to the s.26 Notice of 7 August 2009, question 3 response (OFT Document Reference O977, pages 2 to 4).

⁵⁹ [...] interview transcript, Tape 1 (OFT Document Reference O559, page 10).

⁶⁰ *Argos, Littlewoods and JJB (EWCA)* (n651), paragraph 173.

side constraint, the division must be able to market and sell the product to customers effectively.⁶¹ The evidence shows that customers value sector expertise; thus, without such sector expertise, it is unlikely that other divisions would be able to provide a sufficient constraint by way of supply side substitutability. The OFT therefore continues to consider that sector expertise is relevant for the purpose of market definition in this case.

59. From data provided by Barclays and RBS (see Table 1 and Table 2 below), there appear to be several differences in average margins across industry teams.

Table 1: Barclays Average Margin Data for Industry Teams⁶²

Loan Margin (Average weighted margin)		%	%
		2007	2008
[...]	[...]	[.....]	[.....]
[...]	[...]	[.....]	[.....]
[...]	[...]	[.....]	[.....]
[...]	[...]	[.....]	[.....]
[...]	[...]	[.....]	[.....]
[...]	[...]	[.....]	[.....]
[...]	[...]	[.....]	[.....]
[...]	[...]	[.....]	[.....]
[...]	[...]	[.....]	[.....]
[...]	[...]	[.....]	[.....]
[...]	[...]	[.....]	[.....]
[...]	[...]	[.....]	[.....]
[...]	[...]	[.....]	[.....]
[...]	[...]	[.....]	[.....]
[...]	[...]	[.....]	[.....]
[...]	[...]	[.....]	[.....]

60. The margins on Barclays' Larger Business group in 2008 vary from [.....] for [.....] to [.....] for [.....]. The differences between business groups also exist within 2007. The fact that there are significant variances in relative terms between business groups and that they persist over time suggests that loans to large professional services firms (at [.....] margin in 2008) may not be in the same relevant market as loans to other industry sectors.

Table 2: RBS Average Margin Data for Industry Teams⁶³

⁶¹ Supply side substitution requires that firms are able to supply the product 'at short notice and without incurring substantial sunk costs'. Marketing and the building of relationships with professional services teams sufficient to be seen as an effective competitor is likely to require substantial sunk costs: 'although potential suppliers may be able to supply the market, there may be reasons why customers would not use their products'. See OFT Guidance 403, *Market Definition* (December 2004) (the 'Market Definition Guidance'), paragraphs 3.13 and 3.16 respectively.

⁶² Data from Annex 1 of Barclays Response dated 1 September 2009 to the s.26 Notice of 7 August 2009 (OFT Document Reference 0996).

Average margin	%	%
	2007	2008
[...]	[.....]	[.....]
[...]	[.....]	[.....]
[...]	[.....]	[.....]
[...]	[.....]	[.....]
[...]	[.....]	[.....]
[...]	[.....]	[.....]
[...]	[.....]	[.....]
[...]	[.....]	[.....]
[...]	[.....]	[.....]

61. Likewise the average margin data for RBS shows substantial variance in relative terms between the different teams. The lowest margin in 2008 was the [.....] at [.....] whilst the highest margin was within the [.....] at [.....]. If there were supply-side substitution between loans to these different sectors we would expect the margins to be broadly similar across all sectors.
62. In its response to the Statement of Objections, Barclays argues that margins do no more than reflect the level of risk in lending and that it is wrong to suggest that the existence of variance in average margin indicates the existence of separate markets. However, the OFT considers that, even if the variance in margin reflects a difference in the risk factors associated with supplying different categories of customers, it also reflects a variance in both customer requirements and market conditions. Higher margins may reflect higher risk, but this is likely to reflect different market conditions and customer requirements as compared with low risk, low margin customers. The fact that separate customers can be identified, and there are significant differences in the risks of lending to these customers, is indicative of the existence of different markets.
63. Consequently, for present purposes, the OFT is treating the market as limited to services to professional services firms.

Customer grouping

64. The OFT notes that the Barclays and RBS teams concerned define the business which they target by reference to the annual turnover of the professional services firms concerned; both teams focused on larger firms with an annual turnover in excess of £20 million and £25 million respectively.

⁶³ Data from RBS Response dated 25 September 2009 to the s.26 Notice of 7 August 2009, question 4 response (OFT Document Reference O977, page 5); and RBS Response dated 29 September 2009 to the s.26 Notice of 7 August 2009, question 4 further response (OFT Document Reference O972 pages 2 and 3).

65. RBS states that its PPC team targets professional services firms with an annual turnover of £25 million or more.⁶⁴ In addition, the PPC team has not in the last five years provided debt products to other types of customers.⁶⁵ Furthermore, RBS is not aware of another industry team based elsewhere within the London Corporate Sector Coverage Team of RBS having provided debt products to professional services firms in the past five years.⁶⁶
66. RBS argues that because there is a clear demarcation between the customers targeted by its PPC team and the target customers of its other professional practices teams based elsewhere within the RBS Group (i.e. those professional services firms with an annual turnover of less than £25 million), the relevant product market should not include customers served by these teams (in particular as the relatively smaller size of such customers can alter their requirements).⁶⁷ RBS notes in its response to the Statement of Objections that it is not possible to ascertain turnover generated in relation to professional services firm customers with an annual turnover of between £20 million to £25 million as it does not organise its divisions in this way.
67. Barclays has not, in its submissions to the OFT, specifically addressed the issue of customer grouping because it regards the market as being wider, taking in '*corporate banking*' as a whole.
68. However, Barclays has pointed out that, whilst the financing needs of professional services firms are typically handled by its PLB team, there have been rare occasions when the PLB team has provided loan products to non-professional services firms. There have been similarly rare occasions when other industry teams within Barclays have provided loans to professional services firms. Both these variations to normal procedure tend to result from legacy relationships (for example, where the relationship with a particular customer is rooted in another division).⁶⁸
69. Due to differing internal structures, Barclays' PLB team focused on targeting and servicing professional services firms with an annual turnover of £20 million or more, whereas RBS's PPC team focused on targeting and servicing professional services firms with an annual turnover of £25 million or more. However, these thresholds are not absolute.

⁶⁴ RBS Response dated 13 May 2009 to the s.26 Notice of 27 April 2009, question 1 response (OFT Document Reference 0851, page 2); and RBS Response dated 25 September 2009 to the s.26 Notice of 7 August 2009, question 1 response (OFT Document Reference 0977, page 1).

⁶⁵ RBS Response dated 25 September 2009 to the s.26 Notice of 7 August 2009, question 1 response (OFT Document Reference 0977, page 2).

⁶⁶ RBS Response dated 25 September 2009 to the s.26 Notice of 7 August 2009, question 2 response (OFT Document Reference 0977, page 2).

⁶⁷ RBS Response dated 27 May 2009 to the s.26 Notice of 27 April 2009, question 19 response (OFT Document Reference 0872, pages 9 and 10); and RBS Response dated 13 May 2009 to the s.26 Notice of 27 April 2009, question 1 response (OFT Document Reference 0851, page 2).

⁶⁸ Barclays Response dated 1 September 2009 to the s.26 Notice of 7 August 2009, questions 1 to 3 responses (OFT Document Reference 0995, page 2).

70. For example, RBS notes that it is possible that a relatively small number of the PPC team's legacy customers have a turnover of less than £25 million as the turnover threshold for PPC customers has increased over time. In addition, owing to the fact that a customer's turnover can fluctuate, it is possible that certain PPC customers who were targeted on the basis of a turnover of £25 million or more may no longer realise that same level of turnover or may drop below the threshold from time to time. In those circumstances, such customers would not be referred to another team.⁶⁹
71. The OFT notes that whilst the Barclays PLB team and RBS PPC teams do not apply exactly the same thresholds, both are evidently focused on large professional services firms. Thus, the OFT considers that the two teams can be regarded broadly as targeting the same business.
72. Taking a broad view of the particular trade affected by the Infringement, the OFT is treating the market as limited to the larger customers served by the two teams in question; that is, professional services firms with an annual turnover of £20 million or more ('Large Professional Services Firms').⁷⁰ The OFT considers that this approach reflects the '*commercial reality*' of the Parties' business.

Product grouping

73. The final question in defining the product market for present purposes is to consider which products fall within the relevant market.

Demand-side perspective

74. There is evidence to suggest that a customer will not generally distinguish between the variety of available lending mechanisms, such as overdrafts (which are linked to deposits), revolving credit facilities and term loans.⁷¹ Instead, a customer tends to have a particular business need in mind and will choose from the available financing options put forward by a provider based on cost and suitability to meet that need.⁷² This supports the market being at least as wide as all types of loans provided to Large Professional Services Firms (with the

⁶⁹ RBS Response dated 25 September 2009 to the s.26 Notice of 7 August 2009, question 7 response (OFT Document Reference 0977, page 9).

⁷⁰ For the purposes of the penalty calculation, the relevant turnover would be identified using data relating to the Barclays PLB team and RBS PPC team (calculated in accordance with the Penalties Order (as amended) (n16). Although as described above, the remit of these teams is defined slightly differently, the OFT considers that that this is the best data available for the purposes of calculating market turnover under the OFT's market definition. In addition to the limitations on the available data noted in paragraph 66, such data is necessarily inexact. The OFT notes in particular that customers' turnover can fluctuate, and that, in order to provide this information, the Parties would need to make a number of adjustments against their reported income. The OFT is satisfied that this turnover data for both Parties is as comparable as is practicable in the circumstances.

⁷¹ RBS Response dated 27 May 2009 to the s.26 Notice of 27 April 2009, question 19 response (OFT Document Reference 0872, page 10).

⁷² Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009, question 5 response (OFT Document Reference 0860, page 7).

possible exception of specialised loan products which lend themselves to particular financial needs (see paragraph 89 below)).

75. With regard to whether there is a wider market for loans and deposits, there is evidence to suggest that customers often buy these products as a bundle. As noted in paragraph 50 above, the relationship with a bank is seen as important from the point of view of the customer. Relationship Directors are typically in regular contact with the Large Professional Services Firms in their portfolio. Depending on the context in which contact is initiated, a discussion regarding a loan might well form part of a more wide-ranging discussion of the customer's requirements in relation to other services offered by the relevant professional services team.⁷³
76. In this context, when seeking debt finance from a bank, an established relationship through which a customer acquires other products and services from the same bank may present that customer with additional bargaining power. Customers appear to be aware of the benefit from sourcing multiple services from a single bank, as it provides a degree of scope to '*emotionally leverage*'⁷⁴ the relevant bank. It has, for example, been put to the OFT that a bank having ancillary services would be able to be more competitive because of those ancillary services.⁷⁵
77. In addition, there is evidence to suggest that:
- 'a loan and deposit, even though they may be purchased at different points in time, exhibit features of a bundle, such that demand-side substitution is on the basis of choosing between banks with which a customer has a pre-existing relationship (typically based on deposits), or more generally on the basis of consideration of the 'package' that a bank may be able to offer to the customer if the customer takes both loan and deposit products'*.⁷⁶
78. The importance of customers' relationship with a bank and customers' awareness that they have the ability to leverage their existing deposits in negotiations for loans support a widening of the product range considered to be part of the relevant market in this case. The fact that firms structure their teams around this bundle (discussed at paragraphs 81 to 96 below) is additional support for a wider market definition, encompassing both loans and deposits.
79. In its response to the Statement of Objections, Barclays argues that larger corporate customers will use a sophisticated and changeable product mix to ensure that they have the banking and financing solution that is best tailored to suit their individual business needs. Barclays

⁷³ Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009, question 9 response (OFT Document Reference 0860, page 12).

⁷⁴ [...] interview transcript, Tape1 (OFT Document Reference 0874, page 16).

⁷⁵ [...] interview transcript, Tape 3 (OFT Document Reference 0883, page 2).

⁷⁶ RBS submission on market definition prepared by Oxera dated 19 March 2010, paragraph 2.28 (OFT Document Reference 1047, page 8). See also Market Definition Guidance (n61), paragraph 5.11.

suggests that the sub-division of product types (specifically into 'core' and other 'specialised' products) is not recognised by those customers.

80. Such a broad approach assumes, however, that customers approach the purchase of all products in the same way. On Barclay's suggested approach, the commercial relationship between bank and customer is of equal importance irrespective of the product in question. Whilst this may be the case, the evidence is at least mixed.

Supply-side perspective

81. The Barclays PLB team and the RBS PPC team offer a number of products.
82. Typical products and services covered by Barclays' PLB team include asset financing, card services, currency lending, deposits, financial risk management, foreign exchange, fund management, money transmission, overdrafts, personal banking, property finance, sales financing, term lending, trade finance, treasury and wealth services.⁷⁷
83. RBS's PPC team offers a number of loan products, namely bilateral loans or facilities, 'club deals' and syndicated loans. It also offers a range of other services (sometimes with the assistance of other teams within RBS) such as deposit and liquidity solutions, financing solutions, electronic and online banking solutions, payment solutions, risk and business solutions, international trade solutions, global travel money services and, on occasion, debt capital market services, equity capital market services or the provision of certain broking products.⁷⁸
84. Deposits and loans, however, are the mainstay of the products offered by the PLB and PPC teams. In this regard, it has been submitted to the OFT that:

'[I]ending and deposits are the core elements of banking. ... [And] [c]ompetition between banks in respect of professional services firms therefore may sometimes or frequently take place on the basis of putting together a commercial package that links the value of deposits to the pricing of loans, and potentially vice versa'.⁷⁹

85. That deposits and loans form part of a commercial package, or bundle, is driven and reinforced by the fact that banks see their relationship with customers as a significant part of the commercial dynamic when supplying products.

⁷⁷ Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009, question 4 response (OFT Document Reference 0860, pages 5 and 6).

⁷⁸ RBS Response dated 13 May 2009 to the s.26 Notice of 27 April 2009, question 4 response (OFT Document Reference 0851, pages 5 and 6).

⁷⁹ RBS submission on market definition prepared by Oxera dated 19 March 2010, paragraphs 2.22 and 2.23 (OFT Document Reference 1047, page 7).

86. For example, in terms of the typical approach of a professional services team to marketing its products to Large Professional Services Firms, the OFT has been told that Barclays' PLB team:

'does not market particular debt products, but rather offers a full relationship banking service to its clients in which the full suite of products and services are available. ... The sales teams do not go out to sell particular products or services, but rather establish full service relationships with industry participants'.⁸⁰

87. Therefore, there are certain products and services provided as a consequence of the *'full service relationship'* that form part of a commercially inter-connected product group from the perspective of the supplier. For example, a bank may choose strategically to accept less favourable terms on one aspect of its relationship business with a Large Professional Services Firm in order to nurture that relationship with a view to generating other business in the future. For example, according to a witness from Barclays, *'if someone wants to borrow a relatively small amount of money and they're a large depositor with us, we're not going to upset the applecart for something that's not worth it, effectively'.⁸¹*

88. A question arises as to whether the market should include *'the full suite of products and services [which] are available'⁸²* to professional services clients. Alternatively, and taking a narrower approach, the relevant boundary may be that between those products typically provided through the relationship between the professional services team and the Large Professional Services Firm on the one hand, and those which are generally less reliant on that relationship on the other.

89. In this context, there are certain other products or services provided to Large Professional Services Firms which are more one-off or specialised in nature. This could include products or services not typically required by a Large Professional Services Firm or not generally provided through the allocated Relationship Director or professional services team but instead via a more specialised division within the bank, for example, interest rate hedging, asset finance, money transmission and related services.⁸³ These specialised one-off products can be distinguished from *'core'* products⁸⁴ offered by the Barclays PLB team and RBS PPC team. It has been argued that specialised services *'are normally a trivial economic factor when considering the gross income from a typical*

⁸⁰ Barclays Response dated 1 September 2009 to the s.26 Notice of 7 August 2009, questions 1 to 3 responses (OFT Document Reference 0995, page 1).

⁸¹ [...] interview transcript, Tape 1 (OFT Document Reference 0541, page 10).

⁸² Barclays Response dated 1 September 2009 to the s.26 Notice of 7 August 2009, questions 1 to 3 responses (OFT Document Reference 0995, page 1).

⁸³ RBS supplementary submission on market definition prepared by Oxera dated 24 March 2010, paragraphs 2.1 to 3.2, 3.6 and 3.7 (OFT Document Reference 1048, pages 2 to 4). For example, see http://www.rbs.com/microsites/gra2008/divisional_review/global_transaction.html for a description of RBS's money transmission and related services.

⁸⁴ For example, LIBOR loans, base rate loans and interest bearing balances held in current account.

professional services customer'.⁸⁵ They are more ancillary in nature, being less directly related to the relationship with the providing bank.

90. In its response to the Statement of Objections, Barclays notes that banks tend to advertise that they provide a full range of services and support, and has argued that a bank identified as the '*main*' or '*principal*' relationship bank to a client will generally provide all or a majority of that client's day to day transactional banking requirements, including the current account and money transmission services. But this itself is ambiguous, and raises a question as to what is meant by '*majority*' and '*day to day*' services, and which services fall outside this description.
91. The OFT has decided, for present purposes (that is, for the purposes of calculating a penalty only), to adopt a more conservative approach. The OFT is therefore treating the relevant market as constituting only those products which form the mainstay of the offerings of Barclays' PLB team and RBS's PPC team and which are most clearly driven by the customer relationship, namely core lending and deposit products. The OFT is satisfied that this approach reflects a broad view of the particular trade affected by the Infringement, and the commercial reality of the Parties' businesses.

Conclusions on relevant product market

92. For the reasons set out above, the OFT is defining the relevant product market as the provision of core lending and deposit products to Large Professional Services Firms.
93. In its response to the Statement of Objections, Barclays argues that, in reaching a conclusion on the relevant product market, the OFT has placed too much emphasis on certain evidence provided by RBS. Barclays also notes that it did not have an opportunity to comment on this evidence when it was provided to the OFT (in the context of early resolution discussions between the OFT and RBS). However, the OFT does not accept this criticism; its conclusions have been reached taking into account the totality of evidence provided to it, as set out and considered in this Decision. The OFT also considers that Barclays has, through the process set out under the Act and the OFT's Rules, had adequate opportunity to make representations on the matters set out in this Decision.
94. In its response to the Statement of Objections, Barclays states that there is a body of EU and UK case law which makes it clear that the relevant market should be that of '*corporate banking*' as a whole. In making its arguments in this respect Barclays points to a number of merger cases. In merger decisions, however, it may not be necessary to conclude on the existence of separate product markets because even on the narrowest market definition the concentration does not raise

⁸⁵ RBS submission on market definition prepared by Oxera dated 19 March 2010, paragraph 2.25 (OFT Document Reference 1047, page 7).

concerns.⁸⁶ In any event, a fresh analysis of the market must always be made in any particular case, and a finding on market definition will not necessarily be based on the same considerations as those underlying a previous finding.⁸⁷ Market definition cannot, therefore, be determined by reference to precedents.

95. The OFT notes that there are a number of possible views of the relevant market, in addition to the view that the OFT has taken, including: that it is narrow and only includes loans to Large Professional Services Firms; that it is wider and includes all products (for example, core lending and deposit products) provided to Large Professional Services Firms; or that the market should be as wide as 'corporate banking' generally (i.e. the broad range of banking services offered to general corporate clients).⁸⁸
96. It should be noted, however, that in this case the OFT has defined the relevant product market for the sole purpose of determining the level of financial penalty. In that context, it has reached the conclusions set out above without prejudice to its discretion to adopt a different product market definition in any subsequent case in the light of the relevant facts and other circumstances of that case.

(b) Geographic market

97. In determining the boundaries of the geographic market, it is important to consider both the demand and supply side constraints.

Constraints from outside the UK

98. On the demand side, there is evidence to suggest that customers generally value a strong and personal relationship with the banks from which they borrow, often established and maintained through regular contact with a dedicated Relationship Director.⁸⁹ Savills indicated that it would tend not to use a bank with which it had no relationship [...]⁹⁰. Knight Frank also emphasised the importance of a physically close

⁸⁶ For example, *Fortis/ABN Amro Assets* (Case COMP/M.4844) Commission Decision [2007] OJ C265/2; *Unicredito/HVB* (Case IV/M.3894) Commission Decision; *Merita/Nordbanken* (Case IV/M.1029) Commission Decision [1998] OJ C44/5; and *Fortis/CGER* (Case IV/M.342) Commission Decision [1993] OJ C23 ('*Fortis/CGER*'), all of which were cited by Barclays in its submissions on the Statement of Objections.

⁸⁷ Joined cases T-125/97 and T-127/97 *The Coca-Cola Company and Coca-Cola Enterprises Inc v Commission of the European Communities* [2000] ECR II-1733, paragraph 82.

⁸⁸ For example, in previous cases, a distinction has been drawn between retail banking, corporate banking and financial market services. See *Fortis/CGER* (n86), paragraph 19; and *Banco Santander/Abbey National* (Case IV/M.3547) Commission Decision [2004] OJ C255/7, paragraph 16. In a different but related context, it has been argued that '*it is not sensible to distinguish between different products within the corporate banking market*'. See OFT Report, *Anticipated acquisition by Lloyds TSB plc of HBOS plc: Report to the Secretary of State for Business Enterprise and Regulatory Reform* (24 October 2008), paragraph 255.

⁸⁹ Barclays Response dated 1 September 2009 to the s.26 Notice of 7 August 2009, questions 1 to 3 responses (OFT Document Reference 0995, page 2); [...] interview transcript, Tape 1 (OFT Document Reference 0533, page 4). For example, see Responses to the s.26 Notice of 27 August 2009 from [a selection of customers of RBS and Barclays], questions 5, 9 and 10 responses (OFT Document References 0958, page 2; and 0968, pages 2 and 3 respectively).

⁹⁰ [...] interview transcript, Tape 2 (OFT Document Reference 0917, page 5).

relationship with its bank so as *'to be able to look in the whites of their eyes'*.⁹¹

99. A significant majority of the Parties' customers sampled by the OFT also confirmed the weight given to an established relationship and/or a sound understanding of the professional services sector in the UK when it came to deciding which banks to approach for debt finance.⁹² Customers have highlighted that factors relating to local industry and sector knowledge, for example an understanding of relevant regulatory rules, are important (see paragraph 53 above). Only one of the ten customers to which the OFT sent an information request stated it had obtained debt finance from a non-UK bank over the last five years.⁹³
100. In its response to the Statement of Objections, Barclays states that it considers the relevant geographic market to be international. It points to the fact that some customers have approached or used overseas banks for certain banking services (including, for example, a term loan). However, the OFT notes that, although possible, the evidence suggests that it is relatively rare for UK-based Large Professional Services Firms to consider banks outside the UK (particularly for UK-based operations). A witness from Barclays has stated that, *'UK firms would like to deal with UK banks'*.⁹⁴ Consequently, the OFT concludes that banks outside the UK would not typically be considered by Large Professional Services Firms for their financing needs.
101. On the supply side, the OFT has received no evidence to suggest that banks outside the UK typically seek to meet the financing needs of Large Professional Services Firms in the UK.
102. Thus, the OFT takes the view that the geographic market in this case is no wider than the UK.

Constraints from inside the UK – regional segmentation

103. There is evidence to suggest that the Parties organise their sales teams along geographic lines. For example, Barclays has stated that *'over the past two years BCB has reorganised its sales force along industry specialism and geographic lines so that it can better serve the needs of*

⁹¹ [...] interview transcript, Tape1 (OFT Document Reference 0874, page 15). See also [...] interview transcript, Tape 2 (OFT Document Reference 0910, page 3).

⁹² Responses to the s.26 Notice of 27 August 2009 from [a selection of customers of RBS and Barclays], question 10 response (OFT Document References 0965, page 3; 0954, page 3; 0967, page 5; 0970, page 2; 1023, pages 2 and 3; 0958, page 2; 0962, page 3; and 0968, page 3, respectively).

⁹³ Response to the s.26 Notice of 27 August 2009 from [a customer of RBS and Barclays], question 11 response (OFT Document Reference 0967, page 5). Note that [another customer] responded to say its choice of bank is dictated by its parent group in the United States. See Response to the s.26 Notice of 27 August 2009, from [a customer of RBS and Barclays], question 11 response (OFT Document Reference 0953, page 2).

⁹⁴ [...] interview transcript, Tape 1 (OFT Document Reference 0541, page 8).

its customers'.⁹⁵ With regards to RBS, organisational charts illustrate that the Client Coverage Team (within UK Retail and Commercial Banking) has North, Midlands, South and London divisions. The PPC sits within the London division.⁹⁶ However, although there are regional divisions, there is no available evidence to show that the pricing models of RBS or Barclays differentiate along these lines.

104. The Parties disagree with each other as to the width of the geographic market, with Barclays favouring a wider approach and RBS supporting a more London-centric definition. However, RBS states that:

'[t]he PPC Team's experience and expertise in the professional services sector means that it would be extremely unlikely that RBSG's internal committees would grant sanction to a sector team other than the PPC Team, for the provision of a debt product to a professional services firm'.⁹⁷

As detailed in paragraph 68 above, Barclays has indicated that the default position is that its central London PLB team typically manages the financing needs of all its large professional services customers (albeit for legacy reasons some such customers may still be handled outside that team).⁹⁸

105. Therefore, although the Parties' wider corporate banking teams may be divided along regional lines, Large Professional Services Firms are generally served by the Parties via a single, bespoke London-based team (PLB in Barclays and PPC in RBS), notwithstanding the location in the UK of the particular customer. For example, two of the top ten customers (financial year ending 2007) of RBS's PPC team are based outside London.⁹⁹ This counters the idea of a regional market, where advice would be sought and provided locally to the customer.

Conclusions on relevant geographic market

106. There is evidence to suggest that providers of core lending and deposit products outside the UK would not constrain providers of similar products in the UK. As such, the geographic market is no wider than the UK.

⁹⁵ Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009, question 3 response (OFT Document Reference 0860, page 4); and Annex 2 of Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009 for information on organisational division along regional lines (OFT Document References 0863, page 1).

⁹⁶ RBS Response dated 13 May 2009 to the s.26 Notice of 27 April 2009, question 1 response (OFT Document Reference 0851, page 2); and Annex 5 of RBS Response dated 13 May 2009 to the s.26 Notice of 27 April 2009 (OFT Document Reference 0856, page 2).

⁹⁷ RBS Response dated 25 September 2009 to the s.26 Notice of 7 August 2009, question 2 response (OFT Document Reference 0977, page 2).

⁹⁸ Barclays Response dated 1 September 2009 to the s.26 Notice of 7 August 2009, questions 1 to 3 responses (OFT Document Reference 0995, page 2).

⁹⁹ RBS Response dated 27 May 2009 to the s.26 Notice of 27 April 2009, question 16 response (OFT Document Reference 0872, page 3).

107. In addition, the evidence does not support a regional segmentation of the market. It is not evident that providers of core lending and deposit products to Large Professional Services Firms based in London provide such services on a basis which distinguishes according to region. Neither RBS nor Barclays have professional services teams based outside London in order to serve Large Professional Services Firms in other regions of the UK.
108. Consequently, the OFT concludes that, in this case, the relevant geographic market is the UK national market.
109. It should be noted, however, that the OFT has defined the relevant geographic market in this case without prejudice to its discretion to adopt a different geographic market definition in any subsequent case in the light of the relevant facts and other circumstances of that case.

iv. Conclusions on the relevant market

110. In light of the evidence considered above, for the purposes of calculating the financial penalties in this case, the OFT considers the relevant market to comprise the provision of core lending and deposit products in the UK to Large Professional Services Firms (i.e. professional services firms with an annual turnover of £20 million or more).
111. The OFT is defining the relevant product and geographic markets in this case for the sole purpose of determining the level of financial penalty. It has reached the conclusions set out above without prejudice to the OFT's discretion to adopt a different market definition in any subsequent case in the light of the relevant facts and other circumstances of that case.

D. Pricing of loans to professional services firms

112. The OFT considers that the factual background as to how loans to Large Professional Services Firms are agreed lends important context to the circumstances in which the Infringement occurred. The OFT's understanding of this process is based on submissions made by both RBS and Barclays in response to the OFT's section 26 information requests.¹⁰⁰
113. The OFT recognises that due to changes in market conditions some aspects of the process for agreeing loan transactions may have changed since the period in which the Infringement took place. For the purposes

¹⁰⁰ For example, Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009 (OFT Document Reference 0860); Barclays Response dated 1 September 2009 to the s.26 Notice of 7 August 2009 (OFT Document Reference 0995); RBS Response dated 22 May 2009 to the s.26 Notice of 27 April 2009 (OFT Document Reference 0871); and RBS Response dated 25 September 2009 to the s.26 Notice of 7 August 2009 (OFT Document Reference 0977). See also Responses to the s.26 Notice of 27 August 2009 from [a selection of customers of RBS and Barclays] (OFT Document References 0965; 0953; 0954; 0967; 0970; 1023; 0958; 0962; 0950; and 0968 respectively).

of Section II, the OFT refers to the processes and procedures which were in existence during the period in which the Infringement took place.

114. The OFT has been told that the process followed for each loan transaction will vary according to the particular circumstances of each case. The features of individual loan agreements can vary considerably from one to the next, depending on a combination of factors, including:
- the purpose of the loan (e.g. short-term financing for settling a bill or purchasing equipment to the provision of strategic debt finance to fund an acquisition);
 - the customer's borrowing criteria (for example, term and interest rate structure, repayment schedule, etc); and
 - the bank's lending criteria (dependent on cost and risk).¹⁰¹
115. The majority of loans arranged by Barclays' PLB team and RBS's PPC team are arranged on a bilateral, sole bank basis and, while it may not be possible to generalise about a typical sequence of events for arranging such a loan, some common interactions are described in the following paragraphs.
116. Following a request from a customer for a funding requirement, the appropriate team at the bank will conduct an initial assessment of the customer's credit quality and other commercial circumstances surrounding the proposed transaction in order to determine whether the bank has an appetite to lend to the customer.
117. In order to determine appropriate pricing for the transaction (that is, appropriate levels of fees and margin), the deal team may consider, amongst other things, certain data held in the bank's internal records, including, for example, pricing actually quoted for previous transactions for the same client or similar clients in the same sector. This will provide the deal team with an indication of what the ballpark pricing should be for a transaction similar to that proposed by the customer.
118. A preliminary assessment will then be carried out by inputting a number of variables, including, for example, quantum, term, proposed pricing and details of the customer's credit grade and financial status into the bank's bespoke pricing model. Based on this information, the pricing model will generate a figure which reflects the minimum level of the bank's required return. The minimum level of return, which varies from bank to bank, is commonly referred to as the 'hurdle rate' and applies across the corporate banking division of each bank (in other words, the hurdle rate is not specific to loans offered by the teams dealing with Large Professional Services Firms).

¹⁰¹ For example, Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009, question 7 response (OFT Document Reference O860, page 9).

119. If the hurdle rate is not reached, the deal team can adjust one or more of the input factors (for example, price or term) and re-run the model until the appropriate 'hurdle' is reached.
120. It should be noted that the hurdle rate represents a minimum level of return. This means that while the bank's pricing model relies on objective criteria in determining a minimum price, the deal team can employ both internal and external intelligence in a decision to price the facility at a higher level. There may also be a degree of discretion, depending on the particular proposed facility involved, to price below the hurdle rate in certain circumstances.¹⁰²
121. On the basis of the output of the bank's pricing model, the deal team will make an initial assessment of the bank's appetite to lend to the customer. Before the deal team can submit formal proposed terms to the customer for agreement, there may be an additional requirement to obtain approval from the bank's credit committee(s) (or other relevant body) of the relevant terms, including price.¹⁰³ Above particular set thresholds at each bank, the need for committee (or other relevant body) approval is mandatory.¹⁰⁴ Even if formal approval from the bank's credit committee(s) (or other relevant body) is not required in any particular case, the proposed transaction may nevertheless be assessed and approved by an internal 'credit team' (or other relevant team).¹⁰⁵ Indicative terms may be provided to the customer by the deal team in advance of formal credit approval.
122. The deal team can bring to the attention of the relevant committees any publicly available market pricing information or other information of which it is aware, including anything which will enable those committees to assess the competitiveness of the bank's terms.
123. The OFT also notes that a customer's existing relationship with the bank can influence the lending process in two ways. First, the relationship might be relevant to the loan quantum that the bank is willing to lend, as the amount of overall credit exposure which the bank has in general to any given customer is a relevant factor in determining the maximum amount of funding that the bank can provide to that customer. Secondly, the relationship may be relevant to pricing, as the deal team can take account of the value of the business the relationship

¹⁰² RBS Response dated 22 May 2009 to the s.26 Notice of 27 April 2009, questions 7 and 10 responses (OFT Document Reference 0871, pages 3, 7 and 8 respectively); and Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009, question 9 response, footnote 24 (which states that pricing below the hurdle rate was possible prior to October 2008) (OFT Document Reference 0860, page 12).

¹⁰³ The level of the loan determines the level of approval required to proceed and the degree of discretion, where relevant, that could be applied to pricing above or below the 'hurdle'.

¹⁰⁴ RBS Response dated 22 May 2009 to the s.26 Notice of 27 April 2009, question 7 response (OFT Document Reference 0871, pages 3 and 4); and Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009, question 9 response (OFT Document Reference 0860, pages 12 and 13).

¹⁰⁵ For example, RBS response dated 22 May 2009 to the s.26 Notice of 27 April 2009, question 7 response (OFT Document Reference 0871, pages 2 and 3).

generates, including, for example, income from deposits or other lending facilities.

124. Generally speaking, the bank's credit committee review will apply a more sophisticated analysis than the bank's bespoke pricing model. The credit committee holds the authority to approve the pricing of a facility below the hurdle rate and in doing so can take account of a number of factors such as, for example, internal expertise gained through sector-specific experience and external market intelligence, which is often gathered systematically by a dedicated team within the bank.
125. A multilateral loan transaction such as a '*club deal*' or '*syndicated deal*' can arise in a number of ways.¹⁰⁶ First, it may be suggested by the bank in the event that it is unwilling or unable to provide the full quantum requested by the customer on a bilateral basis. Secondly, a customer might ask a bank to participate in a joint loan facility, particularly if the customer wishes to ensure that it provides banking business to a number of its relationship banks. Thirdly, in the case of a syndicated deal, a bank may approach another bank and seek its participation in the loan facility (although, in practice, customers are likely to form their own view as to which other banks they would like to involve in a multilateral deal). In general, a multilateral loan will only be appropriate in circumstances where a customer's borrowing requirement is significant.
126. In order to determine the pricing for its share of a club deal, the bank follows the same process as described above for a bilateral loan. It is then the customer's responsibility to find a way of agreeing a common set of terms and conditions acceptable to all parties.

E. Basel II

127. A further factor which is relevant to the circumstances surrounding the Infringement is the implementation of the Basel II accord in the UK. The Basel II accord was brought into force in the UK by the Financial Services Authority in January 2008. The regime under this accord set new minimum capital adequacy requirements for various types of risk. The relevant capital requirement represents the amount of its own capital a bank must set aside to cover credit, market and operational risks. Since RBS's implementation of Basel II, which began in January 2007, its cost of capital for providing unsecured facilities has increased. As many loans to professional services firms are provided on an unsecured basis, RBS has, in at least some cases, had to increase the

¹⁰⁶ Barclays notes that the terms '*club deal*' and '*syndicated deal*' should be understood to describe different ways in which a joint facility can be arranged. Barclays also notes that these terms are not terms of art and their usage is not always consistent. It suggests that a '*club deal*' can be understood to refer to a joint facility provided by a group of lenders, often with a pre-existing relationship with the borrower and a '*syndicated*' facility refers to a joint facility negotiated and agreed by a group of lenders who may provide a portion of the loan themselves and are appointed by the borrower to find other banks prepared to join the syndicate.

price of unsecured facilities to Large Professional Services Firms.¹⁰⁷
Barclays had already made changes to its pricing model so as to incorporate risk-based pricing as long ago as 1995 to 1997, such that its pricing policy was unaffected by the coming into force of the Basel II accord in January 2008.¹⁰⁸

¹⁰⁷ RBS Response dated 22 May 2009 to the s.26 Notice of 27 April 2009, question 13 response (OFT Document Reference 0871, page 9).

¹⁰⁸ Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009, question 13 response (OFT Document Reference 0860, page 15).

SECTION III – THE CONDUCT OF THE PARTIES

A. Introduction

128. The OFT concludes that between October 2007 and at least February or March 2008¹⁰⁹ the Parties infringed the Chapter I prohibition and/or Article 101 by participating in an agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of loan products to Large Professional Services Firms.
129. Section III sets out the evidence found by the OFT of contacts between RBS and Barclays relating to the supply of loan products to Large Professional Services Firms during that period.

B. Contacts between RBS and Barclays – generic information

130. Between October 2007 and March 2008, individual RBS personnel were involved in a number of contacts with Barclays personnel, through which RBS communicated its intended pricing to Barclays.

i. 9 and 10 October 2007

131. The first of the contacts conveying general pricing information occurred on 9 October 2007 at a bowling event organised by [.....], an accountancy firm.
132. At that event, [RBS RD A] of RBS's PPC team approached several Barclays personnel in the PPSS team, including [Barclays RD A], [Barclays RD E] and [Barclays RD B].¹¹⁰ Through these contacts, [RBS RD A] expressed concern that the new credit regulatory framework, under the Basel II accord, was beginning to affect margins at RBS.¹¹¹
133. According to [Barclays RD B's] witness evidence, in addition to expressing his concerns in relation to the new credit regulatory framework under Basel II, [RBS RD A] also suggested that there should be further discussions between RBS and Barclays in relation to pricing.¹¹² [Barclays RD B] said of his conversation with [RBS RD A]:

'I think it was the effect of Basel II. I believe [RBS RD A] was saying something to do with how he's finding the pricing different to what it was in RBS. ... [D]uring this time there was an offer of having a lunch and chatting about how it's going – how it's affecting both us and them, this pricing, and that offer went to [Barclays RD E] and myself ... he gave me his card, saying we should get together for

¹⁰⁹ n4.

¹¹⁰ [...] interview transcript, Tape 3 (OFT Document Reference 0585, page 4); and [...] interview transcript, Tape 4 (OFT Document Reference 0567, page 2).

¹¹¹ [...] interview transcript, Tape 3 (OFT Document Reference 0543, pages 9 and 10); and [...] interview transcript, Tape 3 (OFT Document Reference 0585, page 4).

¹¹² [...] interview transcript, Tape 3 (OFT Document Reference 0585, pages 4 and 5).

lunch to chat about the effects of this. ... And I think perhaps he targeted me for that conversation because [...].¹¹³

134. The conversations on 9 October 2007 were followed the next day by a discussion between [the RBS Head of Team] and [Barclays RD A] at the Managing Partners' Forum (MPF) dinner held on 10 October 2007. [The RBS Head of Team] had recently been appointed as Professional Practices Group Head at RBS, with responsibility for the PPC team. He expressed his surprise to [Barclays RD A] at the low level of debt pricing that was offered to Large Professional Services Firms. In interview, [Barclays RD A] stated:

'[The RBS Head of Team] said to me that one of his first impressions coming into the team was that pricing in this sector was far too fine. ... I think I did report back, to say: you know, the new boss of the RBS team has said that he thinks pricing is too fine, he's going to do something about it. And he said both on credit balances and debit balances, he thought margins were too low'.¹¹⁴

135. [Barclays RD A] sent an email on 11 October 2007 to other members of Barclays' PPSS team reporting the details of his discussion with [the RBS Head of Team]. In that email [Barclays RD A] stated that [the RBS Head of Team]:

'seems very unhappy with the pricing achieved on debt and indicated that they would not be chasing debt at silly prices. He implied that they would not feel the full effect of Basel 2 until next year but was sure that it would drive pricing up. I think that this can only be good news for us and we may need to be careful not to price too low when we are up against them going forward'.¹¹⁵

136. In interview with the OFT, [the RBS Head of Team's] recollection of the meeting corroborated [Barclays RD A's] email description:

'[m]y background is corporate, it is a fact that the price of debt for corporate is significantly higher, for exactly the same facilities than it is for professional practices. What I actually would have said to [Barclays RD A], I am absolutely sure, and I would have said it to a few other people as well is that my initial impression is I am quite, I am still a bit in shock at the low level of pricing that's charged to professional practice firms'.¹¹⁶

137. When asked whether he would have indicated that RBS would not be chasing debt at silly prices, [the RBS Head of Team] stated:

'I'm not sure I would have been as bold to say RBS, but I would say I'm pretty sure I said something along the lines of, you know, I would

¹¹³ [...] interview transcript, Tape 3 (OFT Document Reference 0585, page 4).

¹¹⁴ [...] interview transcript, Tape 3 (OFT Document Reference 0543, page 11).

¹¹⁵ Email of 11 October 2007 from [Barclays RD A] to Barclays' PPSS team (OFT Document Reference 0116.6, page 1).

¹¹⁶ [...] interview transcript, Tape 13 (OFT Document Reference 0895, page 14).

find it difficult to understand why we would be chasing debt at silly prices'.¹¹⁷

138. When asked to explain how he would expect Barclays to interpret the phrase 'silly prices' [the RBS Head of Team] stated: *'I would take that they would understand it means effectively ridiculously low margin. Or ridiculously low fees, or whatever'.¹¹⁸*

139. [Barclays RD A] explained the meaning of the last sentence in his email *'we may need to be careful not to price too low when we are up against [RBS]'.¹¹⁹* In interview he stated:

'where we were specifically up against RBS, we had on occasion priced below where we would want to price if we thought there was some other business to be gained, effectively. So we would price too low and that's not to say that, you know, we would – I'm trying to think how best to put to put this – effectively what we might do is, is, is subsidise debt pricing if we thought there was something else to be gained. And I think what I was saying is we maybe didn't need to do that anymore'.¹²⁰

140. Later in interview, [Barclays RD A] was asked why he had sent the email:

'I think all I was doing genuinely at the time was sharing some information. He'd said to me that he thought pricing was too low. I was sharing that with colleagues and saying: you know, if we're up against RBS, we shouldn't be going and absolutely cutting our prices to the bone'.¹²¹

141. A number of Barclays personnel confirmed in interview with the OFT that, in relation to the contact between [the RBS Head of Team] and [Barclays RD A] on 10 October 2007, it was unusual for this type of information exchange to take place.¹²² In this regard [Barclays RD C] stated that the Barclays PPSS team *'were all quite taken aback'* by the receipt of the information from RBS.¹²³

142. A number of Barclays personnel were asked in interview about the value which would be placed on such information and whether it could be taken into account in pricing decisions. [Barclays RD F] stated in interview:

¹¹⁷ [...] interview transcript, Tape 13 (OFT Document Reference 0895, page 14).

¹¹⁸ [...] interview transcript, Tape 13 (OFT Document Reference 0895, page 15).

¹¹⁹ Email of 11 November 2007 from [Barclays RD A] to Barclays' PPSS team (OFT Document Reference 0116.6, page 1).

¹²⁰ [...] interview transcript, Tape 3 (OFT Document Reference 0543, page 13).

¹²¹ [...] interview transcript, Tape 3 (OFT Document Reference 0543, page 14).

¹²² [...] interview transcript, Tape 4 (OFT Document Reference 0586, pages 2 and 3); [...] interview transcript, Tape 3 (OFT Document Reference 0575, page 18); [...] interview transcript, Tape 3 (OFT Document Reference 0543, page 12); and [...] interview transcript, Tape 2 (OFT Document Reference 0557, page 17).

¹²³ [...] interview transcript, Tape 6 (OFT Document Reference 0550, page 2).

'like anything that we get about pricing, competitive intelligence, ... and in the back of your mind you're always wanting to know what everyone else is doing. ... And we'd take that into consideration when pricing something'.¹²⁴

143. On 16 October 2007, the information conveyed by [the RBS Head of Team] about RBS's pricing intentions was discussed at the next weekly Barclays PPSS sales team meeting. The draft minutes of that meeting state: *'RBS Margins ↓ (now at RBS) (A) Be less aggressive – don't have to go below (lowest rate)'.¹²⁵*

144. The individual, [.....], who took the minutes of the meeting confirmed in interview that (A) in this context meant that it was an action point for the Relationship Directors.¹²⁶ The OFT notes that the discussion on this topic was not included in the final version of the minutes. However, [the individual who took the minutes] indicated that it was commonplace for some action points not to make it into the final minutes.¹²⁷

ii. 27 November 2007

145. [RBS RD A] of RBS made further contact with the Barclays PLB team ([Barclays RD G]) at an APP seminar which most likely took place [at the office of a law firm].¹²⁸

146. According to [Barclays RD G], [RBS RD A] said it would be a good idea to get together to discuss how Basel II was going to have an effect on the two banks:

'[a]nd he made some sort of remark along the lines of, um, yeah, we ought to have a get-together because these Basel II requirements are going to cause problems for us, aren't they? Something along those lines'.¹²⁹

147. [RBS RD A] recalls having a conversation with [Barclays RD G] although he is not sure that it necessarily took place on this occasion. His recollection of the conversation is hazy but he indicated that it was an innocent interaction and does not recall making any reference to Basel II.¹³⁰

¹²⁴ [...] interview transcript, Tape 3 (OFT Document Reference 0553, page 11).

¹²⁵ Extract headed 'Sales Mtg Level 27 Room 8 16/10/07' from [the individual's] notebook (OFT Document Reference 0116.7, page 1).

¹²⁶ [...] interview transcript, Tape 1 (OFT Document Reference 0591, pages 7 and 9).

¹²⁷ [...] interview transcript, Tape 1 (OFT Document Reference 0591, pages 8 to 10).

¹²⁸ [...] interview transcript, Tape 3 (OFT Document Reference 0572, pages 2 and 4). This contact with [Barclays RD G] may have been made by [RBS RD A] at a different APP seminar, potentially at the seminar which took place at another law firm on 27 November 2007. [Barclays RD G's] recollection in interview with the OFT was unclear on when exactly the conversation took place. See [...] interview transcript, Tape 3 (OFT Document Reference 0572, pages 3 and 4).

¹²⁹ [...] interview transcript, Tape 3 (OFT Document Reference 0572, page 4).

¹³⁰ [...] interview transcript, Tape 19 (OFT Document Reference 0908, page 2).

iii. 8 January 2008

148. On 8 January 2008, [RBS RD A] sought to arrange a meeting with [Barclays RD A]. That arrangement is recorded in an internal Barclays email from [Barclays RD C] to [Barclays RD G], both Relationship Directors in the PPSS team, which states:

'I've spoken to [Barclays RD A] and out of the blue [RBS RD A] has called him and asked to meet [Barclays RD A] for a beer. [Barclays RD A] believes it's about pricing ... [s]uggest we wait until [Barclays RD A] has waited for [RBS RD A] to pour his heart out (we know he won't hold back), and consider our approach then which should probably remain as reactive on the whole'.¹³¹

149. Having seen [Barclays RD C's] email, [Barclays RD A] further clarified in interview that *'I don't recall the conversation but I think [RBS RD A] had said "talk about the market and what's happening", so I must have made an assumption then that he wanted to talk about pricing'.¹³²*

150. Separately, on 9 January 2008, [Barclays RD C] stated in an email sent to others at Barclays that, in connection with the pricing offered to specific customers, Barclays clearly understood from the various contacts that RBS no longer intended to price at the *'bottom end'*.¹³³

iv. 17 January 2008

151. On 17 January 2008, [RBS RD A] and [Barclays RD A] met for lunch at All Bar One. In interview [Barclays RD A] described his conversation with [RBS RD A] as follows:

'he [RBS RD A] basically then said that they were now under pressure because of Basel II to push pricing up. He said there was one client that he'd dealt with which wasn't a Barclays client, so it was just an RBS client, and he'd just increased the margin on their facility to over 2 per cent. ... [H]e was just again saying that, you know, he was under pressure to put pricing up or to get better pricing. ... I think I reported back to our next meeting something to that effect. I can't remember whether I even did an email about that particular thing, because at the time I thought very little of it, really'.¹³⁴

152. [RBS RD A] confirmed in interview with the OFT that he may have discussed with [Barclays RD A] the impact Basel II was going to have on RBS's pricing.¹³⁵

¹³¹ Email of 9 January 2008 from [Barclays RD C] to [Barclays RD G] (OFT Document Reference 0116.9, page 1).

¹³² [...] interview transcript, Tape 3 (OFT Document Reference 0543, page 17).

¹³³ Email of 9 January 2008 from [Barclays RD C] to [Barclays RD G] and [Barclays RD E] (OFT Document Reference 0116.9, page 2). The OFT understands the phrase 'bottom end' to mean that RBS would not be willing to price debt at the lowest possible level in order to win business.

¹³⁴ [...] interview transcript, Tape 4 (OFT Document Reference 0544, page 3).

¹³⁵ [...] interview transcript, Tape 18 (OFT Document Reference 0907, pages 9 and 10).

153. On 18 January 2008, in his weekly report [Barclays RD A] reported internally at Barclays what [RBS RD A] had told him the previous day.¹³⁶ In interview with the OFT, [Barclays RD A] confirmed the contents of that report as follows:

'RBS are feeling impact of Basel II and will not be taking debt under hurdle¹³⁷ and are prepared to lose business. They are extending capital cost to on-demand facilities and will be insisting on upfront or non-use fees'.¹³⁸

154. In interview with the OFT, [Barclays RD A] confirmed that this report would have gone first to [the Barclays Deputy Team Leader], after which it would be amalgamated with other information and escalated within the organisation. [Barclays RD A] also stated in interview that he may also have shared this information with the rest of the PPSS team in their weekly meeting.¹³⁹
155. [Barclays RD A] stated in interview that during the meeting on 17 January 2008, [RBS RD A] also suggested that their respective superiors ([the RBS Head of Team] and [the Barclays Deputy Team Leader]) should meet.¹⁴⁰

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156. On 8 February 2008 (following a meeting concerning a potential loan to Savills), [the RBS Head of Team], [RBS RD A], [Barclays RD H] and [Barclays RD C] went for a drink together at O'Neills, a public house located on London Wall in the City of London.¹⁴¹ During their discussions, [the RBS Head of Team] made reference to pricing in the professional services sector indicating that it was *'fairly thin compared to what he was used to'* in his previous position.¹⁴² When interviewed, [the RBS Head of Team] described this as follows:

'I think I said along the lines of what again was said with, with [Barclays RD A], which is a generic we can't afford to adopt a win at all costs type approach, which I think is generically what's... effectively that's how we sort of, like, we get to such incredibly fine margins on things. You know, we will do it on a case-by-case, on an actual assessed basis, given the current environment, and that's not the same thing'.¹⁴³

¹³⁶ RD weekly reporting template of 18 January 2008 by [Barclays RD A] (OFT Document Reference 0116.10).

¹³⁷ The 'hurdle rate' is the minimum level at which the bank is generally willing to lend. The OFT understands that a Relationship Director would not have the authority to price below the hurdle rate, that is, 'under hurdle', without obtaining approval from a manager and/or credit committee, depending on the level of financing involved. See [...] interview transcript, Tape 5 (OFT Document Reference 0582, page 3) and paragraphs 118 to 124 of this Decision.

¹³⁸ [...] interview transcript, Tape 4 (OFT Document Reference 0544, page 4).

¹³⁹ [...] interview transcript, Tape 4 (OFT Document Reference 0544, page 4)

¹⁴⁰ [...] interview transcript, Tape 4 (OFT Document Reference 0544, page 6); and [...] interview transcript, Tape 18 (OFT Document Reference 0907, pages 8 and 9).

¹⁴¹ [...] interview transcript, Tape 5 (OFT Document Reference 0593, page 13).

¹⁴² [...] interview transcript, Tape 5 (OFT Document Reference 0593, page 14).

¹⁴³ [...] interview transcript, Tape 14 (OFT Document Reference 0896, page 3).

157. [The RBS Head of Team] also suggested that he was interested in meeting [the Barclays Head of Team].¹⁴⁴

vi. 19 February 2008

158. [The RBS Head of Team] gave further indications of RBS's pricing intentions to Barclays. These included separate conversations between [the RBS Head of Team] and [the Barclays Deputy Team Leader] and between [the RBS Head of Team] and [the Barclays Head of Team] at a dinner hosted by [an accountancy firm] on 19 February 2008.¹⁴⁵

159. In interview with the OFT, [the Barclays Deputy Team Leader] recalled his conversation with [the RBS Head of Team] as follows:

'I remember he did mention pricing, and he did talk about the fact that margins were very fine in the, in the sector, and that was in relation to the fact that he came from a background where the margins were much bigger'.¹⁴⁶

160. In interview with the OFT, [the Barclays Head of Team] recalled [the RBS Head of Team] telling him that market conditions were tight and also suggesting that they *'get together and have a cup of coffee'*.¹⁴⁷

161. These conversations with [the RBS Head of Team] were discussed by [the Barclays Deputy Team Leader] and [the Barclays Head of Team] on their journey home from the dinner. Both took the view that RBS was finding business difficult.¹⁴⁸

162. [The Barclays Deputy Team Leader] and [the Barclays Head of Team] were also prompted to send separate internal emails reporting, amongst other things, their conversations with [the RBS Head of Team].¹⁴⁹ [The Barclays Deputy Team Leader's] email sent on 21 February 2008 and entitled *'RBS Competitor Insight'* stated of the conversation with [the RBS Head of Team]: *'[h]e again reaffirmed his belief that margins in the sector are "ridiculously fine"¹⁵⁰ and again confirmed that they will be pricing debt to make a return regardless of any reciprocal or ancillary business'.¹⁵¹*

¹⁴⁴ Email of 8 February 2008 from [RBS Head of Team] to [Barclays RD C] (OFT Document Reference 0420, page 1); [...] interview transcript, Tape 14 (OFT Document Reference 0896, pages 5 and 6); and [...] interview transcript, Tape 5 (OFT Document Reference 0593, page 14).

¹⁴⁵ [...] interview transcript, Tape 3 (OFT Document Reference 0575, page 16).

¹⁴⁶ [...] interview transcript, Tape 3 (OFT Document Reference 0575, page 17).

¹⁴⁷ [...] interview transcript, Tape 4 (OFT Document Reference 0562, page 2).

¹⁴⁸ [...] interview transcript, Tape 4 (OFT Document Reference 0562, page 3); and [...] interview transcript, Tape 3 (OFT Document Reference 0575, pages 17 and 18).

¹⁴⁹ Email of 21 February 2008 from [Barclays Deputy Team Leader] to Barclays' PPSS team (OFT Document Reference 0116.13); and Email of 22 February 2008 from [Barclays Head of Team] to [Barclays Senior Colleague A], [Barclays Senior Colleague B] and [Barclays Senior Manager] (OFT Document Reference 0116.14, page 2).

¹⁵⁰ The OFT understands *'ridiculously fine'* to mean that margins were very low.

¹⁵¹ Email of 21 February 2008 from [Barclays Deputy Team Leader] to Barclays' PPSS team (OFT Document Reference 0116.13).

163. [Barclays RD F] was asked in interview what he had taken from [The Barclays Deputy Team Leader's] email. He responded:

'I guess, I mean, ultimately the same as we've... it reinforces the Basel II... issue. That their pricing was going to have to go up as a result of their cost structure that they have in place, behind the scenes. ... Something to log in the back of the brain, to, um, not feel that RBS were quite as aggressive, or the competitor that, that we've always seen them to be, and therefore, you know, that when I quote a price, I'm less likely to be beaten up by the customer over it, if, if they were also banking at RBS. ... [A]ll you've got in the back of your head is, okay, so RBS are not as competitive as they were yesterday'.¹⁵²

164. [The Barclays Head of Team] emailed a number of senior colleagues ([Barclays Senior Colleague A], [Barclays Senior Manager] and [Barclays Senior Colleague B]) on 22 February 2008, highlighting the importance of the information contained in the email by entitling it *'Enemy Intelligence – RBS'*. The email included the following:

'Ø Both I and [the Barclays Deputy Team Leader] have been verbally approached by RBS ([the RBS Head of Team]) to come to an agreement over raising our pricing as margins are too low they say they are suffering – unsure if this is a ruse or not'.¹⁵³

165. [The Barclays Senior Manager], responded to [the Barclays Head of Team's] email, stating: *'[I]looks to me like a pricing opportunity'.¹⁵⁴*

166. Responding to [the Barclays Head of Team's] first point (the approach from [the RBS Head of Team]), [the Barclays Deputy Team Leader] stated in interview:

'I don't know whether [the Barclays Head of Team] had any other conversations with him. Personally I think that's too literal. I don't believe that – I was not approached to raise our pricing. The only conversation I had with [the RBS Head of Team], was, was the one that's outlined in the email that I sent round. The interpretation of that is a little bit too literal'.¹⁵⁵

C. Contacts between RBS and Barclays – specific contacts

167. Against the background of, and during the same period as the contacts regarding general pricing described above, there were also customer-

¹⁵² [...] interview transcript, Tape 3 (OFT Document Reference 0553, pages 17 and 18).

¹⁵³ Email of 22 February 2008 from [Barclays Head of Team] to [Barclays Senior Colleague A], [Barclays Senior Colleague B] and [Barclays Senior Manager] (OFT Document Reference 0116.14, page 2).

¹⁵⁴ Email of 22 February 2008 from [Barclays Senior Manager] to [Barclays Head of Team], [Barclays Senior Colleague A] and [Barclays Senior Colleague B] (OFT Document Reference 0116.14, page 1).

¹⁵⁵ [...] interview transcript, Tape 4 (OFT Document Reference 0576, pages 5 and 6).

specific contacts between RBS and Barclays relating to pricing. Such contacts occurred in relation to: (i) a loan facility to be provided to Savills; and (ii) a loan facility to be provided to Knight Frank. These are discussed further below.

i. Savills

168. On 17 December 2007, PwC acting as agent on behalf of Savills invited RBS and Barclays¹⁵⁶ by way of letter and information memorandum to submit indicative terms to provide a loan facility to Savills in the amount of £[...] million.¹⁵⁷ The invitation stated that Savills' forecast suggested that a reducing revolving credit facility would meet their requirements but that alternative structures could be proposed by the lenders.¹⁵⁸ The invitation also stated that it had been sent to a number of Savills' relationship banks and made it clear that it was initially envisaged that the facility should be arranged on a joint basis (referred to as a 'club deal') between some or all of the banks approached.¹⁵⁹
169. One of Savills' stated aims of approaching several banks separately at the outset, however, was to inject a degree of competition into the process.¹⁶⁰ Consistent with this aim, the invitation to provide indicative terms for the loan facility contained a confidentiality and non-disclosure agreement which precluded each individual bank from discussing any aspect of the loan facility externally.¹⁶¹ Any discussion by RBS and Barclays of issues such as pricing or the amount they were willing to lend was not permitted at this stage in the process. This is corroborated by [the RBS Head of Team] in interview who, when asked whether it would have been appropriate for competing banks to talk to each other about pricing at this stage, replied: '*[n]ot about pricing, no*'.¹⁶²
170. The same view is taken by [Savills Senior Manager A] and [Savills Senior Manager B], [.....] at the time of the Infringement respectively, in interview.¹⁶³

¹⁵⁶ Note that a third bank was approached at a later date.

¹⁵⁷ Letter dated 17 December 2007 (with enclosed information pack) from [Savills Senior Manager B] to [RBS RD C] (OFT Document Reference 0485, page 1); and Email of 19 December 2007 (with attachments) [...] to [Barclays RD C] (OFT Document Reference 0704, page 3).

¹⁵⁸ Letter dated 17 December 2007 (with enclosed information pack) from [Savills Senior Manager B] to [RBS RD C] (OFT Document References 0485, page 2); and Email of 19 December 2007 (with attachments) [...] to [Barclays RD C] (OFT Document Reference 0704, page 3).

¹⁵⁹ Letter dated 17 December 2007 (with enclosed information pack) from [Savills Senior Manager B] to [RBS RD C] [...] (OFT Document Reference 0485, page 2).

¹⁶⁰ Savills Board Report of 27 November 2007 (OFT Document Reference 0806, page 22).

¹⁶¹ Confidentiality letters dated 17 December 2007 from Savills to RBS and Barclays (OFT Document References 0913, page 1; and 0914, page 1 respectively).

¹⁶² [...] interview transcript, Tape 13 (OFT Document Reference 0895, page 4).

¹⁶³ [...] interview transcript, Tape 2 (OFT Document Reference 0917, page 15); and [...] interview transcript, Tape 1 (OFT Document Reference 0971, pages 5 and 6).

171. Following receipt of the invitation from PwC on 17 December 2007, [RBS RD A], who indicated that he played a supporting role on the Savills loan facility,¹⁶⁴ introduced [RBS RD C], another Relationship Director in RBS's PPC team, to [Barclays RD C] at Barclays in a telephone call two days later on 19 December 2007.¹⁶⁵ Later that same day, [RBS RD A] had a further telephone conversation with [Barclays RD C] to which [RBS RD C] was not a party.¹⁶⁶ Describing these events, [RBS RD A] stated that:

'we had a conference call, three ways, with myself, [RBS RD C] and [Barclays RD C] on the phone. Subsequent to that conversation, i.e. when [RBS RD C] had finished on the call, I did have another conversation with [Barclays RD C]'.¹⁶⁷

172. [RBS RD A] admitted in interview with the OFT that he should not have initiated these contacts with Barclays without Savills' consent.¹⁶⁸

173. [RBS RD A's] own account of the second call on 19 December 2007 is that he wanted to ensure that RBS and Barclays were on the *'same page ... in terms of the interest margin'*.¹⁶⁹ However, he denies giving Barclays a specific figure during the course of this conversation.¹⁷⁰

174. [RBS RD A] is reported by [Barclays RD C] as stating that RBS would be pricing the facility *'somewhere in the 70s'*.¹⁷¹ This statement was later recorded by [Barclays RD C] in papers, which were submitted to the Barclays Large Exposure Pricing Committee on 8 January 2008 for the purpose of seeking approval of Barclays' suggested pricing for the facility, as follows: *'RBS who have been aggressively courting this client and missed out on last years [sic] acquisition line have indicated they will be pricing margin in the 70's [sic]'*.¹⁷²

175. [Barclays RD C's] version of the exchange with [RBS RD A] is also recorded in an email he sent on 9 January 2008 in relation to a different transaction. In that email [Barclays RD C] wrote:

'[g]iven what we know about RBS's recent views on pricing in general (i.e. they no longer want to price at the bottom end as has been confirmed by their call to me about a name in a different sector), I'm surprised they didn't use their head office clout to over rule Coutts'.¹⁷³

¹⁶⁴ [...] interview transcript, Tapes 3 and 6 (OFT Document Reference 0534, pages 57 and 106 respectively); and [...] interview transcript, Tape 10 (OFT Document Reference 0899, page 2).

¹⁶⁵ [...] interview transcript, Tape 10 (OFT Document Reference 0899, page 16).

¹⁶⁶ [...] interview transcript, Tape 10 (OFT Document Reference 0899, page 16).

¹⁶⁷ [...] interview transcript, Tape 10 (OFT Document Reference 0899, page 16).

¹⁶⁸ [...] interview transcript, Tape 12 (OFT Document Reference 0901, page 7).

¹⁶⁹ [...] interview transcript, Tape 10 (OFT Document Reference 0899, page 16).

¹⁷⁰ [...] interview transcript, Tape 12 (OFT Document Reference 0901, page 8).

¹⁷¹ [...] interview transcript, Tape 5 (OFT Document Reference 0593, page 6). The OFT understands this to mean a margin price of between 70 to 79 basis points.

¹⁷² 'Commercial Bank Large Exposures' form for Savills dated 21 December 2007 (OFT Document Reference 0116.20, page 5).

¹⁷³ Email of 9 January 2008 from [Barclays RD C] to [Barclays RD G] and [Barclays RD E] (OFT Document Reference 0116.9, page 2).

In interview, [Barclays RD C] also confirmed that the 'name in a different sector', referred to here, was Savills:

[OFT] *Can you tell us who the name in the different sector is?*

[Barclays RD C]: *Yeah, it's Savills which is – this ties in with the phone call that I told you about that I received from RBS where they'd made the indication about pricing in the 70s'.¹⁷⁴*

176. [Barclays RD C] stated in interview with the OFT that he was reassured by the information received from [RBS RD A]: *'I was relatively pleased to know they wouldn't be pricing at a very fine margins [sic]'*.¹⁷⁵
177. [Barclays RD C] then claims to have said to [RBS RD A]: *'[RBS RD A], you need to do what you need to do, ... you know how Barclays works and I'll be pricing it where I price it'*.¹⁷⁶
178. [RBS RD A's] witness evidence is inconsistent on this point. In interview with the OFT he stated that:
- (a) [Barclays RD C] told him during the course of this conversation that Barclays would price at around 80 basis points¹⁷⁷ (Barclays ultimately priced at 75 basis points);¹⁷⁸ and
 - (b) he told [RBS RD C] that he thought Barclays would price below 80 basis points, but did not report his conversation with [Barclays RD C].¹⁷⁹
179. On 15 January 2008 the RBS Capital Commitments Committee (the 'CCC') met to discuss the Savills deal.¹⁸⁰ [RBS RD A] took the minutes at this meeting. According to [RBS RD A's] own recollections, a margin of 70 to 75 basis points was recommended by the relationship management team (this level of pricing was at the lower limit of RBS's pricing model).¹⁸¹ [RBS RD A] told the CCC that he thought Barclays would price around or slightly less than 70 basis points.¹⁸²

¹⁷⁴ [...] interview transcript, Tape 6 (OFT Document Reference 0550, page 7).

¹⁷⁵ [...] interview transcript, Tape 5 (OFT Document Reference 0593, page 6).

¹⁷⁶ [...] interview transcript, Tape 5 (OFT Document Reference 0593, page 6).

¹⁷⁷ [...] interview transcript, Tape 10 (OFT Document Reference 0899, page 17). This is denied by [Barclays RD C] in interview. See [...] interview transcript, Tape 5 (OFT Document Reference 0593, page 8).

¹⁷⁸ For the £[...] million facility to be provided on a 'club deal' basis. See Barclays Outline Terms and Conditions dated 17 January 2008 for Savills plc (OFT Document Reference 0116.23, page 3).

¹⁷⁹ [...] interview transcript, Tape 10 (OFT Document Reference 0899, page 17).

¹⁸⁰ Capital Commitments Committee Minutes/Actions dated 15 January 2008 (OFT Document Reference 0482, page 1).

¹⁸¹ [...] interview transcript, Tape 10 (OFT Document Reference 0899, page 17).

¹⁸² Capital Commitments Committee Minutes/Actions dated 15 January 2008 (OFT Document Reference 0482, page 3).

180. In relation to the two differing versions of events, the OFT notes that [Barclays RD C's] version is supported by internal contemporaneous Barclays documentation. Thus, the OFT concludes that [RBS RD A] did provide information to [Barclays RD C] of RBS's intended price for the Savills loan facility, acting to co-ordinate their respective prices.

181. It is possible that [Barclays RD C] also disclosed specific pricing information to [RBS RD A]. Although [RBS RD A's] evidence is inconsistent, he does claim to have received pricing information from [Barclays RD C]. The OFT notes that [RBS RD A] also says he informed [RBS RD C] that Barclays would be pricing below 80 basis points, which Barclays in fact did. If [RBS RD A] did receive information to this effect, the only suggested source of the information is [Barclays RD C], who is known to have had discussions with [RBS RD A] in relation to the pricing of the Savills deal. Barclays has stated, in its response to the Statement of Objections, that it does not recognise this characterisation of the evidence. In any event, for the purposes of this Decision, the OFT's finding of infringement does not rely on reciprocation by Barclays. The OFT considers that the requirements for an infringement are met, based on the evidence that RBS passed future confidential, commercially sensitive pricing information to Barclays and that this information was accepted by, and of use to, Barclays.

182. On 13 February 2008, Savills informed both RBS and Barclays that its borrowing requirement had changed from £[...] million to £[...] million.¹⁸³ Savills indicated to Barclays that they were the preferred bank to lend the full amount.¹⁸⁴ Barclays confirmed that it was willing to lend in full and the transaction proceeded on a bilateral basis with Barclays as the sole lender. Barclays priced the facility at 85 basis points (margin).

ii. Knight Frank

183. Further customer-specific contacts took place between RBS and Barclays with regard to a loan facility to be provided to Knight Frank. These contacts took place in the context of RBS and Barclays competing to provide a loan facility to Knight Frank for an amount in the region of £[...] to £[...] million.¹⁸⁵

184. RBS had been in discussions with Knight Frank about the provision of a loan facility in March 2007. Although the deal did not progress at this stage, it was resurrected in late 2007/early January 2008. At this

¹⁸³ [...] interview transcript, Tape 13 (OFT Document Reference 0902, page 13); and [...] interview transcript, Tape 5 (OFT Document Reference 0593, page 15).

¹⁸⁴ [...] interview transcript, Tape 5 (OFT Document Reference 0593, page 15).

¹⁸⁵ RBS and Barclays provided a number of quotes based on loan facilities of between £[...] and £[...] million as the amount sought by Knight Frank changed over time. The facility which was ultimately granted by Barclays was in the amount of £[...] million. See [...] interview transcript, Tape 4 (OFT Document Reference 0581, page 2), which explains that the initial discussions with the client were about providing a loan of £[...] or £[...] million and that Barclays subsequently quoted terms for providing a loan of up to £[...] million.

time, Knight Frank asked each of RBS and Barclays to quote for this loan facility on a bilateral basis.

185. RBS issued initial indicative terms to Knight Frank on 15 January 2008, in advance of a meeting to be held between RBS and Knight Frank on 17 January 2008. These terms quoted a margin of 115 basis points, a 75 basis points arrangement fee and a 60 basis points non-utilisation fee, based on a £[...] million facility over [...] years.¹⁸⁶
186. Barclays issued its first, non-credit approved, indicative terms on margin and fees to Knight Frank on 29 January 2008. The terms quoted were a margin of 90 basis points for a [...] year loan facility and at 100 basis points for a [...] year loan facility.¹⁸⁷
187. Revised terms were issued by RBS on 1 February 2008, 12 February 2008 and 20 February 2008¹⁸⁸ and by Barclays on 15 February 2008.¹⁸⁹
188. During interview, [RBS RD A] informed the OFT that [Knight Frank Senior Manager A] and [Knight Frank Senior Manager B] from Knight Frank met with [RBS RD A] of RBS on 17 January 2008 and 17 and 21 February 2008 to discuss the way in which Knight Frank wished to structure the loan facility.¹⁹⁰ [RBS RD A's] recollection is that some time between the meeting on 17 January 2008 and around 17 February 2008, Knight Frank had indicated to RBS that a club deal might be contemplated.¹⁹¹ [RBS RD A] stated that the possibility of a club deal was reaffirmed at the meeting on 21 February 2008:

¹⁸⁶ Email of 17 January 2008 from [RBS RD A] [...] (with attached RBS Outline Terms and Conditions dated January 2008 for Knight Frank LLP) (OFT Document Reference 0654, pages 3 and 4).

¹⁸⁷ Email of 29 January 2008 from [Barclays RD D] to [Knight Frank Senior Manager A] (with attached Barclays Indicative Terms and Conditions for Knight Frank LLP) (OFT Document Reference 0630, pages 8 and 2 respectively).

¹⁸⁸ Those terms included a margin of 115 basis points. See Email of 1 February 2008 from [RBS RD A] to [Knight Frank Senior Manager B] (with attached RBS revised Outline Terms and Conditions dated 1 February 2008 for Knight Frank LLP) (OFT Document Reference 0606, page 6); Outlook meeting appointment of 21 February 2008 (with attached RBS revised Outline Terms and Conditions dated 12 February 2008 for Knight Frank LLP) (OFT Document Reference 0663, page 3); and Email of 21 February 2008 from [RBS RD A] to [Knight Frank Senior Manager A] and [Knight Frank Senior Manager B] (with attached RBS revised Outline Terms and Conditions dated 20 February 2008 for Knight Frank LLP) (OFT Document Reference 0688, page 5).

¹⁸⁹ Email of 15 February 2008 from [Barclays RD D] to [Knight Frank Senior Manager A] (with attached Barclays Indicative Terms and Conditions for Knight Frank LLP ([...] years) and Barclays Indicative Terms and Conditions for Knight Frank LLP ([...] years)) (OFT Document References 0268; 0269; and 0270 respectively).

¹⁹⁰ [...] interview transcript, Tape 14 (OFT Document Reference 0903, pages 8 to 11). Although during interview [RBS RD A] referred to a meeting on 17 February 2008, it is unlikely that any such meeting took place given that 17 February 2008 was a Sunday: [...] interview transcript, Tape 14 (OFT Document Reference 0903, pages 17 and 18). Moreover, [the Knight Frank Senior Manager A's] Outlook diary only shows meetings on 17 January 2008 and 21 February 2008: Outlook meeting appointment of 17 January 2008 (OFT Document Reference 0659); and Outlook meeting appointment of 21 February 2008 (with attached RBS revised Outline Terms and Conditions dated 12 February 2008 for Knight Frank LLP) (OFT Document Reference 0663, page 1). Nevertheless, [RBS RD A's] clear recollection is that it was becoming apparent during this period that Knight Frank was considering a club deal and talking to other banks in this respect.

¹⁹¹ [...] interview transcript, Tape 14 (OFT Document Reference 0903, page 8).

'it became more of a discussion, if I remember rightly, on the, twenty, 21st of Feb, when they reiterated again and said, you know, we, we think we're going for the sort of club, club space, and we've talked about... [Barclays RD D] came up in discussion, and I said, you know, I know [Barclays RD D], would be very happy to, to work with [Barclays RD D] ' .¹⁹²

189. [Knight Frank Senior Manager A] confirmed in interview with the OFT that Knight Frank may have indicated during discussions with one or more of the banks that a club deal would potentially be contemplated. However, [Knight Frank Senior Manager A] was clear that this structure was not positively decided upon and that no indication was given to any bank that Knight Frank would opt for a club deal (and Knight Frank ultimately opted for a bilateral loan facility).¹⁹³ [Knight Frank Senior Manager A] also confirmed in interview that Knight Frank would not have expected any of the banks to discuss their respective terms with each other while bilateral negotiations between Knight Frank and the banks were in progress.¹⁹⁴
190. Following the meeting on 21 February 2008 between Knight Frank and RBS, [RBS RD A] telephoned [Barclays RD D] of Barclays on 22 February 2008 and told him that he thought Knight Frank were planning to pursue the facility on a club deal basis.¹⁹⁵ [Barclays RD D] recalls that [RBS RD A] emphasised to him during this call that he wanted to *'make sure silly pricing isn't involved'* if the deal were to become a club deal.¹⁹⁶ [Barclays RD D] stated that he was not aware that the client was even considering a club deal at the time he was contacted by [RBS RD A].¹⁹⁷
191. There is documentary evidence which shows that specific pricing was also discussed during the call between [RBS RD A] and [Barclays RD D] on 22 February 2008. An internal email from [the Barclays Head of Team] was sent to colleagues at Barclays on 22 February 2008, entitled *'Enemy Intelligence – RBS'*. The email states that RBS had called about the Knight Frank deal and that specific prices, of RBS at least, were disclosed:

'Ø We pitched for £[...]m of debt for Knight Frank whose main Bankers are RBS. We went in at 90 bps which makes us plenty on money and we thought could be a bit toppy. RBS rang today they went in at over 100 bps (110 we think) and asked if we would split it £[...]m each at

¹⁹² [...] interview transcript, Tape 14 (OFT Document Reference 0903, pages 9 and 10).

¹⁹³ [...] interview transcript, Tape 4 (OFT Document Reference 0877, page 8).

¹⁹⁴ [...] interview transcript, Tapes 2 and 4 (OFT Document References 0910, page 11; and 0877, page 8 respectively).

¹⁹⁵ [...] interview transcript, Tape 4 (OFT Document Reference 0581, pages 7 and 8).

¹⁹⁶ [...] interview transcript, Tape 4 (OFT Document Reference 0581, page 8).

¹⁹⁷ Ibid.

their pricing level. We said no, we make more money on [...] @ 90 although wonder if Knight Frank may wish to split it'.¹⁹⁸

192. In interview, [the Barclays Head of Team] was questioned about the source of the information that he had included in this email. He indicated that the information had been passed to him by one of the Relationship Directors in his team.¹⁹⁹
193. The OFT regards the email of 22 February 2008 as strong evidence of the fact that, during their telephone call of the same date, [RBS RD A] and [Barclays RD D] discussed pricing and, in particular, that [RBS RD A] disclosed a specific price to [Barclays RD D]. This information was disseminated further within Barclays.
194. The information was received in the course of Barclays' negotiations with Knight Frank and prior to formal credit approval for the proposed facility being obtained internally.²⁰⁰ The OFT considers that [Barclays RD D], who was keen to win the contract,²⁰¹ is likely to have been reassured by the information passed to him by RBS that the price put forward by Barclays would be considered competitive by Knight Frank even though the Barclays team had thought the contrary.
195. [RBS RD A] has admitted that he did not have Knight Frank's authority to initiate contact with Barclays and accepts that he should not have made such contact without Knight Frank's consent.²⁰² The OFT considers that [RBS RD A's] stated reason for initiating contact with Barclays, namely that he did this to keep the deal moving forward in the interests of the customer,²⁰³ is unfounded given that, as indicated in paragraph 189 above, Knight Frank had not in fact decided upon a club deal and had not indicated to [RBS RD A] that it intended to pursue a club deal. [RBS RD A] also accepted that the customer had not asked for this discussion to take place. In interview, [Knight Frank Senior Manager A] was clear that the discussion should not have taken place, stating: *'I wouldn't expect there to be any discussion of the pricing until it had been agreed that there was going to be a tendered club deal'.²⁰⁴*

¹⁹⁸ Email of 22 February 2008 from [Barclays Head of Team] to [Barclays Senior Colleague A], [Barclays Senior Colleague B] and [Barclays Senior Manager] (OFT Document Reference 0116.14, page 2).

¹⁹⁹ [...] interview transcript, Tape 4 (OFT Document Reference 0562, page 17).

²⁰⁰ [...] interview transcript, Tape 4 (OFT Document Reference 0581, pages 11 and 15).

²⁰¹ [...] interview transcript, Tape 5 (OFT Document Reference 0582, page 4).

²⁰² [...] interview transcript, Tape 15 (OFT Document Reference 0904, pages 15 and 16). See also [...] interview transcript, Tape 6 (OFT Document Reference 0534, page 105); and [...] interview transcript, Tape 17 (OFT Document Reference 0906, pages 11 and 12). Note that [RBS RD A] does not recall whether this telephone call took place on 22 February 2008 or on another date around that time. See [...] interview transcript, Tape 15 (OFT Document Reference 0904, page 22). The OFT's view that the call took place on 22 February 2008 is based on the Mobile telephone records of [RBS RD A] (OFT Document Reference 0059, page 7) and on the Email of 22 February 2008 from [Barclays Head of Team] to [Barclays Senior Colleague A], [Barclays Senior Colleague B] and [Barclays Senior Manager] (OFT Document Reference 0116.14, page 2).

²⁰³ [...] interview transcript, Tapes 15 and 17 (OFT Document References 0904, pages 15 and 16; and 0906, pages 11 and 12 respectively).

²⁰⁴ [...] interview transcript, Tape 2 (OFT Document Reference 0910, page 12).

196. [RBS RD A] also contacted [Barclays RD D] by text message on 25 February 2008 and again by telephone on 27 February 2008.²⁰⁵ According to [RBS RD A], the pricing of a potential club deal for Knight Frank was discussed further during this call.²⁰⁶ [RBS RD A] stated in interview that he asked [Barclays RD D] to give him a ballpark figure in terms of pricing and that [Barclays RD D] gave him a margin figure of below 100 basis points.²⁰⁷

197. This version of events is disputed by [Barclays RD D]. [Barclays RD D] sent an email minutes after receiving the call from [RBS RD A] on 27 February 2008 (to his own email account) recounting the details of the call. [Barclays RD D's] email indicates that:

'He [RBS RD A] said that it was likely that the KF [Knight Frank] deal would be a two bank deal. He said that there was another bank involved in addition to RBS and Barclays [sic]. He said that he thought that it was HS (?) As they [.....].

He then said that he thought they [sic] had quoted 90 basis points with a fee of 25 and non ut if [sic] 40 which was ridiculously cheap for [...] year money.

He then said: what do you think I said: don't remember'.²⁰⁸

198. In interview, [Barclays RD D] expanded on this note of the telephone call:

'[h]e said: well, they've issued silly terms. I believe he said "silly terms", from memory. "They've issued [...] year money at one over cost of funds. It's ridiculous, ridiculous, what do you think?" I said: [RBS RD A], I'm on a train, can't speak, goodbye'.²⁰⁹

199. The OFT notes that various discussions took place between representatives of Knight Frank and [RBS RD A], after Barclays submitted its price, and there is evidence that [RBS RD A] was told that RBS's price was not competitive.²¹⁰ Although the customer could have told [RBS RD A] in those discussions that Barclays had submitted a price of below 100 basis points margin, the OFT has not received any evidence to suggest that Knight Frank had passed specific prices to either RBS or Barclays by the end of February 2008.²¹¹

²⁰⁵ Mobile telephone records of [RBS RD A] (OFT Document Reference 0059, pages 2 and 8).

²⁰⁶ [...] interview transcript, Tape 16 (OFT Document Reference 0905, pages 3 and 4).

²⁰⁷ [...] interview transcript, Tape 16 (OFT Document Reference 0905, page 4).

²⁰⁸ Email of 27 February 2008 from [Barclays RD D] to himself (OFT Document Reference 0089).

²⁰⁹ [...] interview transcript, Tape 4 (OFT Document Reference 0581, page 13).

²¹⁰ For example, [...] interview transcript, Tape 15 (OFT Document Reference 0904, pages 10 and 11).

²¹¹ In interview [Knight Frank Senior Manager B] was asked whether he or [Knight Frank Senior Manager A] discussed the specific pricing of each of the competing banks with the other. [Knight Frank Senior Manager B] responded that he would not have volunteered this information. [Knight Frank Senior Manager A] stated in interview that he would have communicated the fact that one bank had more competitive terms to the other banks involved in the process. However, neither

200. RBS issued further indicative terms on 6 March 2008 in which it reduced its margin price to 110 basis points.²¹²
201. There was a further meeting between Knight Frank and Barclays on 20 March 2008.²¹³
202. Also on 20 March 2008, the RBS Credit Committee meeting considered the proposed pricing of the Knight Frank deal. A minute of this meeting was prepared, which states:
- '[t]he Deal Team consider Knight Frank to be a conservative firm, run by an excellent management team. RBS was in competition for this mandate with Barclays and HSBC. ... The Deal Team confirmed that the pricing proposed now was higher than what the Bank quoted last year, and RBS was more expensive than Barclays who are quoting a margin of 90bps, a 40bps NUF [non utilisation fee] and 25bps arrangement fee'.²¹⁴*
203. RBS went back to Knight Frank with a revised margin pricing of 135 basis points (increased from 110 basis points) following the committee meeting.²¹⁵

[Knight Frank Senior Manager B] nor [Knight Frank Senior Manager A] stated that specific pricing information was passed to any of the banks at this stage in the process. See [...] interview transcript, Tape 2 (OFT Document Reference 0923, pages 3 and 4); and [...] interview transcript, Tape 4 (OFT Document Reference 0877, page 5).

²¹² Email of 6 March 2008 from [RBS RD A] to [Knight Frank Senior Manager B] (with attached RBS Outline Terms and Conditions dated 6 March 2008 for Knight Frank LLP) (OFT Document Reference 0652, page 3).

²¹³ Outlook meeting appointment of 20 March 2008 (OFT Document reference 0668).

²¹⁴ Minutes of CB Credit Committee 50th Meeting dated 20 March 2008 (OFT Document Reference 0481, page 1).

²¹⁵ Email of 31 March 2008 from [RBS RD A] to [Knight Frank Senior Manager A] and [Knight Frank Senior Manager B] (with attached RBS Outline Terms and Conditions for Knight Frank LLP) (OFT Document Reference 0651, page 4).

SECTION IV – LEGAL BACKGROUND

A. Introduction

204. Section IV sets out the legal framework within which the OFT has considered the evidence in this case.
205. The legal provisions prohibiting agreements and/or concerted practices which prevent, restrict or distort competition are contained in the Chapter I prohibition and Article 101. Both provisions are relevant to this case, by reason of Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82²¹⁶ of the Treaty²¹⁷ (the ‘Modernisation Regulation’). The relevant parts of both provisions are therefore set out below, followed by a detailed examination of the key concepts contained within each, together with the law on the burden and standard of proof.

B. The Chapter I prohibition

i. General

206. The Chapter I prohibition prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK unless they are excluded or exempt in accordance with the provisions of Part I of the Act.²¹⁸ The Chapter I prohibition applies in particular to agreements, decisions or practices which directly or indirectly fix selling prices or any other trading conditions.²¹⁹
207. In order to find an infringement of the Chapter I prohibition, the OFT must establish that the Parties entered into an agreement or engaged in a decision or a concerted practice which may affect trade within the UK and which had as its object or effect the appreciable prevention, restriction or distortion of competition.

ii. Consistency with European law

208. Section 60 of the Act provides that, so far as is possible (having regard to any relevant differences between the provisions concerned), questions relating to UK competition law should be dealt with in a manner which is consistent with the treatment of corresponding questions under EU competition law.
209. Section 60 also provides that the OFT must act (so far as is compatible with the provisions of Part I of the Act) with a view to securing consistency with the principles laid down by the TFEU, European Court

²¹⁶ Now TFEU, Articles 101 and 102 respectively.

²¹⁷ [2003] OJ L1/1.

²¹⁸ The Chapter I prohibition came into force on 1 March 2000. See The Competition Act 1998 (Commencement No 5) Order 2000 SI 2000/344, Article 2 and Schedule 1.

²¹⁹ Section 2(2)(a) of the Act.

and any relevant decision of the European Court.²²⁰ The OFT must, in addition, have regard to any relevant decision or statement of the European Commission (the 'Commission').

210. The provision in EU competition law closely corresponding to the Chapter I prohibition is Article 101, on which the Chapter I prohibition is modelled.

C. Article 101

211. Article 101 prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

212. Following the entry into force of the Modernisation Regulation from 1 May 2004,²²¹ the OFT is required, when applying national competition law to agreements and concerted practices between undertakings which may affect trade between Member States to an appreciable extent, also to apply Article 101.²²²

213. Since the agreement and/or concerted practice particularised in this Decision occurred after 1 May 2004, the OFT considers that it is under an obligation to apply Article 101 if the Parties' conduct 'may affect trade between Member States', within the terms of Article 101.

214. The OFT sets out the principles relevant to the determination of this question in paragraphs 270 to 275 below and sets out its conclusions in paragraphs 332 to 342 below. As set out there, the OFT considers that the agreement and/or concerted practice between RBS and Barclays fulfils this criterion and, thus, that Article 101 is applicable in the present case.

D. Undertakings

215. The Chapter I prohibition and Article 101 apply to agreements or concerted practices between '*undertakings*'.

216. The term '*undertaking*' is not defined in the Act or in the TFEU. It is a wide term that the ECJ has held to cover '*every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed*'.²²³

217. The concept of an '*undertaking*' is used to designate an economic unit. As such it is distinct from that of legal personality and may consist of

²²⁰ The 'European Court' includes the European Court of Justice (the 'ECJ') and the General Court (formerly the Court of First Instance or 'CFI').

²²¹ Modernisation Regulation (n217), Article 45.

²²² Modernisation Regulation (n217), Article 3.

²²³ Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-1979, paragraph 21.

several persons, natural or legal.²²⁴ In particular, a subsidiary which has no real freedom to determine its conduct on the market and which does not enjoy economic independence will form part of the same undertaking as its parent company even though each has its own legal personality.²²⁵

E. Agreements or concerted practices between undertakings

i. Agreement 'and/or' concerted practice

218. The Chapter I prohibition and Article 101 apply to '*agreements*' and '*concerted practices*'.²²⁶

219. The European Court and the CAT have confirmed that it is not necessary, for the purposes of finding an infringement, to characterise conduct exclusively as an agreement or as a concerted practice.²²⁷ The concepts of agreement and concerted practice are not mutually exclusive and there is no rigid dividing line between the two. On the contrary, they are intended '*to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and the forms in which they manifest themselves*'.²²⁸

220. The ECJ explained this in *Anic* as follows:

'[t]he list in Article [101(1)] of the [TFEU] is intended to apply to all collusion between undertakings, whatever the form it takes. ... The only essential thing is the distinction between independent conduct, which is allowed, and collusion, which is not, regardless of any distinction between types of collusion'.²²⁹

²²⁴ Case 170/83 *Hydrotherm Gerätebau GmbH v Compact del Dott Ing Mario Andreoli & C Sas* [1984] ECR 2999, paragraph 11.

²²⁵ Case T-102/95 *Viho Europe BV v Commission of the European Communities* [1995] ECR II-17, paragraphs 47 to 51. Confirmed on appeal in Case C-73/95P *Viho Europe BV v Commission of the European Communities* [1996] ECR I-5457, paragraph 16. See also OFT Guidance 407, *Enforcement: Incorporating the Office of Fair Trading's guidance as to the circumstances in which it may be appropriate to accept commitments* (December 2004) (the 'Enforcement Guidance'), paragraph 5.41.

²²⁶ Section 2(1) of the Act and TFEU, Article 101(1).

²²⁷ Case T-7/89 *SA Hercules Chemicals NV v Commission of the European Communities* [1991] ECR II-1711 ('*Hercules (CFI)*'), paragraph 264; and substantially upheld on appeal in Case C-51/92P *Hercules Chemicals NV v Commission of the European Communities* [1999] ECR I-4235. See also Joined Cases T-305/94 etc *Limburgse Vinyl Maatschappij NV and Others v Commission of the European Communities* [1999] ECR II-931 ('*PVC II*'), paragraphs 695 to 698; and Case C-49/92P *Commission of the European Communities v Anic Partecipazioni SpA* [1999] ECR I-4125 ('*Anic*'), paragraph 132.

²²⁸ *Anic* (n227), paragraph 131. Followed in Case T-9/99 *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co KG and Others v Commission of the European Communities* [2002] ECR II-1487 ('*HFB Holding*'), paragraph 190. See also *Argos, Littlewoods and JJB (EWCA)* (n51), paragraph 21(iii); *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4 ('*Apex Asphalt*'), paragraph 206(ii); and followed in *Makers UK Limited v Office of Fair Trading* [2007] CAT 11 ('*Makers*'), paragraph 103(ii).

²²⁹ *Anic* (n227), paragraph 108.

This reasoning has been expressly cited by the ECJ and the CAT in several recent cases.²³⁰ The ECJ in *T-Mobile Netherlands*, referring to the opinion of AG Kokott,²³¹ held that:

*'the criteria laid down in the Court's case-law for the purpose of determining whether conduct has as its object or effect the prevention, restriction or distortion of competition are applicable irrespective of whether the case entails an agreement, a decision or a concerted practice'.*²³²

221. While there is a particular overlap between the concepts of agreements and concerted practices in the case of single complex infringements of long duration,²³³ the same principle will apply to discrete infringements of short duration. As the CAT has confirmed in its judgments in both *JJB/Allsports* and *Argos/Littlewoods (Liability)*, both of which involved discrete infringements of comparatively short duration:

*'[i]t is trite law that it is not necessary for the OFT to characterise an infringement as either an agreement or a concerted practice: it is sufficient that the conduct in question amounts to one or the other'.*²³⁴

This position has since been upheld by the Court of Appeal.²³⁵

222. It is not necessary therefore for the OFT to come to a conclusion as to whether the behaviour of the Parties specifically constitutes an agreement or a concerted practice in order to demonstrate an infringement of the Chapter I prohibition or Article 101 in the present case.

ii. Agreements

223. An agreement does not have to be a formal written agreement to be caught by the Chapter I prohibition and/or Article 101. Nor does an agreement have to be legally binding or contain any enforcement

²³⁰ Case C-8/08 *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529 ('*T-Mobile Netherlands*'), paragraph 23; and *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17 ('*JJB/Allsports*'), paragraphs 153 and 154; and *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24 ('*Argos/Littlewoods (Liability)*'), paragraphs 148 and 149 (both citing *Anic* (n227), paragraphs 108, 130 and 131). See also *Apex Asphalt* (n228), paragraphs 201 and 206(ii); and *Makers* (n228), paragraph 103(ii).

²³¹ Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, paragraph 38.

²³² *T-Mobile Netherlands* (n230), paragraph 24.

²³³ See *Citric acid* (Case COMP/E-1/36 604) Commission Decision 2002/742/EC [2002] OJ L239/18, paragraph 143. Not challenged on appeal in Case T-59/02 *Archer Daniels Midland Co v Commission of the European Communities* [2006] ECR II-3627; and Case T-43/02 *Jungbunzlauer AG v Commission of the European Communities* [2006] ECR II-3435.

²³⁴ *JJB/Allsports* (n230), paragraph 644; and *Argos/Littlewoods (Liability)* (n230), paragraph 665.

²³⁵ *Argos, Littlewoods and JJB (EWCA)* (n51), paragraph 21.

mechanisms.²³⁶ The Chapter I prohibition and Article 101 are intended to catch a wide range of agreements and concerted practices, including oral agreements²³⁷ and '*gentlemen's agreements*',²³⁸ since anti-competitive agreements are, by their nature, rarely in written form.²³⁹

224. The key question is whether there has been '*a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention*'.²⁴⁰
225. The intention of the parties must be to conduct their activity on the market in a specific way,²⁴¹ for example, by adhering to a common plan that limits or is likely to limit their individual commercial freedom by determining lines of mutual action or abstention from action in the market.²⁴²
226. The precise manner in which the parties' intention to behave on the market in accordance with the terms of the relevant agreement is expressed, is not significant. An agreement may be express or it may be implied from the conduct of the parties.²⁴³ It may also consist of either an isolated act or a series of acts or a course of conduct.²⁴⁴
227. The fact that a party may have played only a limited part in the setting up of the agreement, may not be fully committed to its implementation or may have participated only under pressure from other parties does not mean that it is not party to the agreement (although these facts may be relevant to the level of penalty).²⁴⁵

²³⁶ *Soda ash – Solvay* (Case COMP/33.133-C) Commission Decision 2003/6/EC [2003] OJ L10/10 ('*Soda Ash/Solvay*'), paragraphs 83, 153 and 161; and *PVC* (Case IV/31.865) Commission Decision 94/599/EC [1994] OJ L239/14, paragraph 30.

²³⁷ Case 28/77 *Tepea BV v Commission of the European Communities* [1978] ECR 1391, paragraph 41.

²³⁸ Case 41-69 *ACF Chemiefarma NV v Commission of the European Communities* [1970] ECR 661 ('*ACF Chemiefarma*'), paragraphs 106 to 114.

²³⁹ See also OFT Guidance 401, *Agreements and concerted practices* (December 2004) (the '*Agreements and Concerted Practices Guidance*'), paragraph 2.7.

²⁴⁰ Case T-41/96 *Bayer AG v Commission of the European Communities* [2000] ECR II-3383 ('*Bayer (CFI)*'), paragraph 69. Upheld on appeal in Joined Cases C-2/01P and C-3/01P *Bundesverband der Arzneimittel-Importeure eV and Commission of the European Communities v Bayer AG* [2004] ECR I-23. See also *JJB/Allsports* (n230), paragraphs 156 and 637; *Argos/Littlewoods (Liability)* (n230), paragraphs 151 and 658; and *Argos, Littlewoods and JJB (EWCA)* (n51), paragraph 21(iv).

²⁴¹ *ACF Chemiefarma* (n238), paragraph 112; Joined Cases 209 to 215 and 218/78 *Heintz van Landewyck SARL and Others v Commission of the European Communities* [1980] ECR 3125 ('*van Landewyck*'), paragraph 86; *Hercules (CFI)* (n227), paragraph 256; *PVC II* (n227), paragraph 715; and *Bayer (CFI)* (n240), paragraph 67. See also *JJB/Allsports* (n230), paragraphs 156 and 637; and *Argos/Littlewoods (Liability)* (n230), paragraphs 151 and 658.

²⁴² For example, *Polypropylene* (Case IV/31.149) Commission Decision 86/398/EEC [1986] OJ L230/1, paragraph 81.

²⁴³ For example, *Soda ash/Solvay* (n236), paragraphs 154 to 160, 162 to 164, 169, 170 and 180.

²⁴⁴ *Anic* (n227), paragraph 81.

²⁴⁵ *Agreements and Concerted Practices Guidance* (n239), paragraph 2.8. For example, *Anic* (n227), paragraph 80; Joined Cases T-25/95 etc *Cimenteries CBR SA and Others v Commission of the European Communities* [2000] ECR II-491 ('*Cimenteries*'), paragraphs 1389 and 2557; and Case T-28/99 *Sigma Technologie di rivestimento Srl v Commission of the European Communities* [2002] ECR II-1845, paragraph 40.

iii. Concerted practices

228. A concerted practice will exist where there is a mental consensus whereby practical co-operation is knowingly substituted for competition.²⁴⁶ Consensus can come about by direct or indirect contact between parties.²⁴⁷ A concerted practice does not require an actual agreement (whether express or implied) to have been reached. As the ECJ held in *Dyestuffs*, a concerted practice is:

*'a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition'.*²⁴⁸

229. The concept of a concerted practice must be understood in the light of the principle that each economic operator must determine independently its policy on the market. The ECJ explained this in its judgment in *Suiker Unie* in the following terms:

*'[t]he criteria of coordination and cooperation laid down by the case-law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells'.*²⁴⁹

230. In its judgment in *Anic*, the ECJ cited a number of further cases in addition to *Suiker Unie*.²⁵⁰ It explained the requirement of independence as follows:

'[a]ccording to [the Court's] case-law, although [the] requirement of independence does not deprive economic operators of the right to

²⁴⁶ Case 48-69 *Imperial Chemical Industries Ltd v Commission of the European Communities* [1972] ECR 619 ('*Dyestuffs*'), paragraph 64.

²⁴⁷ *JJB/Allsports* (n230), paragraph 643.

²⁴⁸ *Dyestuffs* (n246), paragraph 64. Followed in Joined Cases 40-73 etc *Coöperatieve Vereniging 'Suiker Unie' UA and Others v Commission of the European Communities* [1975] ECR 1663 ('*Suiker Unie*'), paragraph 26; Joined Cases C-89-85 etc *A. Ahlström Osakeyhtiö and Others v Commission of the European Communities* [1993] ECR I-1307 ('*Woodpulp II*'), paragraph 63; *Anic* (n227), paragraph 115; and Case C-199/92P *Hüls AG v Commission of the European Communities* [1999] ECR I-4287 ('*Hüls*'), paragraph 158. See also *JJB/Allsports* (n230), paragraph 151; *Argos/Littlewoods (Liability)* (n230), paragraph 146; *Argos, Littlewoods and JJB (EWCA)* (n51), paragraph 21(ii); and *Apex Asphalt* (n228), paragraphs 196 and 206(iii) (followed in *Makers* (n228), paragraphs 101 and 103(iii)).

²⁴⁹ *Suiker Unie* (n248), paragraph 173. Followed in *Anic* (n227), paragraph 116; and *Hüls* (n248), paragraph 159. See also *Apex Asphalt* (n228), paragraphs 198 and 206(iv); and *Makers* (n228), paragraphs 102 and 103(iv).

²⁵⁰ *Anic* (n227), paragraphs 116 and 117. Citing *Suiker Unie* (n248), paragraphs 173 and 174; Case 172/80 *Gerhard Züchner v Bayerische Vereinsbank AG* [1981] ECR 2021 ('*Züchner*'), paragraphs 13 and 14; *Woodpulp II* (n248), paragraph 63; and Case C-7/95P *John Deere Ltd v Commission of the European Communities* [1998] ECR I-3111 ('*John Deere Ltd*'), paragraphs 86 and 87.

adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market'.²⁵¹

231. A concerted practice may occur where there are reciprocal contacts between undertakings which have the object or effect of removing or reducing uncertainty as to their future conduct on the market,²⁵² including by way of the disclosure to a competitor of the course of conduct which an undertaking has itself decided to adopt or contemplates adopting on the market.²⁵³
232. As stated by the ECJ in *T-Mobile Netherlands*:
- 'the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted'.²⁵⁴*
233. Therefore, in order to prove concertation, it is not necessary to show that the competitor in question has formally undertaken, in respect of one or several others, to adopt a particular course of conduct or that the competitors have expressly agreed a particular course of conduct on the market. It is sufficient that the exchange of information should have removed or reduced uncertainty as to the conduct on the market to be expected on his part.
234. Moreover, in *Cimenteries* the General Court held that reciprocal contacts are established *'where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it'.²⁵⁵*

²⁵¹ *Anic* (n227), paragraph 117. Followed in *Hüls* (n248), paragraphs 159 and 160; and *HFB Holding* (n228), paragraph 212.

²⁵² *Suiker Unie* (n248), paragraph 175. See also *Apex Asphalt* (n228), paragraph 206(vi); and *Makers* (n228), paragraph 103(vi).

²⁵³ *Suiker Unie* (n248), paragraph 174; and *Anic* (n227), paragraph 117.

²⁵⁴ *T-Mobile Netherlands* (n230), paragraph 35. Citing *John Deere Ltd* (n250), paragraph 90; and Case C-194/99P *Thyssen Stahl AG v Commission of the European Communities* [2003] ECR I-10821 (*'Thyssen Stahl'*), paragraph 81. See also, citing *Cimenteries* (n245), paragraph 1852, *JJB/Allsports* (n230), paragraph 158; *Argos/Littlewoods (Liability)* (n230), paragraph 154; and *Apex Asphalt* (n228), paragraph 206(viii) (followed in *Makers* (n228), paragraph 103(vi)).

²⁵⁵ *Cimenteries* (n245), paragraph 1849. See also *JJB/Allsports* (n230), paragraph 158; *Argos/Littlewoods (Liability)* (n230) paragraph 154; *Argos, Littlewoods and JJB (EWCA)* (n51), paragraph 21(v); and *Apex Asphalt* (n228), paragraph 206(vii) (followed in *Makers* (n228), paragraph 103(vii)).

235. The General Court analysed that case using the same principle that:

'[i]t is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct to expect of the other on the market'.²⁵⁶

236. *Tate & Lyle* also considered the application of Article 101 in the context of unilateral communications. In that case, the General Court held that: *'the fact that only one of the participants at the meetings in question reveals its intentions is not sufficient to exclude the possibility of an agreement or concerted practice'.²⁵⁷*

237. Thus the mere receipt of information concerning competitors may be sufficient to give rise to concertation.²⁵⁸

238. This is reflected in the following statement by the CAT in *JJB/Allsports*:

'Cimenteries (at paragraphs 1849 and 1852) and Tate & Lyle (at paragraphs 54 to 60) ... show that even the unilateral disclosure of future pricing intentions can constitute a concerted practice if the effect of disclosure is in fact to reduce uncertainty in the marketplace'.²⁵⁹

239. The ECJ has stated that an undertaking which receives information relating to an anti-competitive arrangement without manifestly opposing it will be taken to have participated in a concerted practice unless that undertaking puts forward evidence to establish that it had indicated its opposition to the anti-competitive arrangement to its competitors.²⁶⁰

240. The rationale for this principle of law is that:

'a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which

²⁵⁶ *Cimenteries* (n245), paragraph 1852.

²⁵⁷ Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc, British Sugar plc and Napier Brown & Co Ltd v Commission of the European Communities* [2001] ECR II-2035 ('*Tate & Lyle*'), paragraph 54. Upheld by the ECJ in Case C-359/01P *British Sugar plc v Commission of the European Communities* [2004] ECR I-4933 ('*British Sugar*'); cited in *JJB/Allsports* (n230), paragraph 159; *Argos/Littlewoods (Liability)* (n230), paragraph 155; and *Argos, Littlewoods and JJB (EWCA)* (n51), paragraph 21(vi).

²⁵⁸ *Tate & Lyle* (n257), paragraph 58. Upheld by the ECJ in *British Sugar* (n257); citing Case T-1/89 *Rhône-Poulenc SA v Commission of the European Communities* [1991] ECR II-867 ('*Rhône-Poulenc*'), paragraphs 122 and 123. See also *Apex Asphalt* (n228), paragraph 200; *JJB/Allsports* (n230), paragraph 159; and *Argos/Littlewoods (Liability)* (n230), paragraph 155.

²⁵⁹ *JJB/Allsports* (n230), paragraph 658.

²⁶⁰ Joined Cases C-204/00P etc *Aalborg Portland A/S and Others v Commission of the European Communities* [2004] ECR I-123 ('*Aalborg Portland*'), paragraph 81; citing *Hüls* (n248), paragraph 155; and *Anic* (n227), paragraph 96.

*is therefore capable of rendering the undertaking liable in the context of a single agreement’.*²⁶¹

241. Nor is the fact that an undertaking does not act on the outcome of a meeting having an anti-competitive purpose such as to relieve it of responsibility from the fact of its participation in the infringement²⁶² unless it has publicly distanced itself from what was agreed.²⁶³

iv. Resulting conduct on the market

242. According to the case law of the ECJ, the concept of a concerted practice requires, besides undertakings concerting together, conduct on the market pursuant to those collusive practices and a relationship of cause and effect between the two.²⁶⁴

243. Where an undertaking participating in concerting arrangements remains active on the market, there is a presumption that it will take account of the information exchanged with its competitors. In *Anic* the ECJ held that:

*‘subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period, as was the case here’.*²⁶⁵

244. In *T-Mobile Netherlands* the ECJ held that, so far as the undertakings participating in the concerted practice remain active on the market in question, there is a presumption of causal connection between the concerted practice and the conduct of the undertaking on that market, even if the concerted action is the result of a meeting held by the participating undertakings on a single occasion. The ECJ held that:

‘[t]he addition of the words ‘particularly when they concert together on a regular basis over a long period’, far from supporting the argument that there is a presumption of a causal connection only if the undertakings meet regularly, must necessarily be interpreted as

²⁶¹ *Aalborg Portland* (n260), paragraph 84.

²⁶² *Cimenteries* (n245), paragraph 1389.

²⁶³ Case T-141/89 *Tréfileurope Sales SARL v Commission of the European Communities* [1995] ECR II-791 (*‘Tréfileurope Sales’*), paragraph 85; citing *Hercules (CFI)* (n227), paragraph 232. See also *HFB Holding* (n228), paragraph 223; and *Aalborg Portland* (n260), paragraph 85 (citing Case C-291/98P *Sarrió SA v Commission of the European Communities* [2000] ECR I-9991, paragraph 50).

²⁶⁴ *Anic* (n227), paragraph 118; and *Hüls* (n248), paragraph 161. See also *Apex Asphalt* (n228), paragraph 206(ix); and *Makers* (n228), paragraph 103(ix).

²⁶⁵ *Anic* (n227), paragraph 121. Followed in *Hüls* (n248), paragraph 162; and *Cimenteries* (n245), paragraphs 1865 and 1910. See also *Apex Asphalt* (n228), paragraph 206(x); and *Makers* (n228), paragraph 103(x).

meaning that that presumption is more compelling where undertakings have concerted their actions on a regular basis over a long period'.²⁶⁶

245. Where undertakings seek to adduce proof to rebut such a presumption, this is a high burden to discharge, especially where the proof of the concerted practice is based upon documentary evidence. In *PVC II*, the General Court held that where the Commission's decision was based on documentary evidence:

'the burden is on the applicants not merely to submit an alleged alternative explanation for the facts found by the Commission but to challenge the existence of those facts established on the basis of the documents produced by the Commission'.²⁶⁷

246. Furthermore, although the concept of a concerted practice presupposes conduct of the participating undertakings on the market, it does not necessarily require that that conduct must produce the concrete effect of restricting, preventing or distorting competition.²⁶⁸ As the ECJ observed in *Hüls*, a concerted practice which has as its object the prevention, restriction or distortion of competition will infringe competition law even where there is no effect on the market.²⁶⁹

F. Prevention, restriction or distortion of competition

i. No need to prove anti-competitive effect where anti-competitive object established

247. In the context of Article 101, the ECJ has held that, *'there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition'*.²⁷⁰ The ECJ has also held that this is equally the case where the conduct in question concerns a concerted practice.²⁷¹

248. It follows that the OFT, when applying the Chapter I prohibition and Article 101, is not obliged to establish that an agreement or concerted

²⁶⁶ *T-Mobile Netherlands* (n230), paragraph 58.

²⁶⁷ *PVC II* (n227), paragraph 728.

²⁶⁸ *Anic* (n227), paragraph 124. See also *Apex Asphalt* (n228), paragraph 206(xi); and *Makers* (n228), paragraph 103(xi).

²⁶⁹ *Hüls* (n248), paragraph 163 and 164. See also *Anic* (n227), paragraph 123; *Apex Asphalt* (n228), paragraph 206(xii); and *Makers* (n228), paragraph 103(xii). See further paragraphs 263 to 265 of this Decision.

²⁷⁰ Joined Cases 56 and 58-64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] ECR 299 ('*Consten and Grundig*'), page 342. Applied in Case C-277/87 *Sandoz prodotti farmaceutici SpA v Commission of the European Communities* [1990] ECR I-45; Case C-219/95P *Ferriere Nord SpA v Commission of the European Communities* [1997] ECR I-4411, paragraphs 14 and 15; *Anic* (n227), paragraph 99; *Cimenteries* (n245), paragraph 837; Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] ECR I-8637 ('*BIDS and Barry Brothers*'), paragraph 16; and *T-Mobile Netherlands* (n230), paragraph 29.

²⁷¹ *Consten and Grundig* (n270), page 343; *Anic* (n227), paragraph 123; *Cimenteries* (n245), paragraphs 1531 and 2589; *Tate & Lyle* (n257), paragraphs 71 to 74; *BIDS and Barry Brothers* (n270), paragraphs 31 to 34; and *T-Mobile Netherlands* (n230), paragraph 30.

practice has an anti-competitive effect where it is found to have as its object the prevention, restriction or distortion of competition.²⁷²

249. In light of the OFT's findings (in paragraphs 322 to 325 below) that the agreement and/or concerted practice described in this Decision had as its object the prevention, restriction or distortion of competition, the OFT sets out in paragraphs 250 to 252 below details of the law on anti-competitive object, but not effect.

ii. The law on anti-competitive object

250. The distinction between '*infringements by object*' and '*infringements by effect*' arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.²⁷³

251. The 'object' of an agreement and/or concerted practice is not assessed by reference to the parties' subjective intentions when they enter into it, but rather is determined by an objective analysis of its aims.²⁷⁴

252. Where the obvious consequence of an agreement or concerted practice is to prevent, restrict or distort competition, that will be its object for the purpose of the Chapter I prohibition and Article 101, even if the agreement or concerted practice had other objectives as well.²⁷⁵

iii. The law on price fixing and the sharing of pricing information

253. The Chapter I prohibition and Article 101 both apply, in particular, to agreements or concerted practices which '*directly or indirectly fix purchase or selling prices*'.²⁷⁶ Thus, for example, informal concertation on price will infringe both the Chapter I prohibition and Article 101, including where this relates to a component of the price, such as a bank's margin on a loan facility. The OFT considers that agreements and concerted practices which fix prices have as their obvious object the prevention, restriction or distortion of competition.²⁷⁷

254. Competition may also be restricted or distorted where the agreement or concerted practice involves the sharing amongst competitors of pricing or other information of commercial or strategic significance. Where

²⁷² *Argos/Littlewoods (Liability)* (n230), paragraph 357.

²⁷³ *BIDS and Barry Brothers* (n270), paragraph 17; and *T-Mobile Netherlands* (n230), paragraph 29.

²⁷⁴ Joined Cases 29 and 30/83 *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission of the European Communities* [1984] ECR 1679, paragraphs 25 and 26.

²⁷⁵ For example, Joined Cases 96/82 etc *NV IAZ International Belgium and Others v Commission of the European Communities* [1983] ECR 3369, paragraphs 22 to 25.

²⁷⁶ Section 2(2)(a) of the Act and TFEU, Article 101(1)(a).

²⁷⁷ Agreements and Concerted Practices Guidance (n239), paragraphs 3.4 to 3.8. For example, Case 123/83 *Bureau national interprofessionnel du cognac v Guy Clair* [1985] ECR 391, paragraph 22; and Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC* [1988] ECR 1919, paragraph 15. See also Case T-14/89 *Montedipe SpA v Commission of the European Communities* [1992] ECR II-1155, paragraphs 246 and 265; and Case T-148/89 *Tréfilunion SA v Commission of the European Communities* [1995] ECR II-1063, paragraphs 101 and 109.

competitors share information which they would otherwise keep secret as confidential business information, this is likely to increase transparency in the market about the undertakings' competitive behaviour and thereby substitute practical co-operation for the risks of competition.²⁷⁸

255. The sharing of pricing information is particularly sensitive from a competition law perspective. Indeed, the mere disclosure of such information to competitors will almost certainly be anti-competitive where it is capable of influencing their future conduct on the market, as will its receipt. Such disclosure eliminates uncertainty and replaces '*the risks of competition and the hazards of competitors' spontaneous reactions by cooperation*'.²⁷⁹ The Commission has explicitly stated that '*[i]t is contrary to the provisions of Article [101(1)] of the [TFEU] for a producer to communicate to his competitors the essential elements of his price policy*'.²⁸⁰

256. Indeed, the General Court has stated that:

'[i]t is true that the concept of concerted practice does in fact imply the existence of reciprocal contacts. However, that condition is met where the disclosure by one competitor to another of its future intentions or conduct on the market is requested or, at the very least, accepted by the latter'.²⁸¹

257. The threat to effective competition is especially obvious where an arrangement involves the repeated sharing of information between competitors as to future pricing intentions. The sharing of such information reduces uncertainties inherent in the competitive process and facilitates the co-ordination of the parties' conduct on the market.²⁸² Such sharing of information risks facilitating parallel price increases and/or delaying price decreases, whilst at the same time reducing, or even eliminating, the risk of losing customers to more efficient competitors that might not otherwise have increased their prices and/or might have reduced prices sooner.²⁸³

²⁷⁸ For example, *Hercules (CFI)* (n227), paragraphs 217, 259 and 260; Case T-29/92 *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and Others v Commission of the European Communities* [1995] ECR II-289, paragraphs 121 and 123; and République Française Conseil de la concurrence Décision n° 05-D-64 de 25 Novembre 2005 *relative à des pratiques mises en œuvre sur le marché des palaces parisiens* (the '*Parisian Luxury Hotels case*'), paragraphs 200 to 236.

²⁷⁹ *Dyestuffs* (n246), paragraph 119.

²⁸⁰ *Agreements between manufacturers of glass containers* (Case IV/400) Commission Decision 74/292/EEC [1974] OJ L160/1, paragraph 43.

²⁸¹ Case T-53/03 *BPB plc v Commission of the European Communities* [2008] ECR II-1333 ('*BPB*'), paragraph 153.

²⁸² See OFT Guidance 408, *Trade associations, professions and self-regulating bodies* (December 2004) (the '*Trade Associations Guidance*'), paragraph 3.10. See also *Thyssen Stahl* (n254), paragraph 81.

²⁸³ For example, *Price-fixing system for the sale of rolled steel products ex stock by stock holders on the German market*, Commission Decision 80/257/ECSC [1980] OJ L62/28, paragraphs 34 and 35; and cited in *Trade Associations Guidance* (n282), paragraph 3.10.

258. Similarly, the frequent sharing of commercially sensitive information is capable of artificially increasing transparency in the market and enabling operators to monitor their immediate competitors' commercial policy and anticipate their reaction to market events.²⁸⁴
259. The OFT therefore considers that the sharing of future confidential and commercially sensitive pricing information has as its obvious object the prevention, restriction or distortion of competition. In order to establish an object infringement of the Chapter I prohibition in such circumstances, it is not necessary for the OFT to demonstrate that the disclosure or exchange had the effect of preventing, restricting or distorting competition.

G. Single continuous infringement

260. Where two or more undertakings engage in a series of anti-competitive actions in pursuit of a common objective or objectives, it is not necessary to divide the conduct by treating it as consisting a number of separate infringements where there is sufficient consensus to adhere to a plan limiting the commercial freedom of the parties.²⁸⁵ Nor is the characterisation of a complex cartel as a single and continuous infringement affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute infringements.²⁸⁶
261. Agreements and/or concerted practices may also constitute a single continuous infringement notwithstanding that they vary in intensity and effectiveness, or even if the arrangement in question is suspended during a short period.²⁸⁷
262. The parties may show varying degrees of commitment to the common plan and there may well be internal conflict. The mere fact that a party does not abide fully by an agreement or concerted practice which is manifestly anti-competitive does not relieve that party of responsibility for it.²⁸⁸ Equally, the fact that a party may come to recognise that in practice it can 'cheat' on the agreement or concerted practice at certain times does not preclude a finding that there was a continuing single overall infringement.²⁸⁹

²⁸⁴ *BPB* (n281), paragraphs 309 to 311; and the *Parisian Luxury Hotels* case (n278), paragraphs 232 to 234 (upheld on appeal in République Française Cour d'appel de Paris, 1ère Chambre - Section H, 26 September 2006, n° RG 2005/24285, pages 8 and 9).

²⁸⁵ *Rhône-Poulenc* (n258), paragraph 126.

²⁸⁶ *Organic peroxides* (Case COMP/E-2/37.857) Commission Decision 2005/349/EC [2005] OJ L110/44, paragraphs 7 and 8.

²⁸⁷ Case T-23/99 *LR AF 1998 A/S, formerly Løgstør Rør A/S v Commission of the European Communities* [2002] ECR II-1705, paragraphs 106 to 109.

²⁸⁸ For example, *Tréfileurope Sales* (n263), paragraphs 60 and 85.

²⁸⁹ Case 246/86 *SC Belasco and Others v Commission of the European Communities* [1989] ECR 2117, paragraphs 10 to 16.

H. Appreciable effect on competition

263. An agreement will fall outside the Chapter I prohibition and Article 101 if its impact on competition is not appreciable. As the ECJ held in *Völk*:

'an agreement falls outside the prohibition in Article [101] when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question'.²⁹⁰

264. The OFT takes the view that an agreement and/or concerted practice will generally have no appreciable effect on competition if the aggregate market share of the parties to the agreement or concerted practice does not exceed ten per cent of the relevant market affected by the agreement where the agreement is made between competing undertakings (i.e. undertakings which are actual or potential competitors on any of the markets concerned). This reflects the Commission's practice as set out in its Notice on Agreements of Minor Importance.²⁹¹

265. However, there will be circumstances where this is not the case. In particular, this approach will not apply to any agreement and/or concerted practice which has as its object the direct or indirect fixing or coordination of prices or the sharing of markets. The OFT will generally regard such agreements and/or concerted practices as being capable of having an appreciable effect even where the parties' combined market share falls below the ten per cent threshold. Again, this reflects the practice of the Commission.²⁹²

I. Effect on trade

266. It is necessary for the purposes of the Chapter I prohibition that the agreement and/or concerted practice may affect trade '*within the United Kingdom*'. Likewise, it is necessary for the purposes of Article 101 that the agreement and/or concerted practice may affect trade '*between Member States*'. In this Part, the OFT addresses the legal principles underlying these requirements in turn.

i. Effect on trade within the United Kingdom

267. By virtue of section 2(1)(a) of the Act, the Chapter I prohibition applies only to agreements or concerted practices which '*may affect trade within the United Kingdom*'.

268. For the purposes of the Chapter I prohibition, the UK includes any part of the UK where an agreement and/or concerted practice operates or is intended to operate.²⁹³

²⁹⁰ Case 5-69 *Franz Völk v S.P.R.L. Ets J. Vervaecke* [1969] ECR 295 ('*Völk*'), paragraphs 5/7.

²⁹¹ Commission Notice (EC) on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) [2001] OJ C368/13 (the 'Notice on Agreements of Minor Importance'), paragraph 7(a).

²⁹² Notice on Agreements of Minor Importance (n291), paragraph 11.

²⁹³ n1.

269. By their very nature, agreements and concerted practices to fix prices and/or share markets restrict competition and are likely to affect trade. It should be noted that, in order to infringe the Chapter I prohibition, an agreement and/or concerted practice does not actually have to affect trade as long as it is capable of affecting trade. Moreover, the test is not read as importing a requirement that the effect on trade should be appreciable.²⁹⁴

ii. Effect on trade between Member States

270. As noted above, Article 101 of the TFEU prohibits only those agreements and/or concerted practices which *'may affect trade between Member States'*.

271. According to the settled case law of the ECJ, in order for an agreement or concerted practice to satisfy the *'effect on trade'* criterion,

'it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States'.²⁹⁵

272. In this context, the concept of *'trade'* has a wide scope and is not limited to exchanges of goods and services across borders.²⁹⁶ The *'pattern of trade'* will be affected, for example, by an agreement fixing price levels between the major suppliers of a service and thereby *'deflecting demand'* for that service amongst the undertakings involved and other undertakings.²⁹⁷ Furthermore, trade between Member States may be affected notwithstanding that the relevant market may be national or sub-national in scope.²⁹⁸

273. The ECJ has held that a cartel extending over the whole of a territory of a Member State has, by its very nature, the effect of reinforcing markets on a national basis, thus impeding the economic penetration which the EC Treaty is designed to bring about. In those circumstances, there exists a presumption that trade between Member States is affected, which presumption can only be rebutted if an

²⁹⁴ *Aberdeen Journals Limited v The Office of Fair Trading* [2003] CAT 11 (*'Aberdeen Journals'*), paragraphs 459 and 460.

²⁹⁵ Case 56-65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* [1966] ECR 235, page 249. See also *van Landewyck* (n241), paragraph 170; Case 126/80 *Maria Salonia v Giorgio Poidomani and Franca Baglieri, née Giglio* [1981] ECR 1563, paragraph 12; Case 42/84 *Remia BV and Others v Commission of the European Communities* [1985] ECR 2545 (*'Remia'*), paragraph 22; and Commission Notice (EC) Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C101/81 (the *'Effect on Trade Notice'*), paragraph 24.

²⁹⁶ *Züchner* (n250), paragraph 18; and *Effect on Trade Notice* (n295), paragraph 19.

²⁹⁷ *Greek Ferries* (Case IV/34466) Commission Decision 1999/271/EC [1999] OJ L109/24, paragraph 143; endorsed on appeal in Case T-61/99 *Adriatica di Navigazione SpA v Commission of the European Communities* [2003] ECR II-5349, paragraphs 28 and 29. See also *Ferry operators – Currency surcharges* (Case IV/34.503) Commission Decision 97/84/EC [1997] OJ L26/23, paragraph 61.

²⁹⁸ *Effect on Trade Notice* (n295), paragraph 22.

analysis of the characteristics of an agreement and its economic context demonstrates the contrary.²⁹⁹

274. In *Raiffeisen Zentralbank*,³⁰⁰ the General Court held that a banking cartel in Austria had an effect on trade between Member States. The General Court held that the effect of anti-competitive behaviour on intra-Community trade was the result of a combination of several factors and was likely to arise where trade patterns were diverted from their ordinary course.³⁰¹ Further, it was sufficient for there to be the potential for trade to be affected, as opposed to there being an actual effect on trade.³⁰² Its decision was upheld by the ECJ.³⁰³
275. The agreement or concerted practice must affect trade between Member States to an appreciable extent.³⁰⁴ This is a jurisdictional requirement demarcating the boundary between EC competition law and national competition law.³⁰⁵ Appreciability can be assessed by reference to the market position and importance of the undertakings concerned, and it will be absent where the effect on the market is insignificant because of the undertakings' weak position on the market.³⁰⁶

J. Burden and standard of proof

i. Burden of proof

276. The burden of proving an infringement of the Chapter I prohibition lies upon the OFT. The CAT held in *Napp* that:

²⁹⁹ See Case C-309/99 *JCJ Wouters, JW Savelbergh, Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577 ('*Wouters*'), paragraph 95, where the ECJ expressly upheld prior case law (citing Case 8/72 *Vereeniging van Cementhandelaren v Commission of the European Communities* [1972] ECR 977 ('*Cement Dealers' Association*'), paragraph 29; *Remia* (n295), paragraph 22; and Case C-35/96 *Commission of the European Communities v Italian Republic* [1998] ECR I-3851, paragraph 48); and Effect on Trade Notice (n295), paragraphs 78 and 79. See also Joined Cases C-125/07P etc *Erste Group Bank AG, formerly Erste Bank der österreichischen Sparkassen AG ('Erste Group Bank'), and Others v Commission of the European Communities* [2009] ECR I-8681, paragraphs 38 and 39.

³⁰⁰ Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich AG and Others v Commission of the European Communities* [2006] ECR II-5169 ('*Raiffeisen Zentralbank*').

³⁰¹ *Raiffeisen Zentralbank* (n300), paragraphs 163 and 164.

³⁰² *Raiffeisen Zentralbank* (n300), paragraph 166.

³⁰³ *Erste Group Bank* (n299), paragraphs 66 to 70.

³⁰⁴ *Völk* (n290), paragraphs 5/7; and Case 22-71 *Béguelin Import Co v S.A.G.L. Import Export* [1971] ECR 949, paragraph 16.

³⁰⁵ Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission of the European Communities* [1979] ECR 1869, paragraph 17. See also *Aberdeen Journals* (n294), paragraph 459; and Effect on Trade Notice (n295), paragraph 44.

³⁰⁶ *Völk* (n290), paragraphs 5/7; Case 99/79 *SA Lancôme and Cosparfrance Nederland BV v Etos BV and Albert Supermart BV* [1980] ECR 2511, paragraph 24; Case T-77/92 *Parker Pen Ltd v Commission of the European Communities* [1944] ECR II-549, paragraph 40; and Effect on Trade Notice (n295), paragraph 44.

'[a]s regards the burden of proof, the Director³⁰⁷ accepts that it is incumbent upon him to establish the infringement, and that the persuasive burden of proof remains on him throughout. However, that does not necessarily prevent the operation of certain evidential presumptions[.] ... In our view it follows from Article 6(2) [of the European Convention on Human Rights] that the burden of proof rests throughout on the Director to prove the infringements alleged'.³⁰⁸

277. However, this burden does not preclude the OFT from relying, where appropriate, on evidential presumptions. In *Napp* the CAT went on to say:

'[t]hat approach does not in our view preclude the Director, in discharging the burden of proof, from relying, in certain circumstances, from [sic] inferences or presumptions that would, in the absence of any countervailing indications, normally flow from a given set of facts, for example ... that an undertaking's presence at a meeting with a manifestly anti-competitive purpose implies, in the absence of explanation, participation in the cartel alleged'.³⁰⁹

ii. Standard of proof

278. The applicable standard of proof is the normal civil standard. As confirmed by Lord Hoffman in *Re B*, *'there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not'*.³¹⁰

279. The OFT is therefore required to demonstrate that an infringement has occurred on the balance of probabilities.

280. Previous decisions of the CAT have found that the weight of evidence required to satisfy this standard will depend on the seriousness of the alleged infringement and that strong and compelling evidence is needed to prove an infringement; parties are entitled to a presumption of innocence.³¹¹

281. These statements must now be read in the light of recent decisions of the House of Lords, in other contexts but of general application, in *Re B* and *Re D (Northern Ireland)*.³¹² In *Re B*, the House of Lords rejected the idea that the seriousness of the allegation necessarily renders the

³⁰⁷ References to the 'Director' are to the Director General of Fair Trading. From 1 April 2003, s.2(1) of the Enterprise Act 2002 transferred the functions of the Director General of Fair Trading to the OFT.

³⁰⁸ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading*, [2002] CAT 1 ('*Napp*'), paragraphs 95 and 100. The CAT has confirmed this approach in *JJB/Allsports* (n230), paragraph 164.

³⁰⁹ *Napp* (n308), paragraph 110.

³¹⁰ *Re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2008] UKHL 35, [2009] 1 AC 11 ('*Re B*'), paragraph 13. See also *Re D (Secretary of State for Northern Ireland intervening)* [2008] UKHL 33, [2008] 1 WLR 1499 ('*Re D (Northern Ireland)*'), paragraph 28.

³¹¹ *JJB/Allsports* (n230), paragraph 199.

³¹² n310.

allegation less probable. Accordingly, there should be no general presumption that serious conduct has not occurred. Rather, regard should be had to any surrounding circumstances which might increase, or decrease, the probability that an infringement of the Act occurred.³¹³

282. In *Re D (Northern Ireland)*, Lord Carswell said that serious allegations may call for '*heightened examination*' but went on to say:

'[t]hese are all matters of ordinary experience, requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established'.³¹⁴

283. The CAT gave specific guidance in relation to establishing concertation in price-fixing cases in its judgment in *JJB/Allsports* where it noted that:

'[a]s regards price fixing cases under the Chapter I prohibition, the Tribunal pointed out in Claymore Dairies³¹⁵ that cartels are by their nature hidden and secret; little or nothing may be committed to writing. In our view even a single item of evidence, or wholly circumstantial evidence, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard: see Claymore Dairies at [3] to [10].³¹⁶ ... As the Court of Justice said in Cases 204/00P etc. Aalborg Portland v Commission ... at paragraphs 55 to 57:

55. Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum.

56. Even if the Commission discovers evidence explicitly showing unlawful conduct between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction.

57. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another

³¹³ *Re B* (n310), paragraphs 14 and 72.

³¹⁴ *Re D (Northern Ireland)* (n310), paragraph 28.

³¹⁵ *Claymore Dairies Ltd and Express Dairies plc v The Office of Fair Trading* [2003] CAT 18 ('*Claymore Dairies*').

³¹⁶ See also *Cimenteries* (n245), paragraphs 1838 and 1839.

plausible explanation, constitute evidence of an infringement of the competition rules'.³¹⁷

284. The CAT in *Claymore Dairies* also made the following observations on, among other things, the use of witness evidence:

'[i]n Chapter I cases, however, in the light of the factors we have already identified, we think it important to underline that the Napp standard should not be interpreted in a way that leads to the absence of prosecution of Chapter I infringements that ought to be prosecuted. In our view, there is no rule of law that, in order to establish a Chapter I infringement, the OFT has to rely on written or documentary evidence. The oral evidence of a credible witness, if believed, may in itself be sufficient to prove an infringement, depending on the circumstances of a particular case. Of course, if the OFT is relying primarily on a witness rather than on documents, it will no doubt look for support in the surrounding circumstances, for example, the dates and timing of price increases. It will no doubt ask itself whether there is reason to believe that the witness may be untruthful or mistaken but, as at present advised, we do not think there is any technical rule that precludes the OFT from accepting an oral statement of a witness at face value if it thinks it right to do so'.³¹⁸

³¹⁷ *JJB Sports/Allsports* (n230), paragraph 206. See also Joined Cases T-44/02OP etc *Dresdner Bank AG and Others v Commission of the European Communities* [2006] ECR II-3567, paragraphs 64 and 65.

³¹⁸ *Claymore Dairies* (n315), paragraph 8.

SECTION V – LEGAL ASSESSMENT

A. Introduction

285. The OFT sets out in Section V its conclusions concerning the legal assessment of the conduct of the Parties described in Section III above.

B. Undertakings

286. RBS and Barclays are both clearly engaged in economic activity, and therefore constitute undertakings for the purposes of the Chapter I prohibition and Article 101.

C. Agreement and/or concerted practice

287. On the basis of the facts and evidence set out in Sections II and III above, the OFT concludes that the Parties entered into an agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of loan products to Large Professional Services Firms.

288. The agreement and/or concerted practice relates to the provision of confidential, commercially sensitive pricing information, by RBS to Barclays, during the course of a number of contacts over a period of months.

i. Concerted practice

289. At the very least, the OFT has found evidence of a concerted practice between RBS and Barclays.

(a) Generic contacts

290. Between October 2007 and at least February or March 2008, members of RBS's PPC team shared confidential, commercially sensitive pricing information in respect of loan products to Large Professional Services Firms with their counterparts at Barclays. This information related to their general pricing for loan products.³¹⁹

291. The OFT notes that the information-sharing was carried out deliberately over a period of months and is supported by a consistent body of witness and contemporaneous evidence from the Parties.

292. The OFT also notes that, although Barclays' internal pricing procedures include the use of financial modelling to calculate a range within which to price a loan facility, the deal team and, in particular, the Relationship Director retain an element of discretion as to where to price within that range. Further the system has an element of flexibility which allows pricing outside of the calculated range under certain circumstances and

³¹⁹ See paragraphs 130 to 166 of this Decision.

the Relationship Directors exert a degree of influence in the bank reaching such a decision.³²⁰

293. The information shared, although sometimes limited, was sufficient to highlight to Barclays that there was less downward pressure on its prices than Barclays might otherwise have expected.³²¹
294. The evidence indicates that the contacts were not considered by Barclays to be commonplace.³²² In addition, the information provided by RBS was regarded by those who received it as information of interest and value.³²³ For example, it was considered sufficiently important to be disseminated within Barclays, both to the PLB team and higher up.³²⁴
295. In this regard, the OFT notes the following evidence in particular:
- an email from [Barclays RD A] sent on 11 October 2007.³²⁵ The OFT notes the terms in which the information contained in that email (i.e. information provided by [RBS Head of Team] on 10 October 2007) was disseminated within Barclays, and the view of Barclays' personnel as regards the receipt and usefulness of such information;³²⁶
 - an email of 9 January 2008, which shows that Barclays remained interested in receiving information through contacts with RBS;³²⁷ and
 - internal correspondence at Barclays, which suggests that information received from RBS in February 2008 was useful.³²⁸
296. According to the applicable case law,³²⁹ the OFT is entitled to presume that information received from RBS was taken into account by Barclays when pricing future deals. Having regard to the evidence, and this presumption of conduct, the OFT finds that the information provided by RBS was taken into account generally by Barclays when formulating its subsequent pricing.
297. In addition, the OFT considers that RBS could also reasonably have expected the information to be taken into account by Barclays. The information provided by RBS was accepted by Barclays which – until

³²⁰ See paragraphs 112 to 126 of this Decision.

³²¹ For example, see paragraphs 132 to 140, 143, 146, 148 to 153, 156 and 159 to 165 of this Decision.

³²² For example, see paragraph 141 of this Decision.

³²³ See paragraphs 142, 161, 164 and 165 of this Decision.

³²⁴ For example, see paragraphs 143, 153, 154 and 162 to 164 of this Decision.

³²⁵ See paragraph 135 of this Decision.

³²⁶ See paragraphs 140 to 144 of this Decision.

³²⁷ See paragraph 150 of this Decision.

³²⁸ See paragraphs 163 to 165 of this Decision.

³²⁹ See paragraphs 237, 238, 243 and 244 of this Decision.

the matter was reported to the OFT – did not seek to distance itself from the practice.³³⁰

(b) Specific contacts

298. The OFT's conclusions regarding the existence of a concerted practice in relation to the generic contacts are further supported by evidence of the provision by RBS to Barclays of confidential, commercially sensitive customer-specific pricing information. This information related to pricing for loan products for Savills and Knight Frank.³³¹

Savills

299. RBS made direct contact with Barclays in order to initiate communications in relation to the pricing of a proposed facility for Savills.³³² The OFT concludes from this that RBS sought to influence Barclays' pricing through this contact in order to reduce price competition against it.³³³
300. By way of background to this specific contact, the OFT notes that both the customer and its agent intended the process for choosing a bank to provide the facility to be competitive. Not only were confidentiality agreements signed by both RBS and Barclays, but also all parties recognised explicitly that any discussion on pricing in the early stages of the transaction would be inappropriate.³³⁴
301. The evidence set out in paragraphs 171 to 177 above demonstrates that the information provided by [RBS RD A] was accepted by Barclays and considered to be useful and of interest. The information was, for example, disseminated within Barclays.³³⁵
302. According to the applicable case law,³³⁶ the OFT is entitled to presume that this information was taken into account by Barclays when pricing the Savills proposed £ [...] million facility.
303. Any pricing considered or submitted by Barclays in relation to that facility subsequent to the receipt of the information from RBS was arrived at in the knowledge of RBS's proposed pricing and not independently. The OFT notes in particular that the information was presented at the committee meeting at which Barclays' price was affirmed,³³⁷ and the evidence indicates that personnel in Barclays were reassured by the information received from RBS.³³⁸

³³⁰ See paragraphs 237 to 240 of this Decision.

³³¹ See paragraphs 168 to 203 of this Decision.

³³² See paragraphs 168 to 182 of this Decision.

³³³ See paragraphs 228 to 232 of this Decision.

³³⁴ For example, see paragraphs 169, 170 and 172 of this Decision.

³³⁵ See paragraph 174 of this Decision.

³³⁶ n329.

³³⁷ See paragraph 174 of this Decision.

³³⁸ See paragraph 176 of this Decision.

304. Having regard to the evidence and the above presumption, the OFT finds that, notwithstanding that the £[...] million facility was provided ultimately on a bilateral basis, the information was taken into account by Barclays when pricing the proposed £[...] million loan facility. The OFT also considers that RBS could reasonably have expected the information to be taken into account by Barclays.

Knight Frank

305. Further customer-specific direct contacts took place between RBS and Barclays with regard to a loan facility to be provided to Knight Frank.³³⁹

306. The OFT notes that discussions between [RBS RD A] and [Barclays RD D] took place at a time when RBS's and Barclays' prices were still subject to potential change;³⁴⁰ indeed, the OFT notes that RBS's price did in fact change following the discussions.³⁴¹ The OFT considers that the pricing information received by Barclays from RBS would have been of significant practical value to it, and notes that the information provided by [RBS RD A] was disseminated within Barclays.³⁴²

307. Although the source of the information is not clear, the OFT also notes that further specific Barclays' pricing information was disseminated within RBS and presented at the RBS Credit Committee meeting,³⁴³ demonstrating that such information is useful and interesting.

308. According to the applicable case law,³⁴⁴ the OFT is entitled to presume that the information received from RBS was taken into account by Barclays when pricing future deals. The OFT also considers that RBS could reasonably have expected the information to be taken into account by Barclays.

309. The OFT considers that the available evidence is insufficient to conclude that [Barclays RD D] informed [RBS RD A] of Barclays' pricing for the Knight Frank deal in their discussions in late February 2008. This does not affect the OFT's overall finding of an infringement.

(c) Conclusion as regards the existence of a concerted practice

310. Thus the OFT concludes that between October 2007 and at least February or March 2008, members of RBS's PPC team shared confidential, commercially sensitive pricing information in respect of loan products to Large Professional Services Firms with their counterparts at Barclays. This information related to their general pricing for loan products and to at least two specified proposed loans, namely those to Savills and to Knight Frank.

³³⁹ See paragraphs 183 to 203 of this Decision.

³⁴⁰ See paragraph 194 of this Decision.

³⁴¹ See paragraph 203 of this Decision.

³⁴² See paragraphs 191 to 193 of this Decision.

³⁴³ See paragraph 202 of this Decision.

³⁴⁴ n329.

311. The OFT concludes that these contacts amount to a concerted practice for the purposes of the Chapter I prohibition and/or Article 101.
312. The information was disseminated within Barclays and was of practical value. On the basis of the legal presumption³⁴⁵ and the evidence available, the OFT considers that both the generic and customer-specific information was taken into account by Barclays when formulating its pricing. It is, moreover, clear that Barclays did not express any reservations or objections to RBS in relation to the latter's conduct, until the conduct was reported to the OFT.
313. The evidence demonstrates that the contacts between the Parties reduced uncertainty as to their intended conduct on the market and substituted practical co-operation for the risks of competition.³⁴⁶

ii. Agreement

314. It is not necessary, for the purposes of finding an infringement, to characterise conduct exclusively as an agreement or concerted practice.³⁴⁷ Nothing turns on the precise form taken by each of the elements comprising the overall agreement and/or concerted practice.
315. Nevertheless, the OFT notes that the Parties' conduct may also have given rise to an anti-competitive agreement, to the extent that it gave rise to a concurrence of wills as regards the provision of information and a shared understanding and/or expectation between the Parties that RBS would provide Barclays with certain types of information.³⁴⁸
316. Between October 2007 and at least February or March 2008, members of RBS's PPC team shared confidential, commercially sensitive pricing information in respect of loan products to Large Professional Services Firms with their counterparts at Barclays. This information related to their general pricing for loan products and to at least two specified proposed loans, namely those to Savills and to Knight Frank.
317. It is arguable that, over a period of months, there evolved a shared understanding that RBS would provide Barclays with certain types of pricing information. Barclays did not distance itself from this practice and this, in turn, would have led RBS to believe that the practice was accepted and acceptable to Barclays.³⁴⁹ The evidence suggests that Barclays expected to receive useful pricing information as a result of these contacts, and it is notable that this information was disseminated within Barclays. Thus, having regard to the evidence³⁵⁰ and the legal

³⁴⁵ Ibid.

³⁴⁶ See paragraph 228 of this Decision.

³⁴⁷ See paragraphs 219 to 222 of this Decision.

³⁴⁸ See paragraphs 224 and 225 of this Decision.

³⁴⁹ See paragraph 226 of this Decision.

³⁵⁰ For example, see paragraphs 135, 139, 140, 142, 143, 150, 153, 154, 161 to 165, 174, 176 and 191 to 194 of this Decision.

presumption of conduct,³⁵¹ the OFT finds that the information received from RBS was taken into account by Barclays.

318. Thus, the evidence would suggest that the Parties' conduct may have gone so far as to give rise to a common plan that limited, or was likely to limit, their individual commercial freedom, resulting in a shared understanding that any information provided by RBS would be accepted by Barclays and taken into account by Barclays.³⁵²

319. However, the OFT does not need to find an agreement in circumstances where a concerted practice has been established; nor does the OFT need to reach a firm conclusion as to whether the conduct amounted to an agreement, as opposed to a concerted practice.

320. The OFT has not, therefore, reached a firm view as to whether or not the conduct amounts to an agreement, as opposed to a concerted practice.

iii. Conclusion

321. The OFT concludes that the Parties engaged in an agreement and/or concerted practice within the meaning of the Chapter I prohibition and/or Article 101.

D. Anti-competitive object

322. The OFT considers that the sharing between competitors of information regarding confidential future pricing intentions of itself constitutes an obvious restriction of competition and, thus, also has as its object the prevention, restriction or distortion of competition.³⁵³ The OFT considers that this amounts to a serious infringement of the Chapter I prohibition and/or Article 101.

323. The agreement and/or concerted practice in this case took the form of the provision of confidential, commercially sensitive pricing information, by RBS to Barclays, during the course of a number of contacts over a period of months. The information provided related to RBS's general pricing for loan products to Large Professional Services Firms and to at least two customer-specific proposed loans, namely those to Savills and to Knight Frank. The information was useful and of practical value to Barclays and at least sufficient to highlight to Barclays that there would be less downward pressure on its prices than Barclays might otherwise have expected. As such, the provision by RBS to Barclays of this information can be regarded, by its very nature, as being injurious to the proper functioning of normal competition.

324. Moreover, the background to these contacts (for example, the implementation of the Basel II accord in the UK and the resulting

³⁵¹ n329.

³⁵² See paragraph 225 of this Decision.

³⁵³ See paragraphs 253 to 259 of this Decision.

pressure on pricing and margin) clearly suggests that the purpose of these disclosures was to influence Barclays' pricing.³⁵⁴

325. It follows that, for the purposes of establishing an infringement of the Chapter I prohibition and/or Article 101 in the present case, there is no need for the OFT also to show that the agreement and/or concerted practice had an anti-competitive effect.

E. Single continuous infringement

326. The OFT considers that the conduct of the Parties constitutes a number of anti-competitive contacts in pursuit of a common objective, namely to facilitate the co-ordination of the Parties' respective pricing on loans supplied to Large Professional Services Firms. This occurred through the provision of confidential, commercially sensitive pricing information, by RBS to Barclays, during the course of a number of contacts over the period between October 2007 and at least February or March 2008.

327. The OFT therefore considers that the Parties participated in a single continuous infringement lasting from October 2007 to at least February or March 2008. The OFT notes that the information-sharing throughout this period was carried out deliberately on a number of occasions, and is supported by a consistent body of witness and contemporaneous evidence from the Parties and their customers.

328. As set out in paragraph 313 above, the OFT considers that these contacts between the Parties reduced uncertainty as to their intended conduct on the market and substituted practical co-operation for the risks of competition.

F. Effect on trade

329. The OFT considers that, by its very nature, an agreement or concerted practice between competitors to share confidential, commercially sensitive pricing information with the object of facilitating the co-ordination of prices is likely to affect trade within the UK.³⁵⁵

330. The agreement and/or concerted practice referred to in this Decision operated in the UK and was at the very least capable of altering the structure of competition within the UK by reducing competition in the supply of loans to Large Professional Services Firms and, thus, altering the pattern of trade within the UK.

331. The OFT therefore considers that the requirement, within the meaning of the Chapter I prohibition, that an agreement and/or concerted practice may have an effect on trade within the UK is satisfied in this case.

³⁵⁴ See, for example, paragraphs 127, 132 to 135, 146, 151 to 153 and 163 of this Decision.

³⁵⁵ See paragraph 269 of this Decision.

332. The OFT also considers that the Parties' conduct was, by its nature, capable of affecting trade between Member States within the meaning of Article 101 and in accordance with the Commission's Effect on Trade Notice.³⁵⁶
333. In its response to the Statement of Objections, RBS argues that this case falls within the parameters of the reasoning in *Bagnasco*³⁵⁷ and, therefore, outside the jurisdiction of EU competition law.
334. As noted in paragraph 273 above, it has been held that agreements extending over the whole territory of a Member State by their very nature have the effect of reinforcing the partitioning of markets on a national basis by hindering the economic penetration which the TFEU is designed to bring about. This remains the position following *Bagnasco*.
335. RBS contrasts *Raiffeisen Zentralbank*,³⁵⁸ which involved a cartel amongst almost all Austrian banks in which prices and other competitive terms were fixed across a wide range of banking products and services, and the present case, which is said to involve a '*specific banking operation*' like *Bagnasco* (customer guarantees). RBS also argues that the present case involves only two banks, rather than all banks or a majority of banks in the sector.
336. The OFT considers that there are important differences between this case and *Bagnasco* and important similarities with *Raiffeisen Zentralbank*. In this case, the agreement or concerted practice related to pricing information in connection with the provision of a key service (that of lending). It also involved the two largest banks in the sector. The OFT does not therefore consider that the nature of the conduct in the present case can be equated with that in *Bagnasco*.
337. Moreover, even if activities take place in one Member State, they may still affect the pattern of trade or the structure of competition between that country and other Member States.³⁵⁹ The effect on inter-state trade can be direct or indirect, actual or potential.
338. As set out in paragraphs 22 to 23 above, the Parties' customers have international aspects to their businesses. Many have offices in other Member States or have clients who are based in other Member States.³⁶⁰ Debt finance is sometimes sought from banks by UK-based

³⁵⁶ n295.

³⁵⁷ Joined Cases C-215/96 and C-216/96 *Carlo Bagnasco and Others v Banca Popolare di Novara soc coop arl (BPN) and Cassa di Risparmio di Genova e Imperia SpA (Carige)* [1999] ECR I-135 ('*Bagnasco*'). It was held on the facts of the case that a practice restrictive of competition applied throughout the territory of a Member State was not liable to affect intra-Community trade.

³⁵⁸ n300.

³⁵⁹ For example, *Cement Dealers' Association* (n299), paragraphs 26 to 31; *UK Agricultural Tractor Registration Exchange* (Case IV/31.370 and 31.446) Commission Decision 92/157/EEC – [1992] OJ L68/19, paragraphs 57 and 58; and Effect on Trade Notice (n295), paragraphs 78 to 82.

³⁶⁰For example, [some of the customers of RBS and Barclays] all have offices and/or clients based in other Member States, including France, Germany, Italy, Belgium and Spain.

Large Professional Services Firms for use outside the UK.³⁶¹ Barclays has highlighted this in its response to the Statement of Objections (albeit in a different context).³⁶²

339. Where Large Professional Services Firms operate outside of the UK, distortions in their ability to raise finance may distort their ability to operate within other Member States and, hence, distort trade in their services. The product in question, namely loans to professional services firms, may affect the product/services sold by such firms, many of which have international aspects to their businesses.³⁶³
340. The OFT does not accept RBS's argument that it is crucial that the infringements in the present case did not involve participants in other Member States; the case of *Manfredi*³⁶⁴ cited by RBS does not support that proposition. Neither does the OFT consider that RBS's comparison of this case with *Construction*,³⁶⁵ where the markets in question were regional and not national, supports its arguments.
341. Any effect on trade must be appreciable; but where by its very nature the agreement or practice is capable of affecting trade between Member States, the appreciability threshold is lower than where this is not the case.³⁶⁶ In this instance, the OFT notes the Parties' strong position in the supply of loan products to Large Professional Services Firms (as supported by the information set out in paragraphs 19 to 21 above).³⁶⁷ Further, an effect on trade will be all the more appreciable where (as in this case) customers are generally international groups present in several Member States.³⁶⁸ Therefore, the OFT considers that the effect on trade will be appreciable in this case.
342. For these reasons, the OFT continues to consider that the Infringement may also have had an effect on trade between Member States.

³⁶¹ Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009, question 16 response (OFT Document Reference 0860, page 18); and Annex 8 of Barclays Response dated 22 May 2009 to the s.26 Notice of 24 April 2009 (OFT Document Reference 0869).

³⁶² See responses to the s.26 Notice of 27 August 2009 from [customers of RBS and Barclays] (OFT Document References 0954 and 0967 respectively).

³⁶³ In Case 123/83 *Bureau national interprofessionnel du cognac v Guy Clair* [1985] ECR 391, paragraph 29, the ECJ held that trade between Member States was capable of being affected in the case of an agreement involving the fixing of the price of spirits used in the production of cognac. The spirits in question were not exported and only spirits made from grapes grown in the Cognac region could be used in the production of cognac. But given that the product covered by the agreement was used in the production of a product that was traded between Member States, the agreement was capable of producing indirect effects on Member States.

³⁶⁴ Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-6619 ('*Manfredi*').

³⁶⁵ *Bid rigging in the construction industry in England* (Case CE/4327-04) Decision of the Office of Fair Trading CA98/02/2009 ('*Construction*').

³⁶⁶ Effect on Trade Notice (n295), paragraphs 29 and 45.

³⁶⁷ Effect on Trade Notice (n295), paragraph 44.

³⁶⁸ *Wouters* (n299), paragraph 96.

G. Appreciability

343. Given that the overall agreement and/or concerted practice between RBS and Barclays had as its object the co-ordination of prices, it is considered by the OFT to have had an appreciable effect on competition. This is the case irrespective of whether the combined market share of RBS and Barclays in the relevant market falls below ten per cent.
344. The Parties' strong position in the supply of loan products to Large Professional Services Firms and in the relevant and wider markets (as supported by the information set out in paragraphs 19 to 21 above), would, in any event, suggest a combined market share far in excess of ten per cent.

H. Duration of the infringements

345. The duration of infringements in cartel cases may be important in so far as it relates to the penalty that the OFT may decide to impose for the infringements in question.
346. The OFT considers that the agreement and/or concerted practice was entered into in October 2007 and was terminated, at the earliest, in February/March 2008.³⁶⁹ The duration of the Infringement was, therefore, at least five months.

I. Exclusion or exemption

347. The Parties have not sought to prove that the arrangements entered into by RBS and Barclays are exempted from the Chapter I prohibition by operation of section 9 of the Act, or from Article 101 by the operation of Article 101(3) of the TFEU. Notwithstanding that the burden of proving that the conditions for exemption under section 9 of the Act or Article 101(3) of the TFEU would rest with the Parties, the OFT considers it most unlikely that the conditions would be met in this case. In particular, it is hard, if not impossible, to see how the Parties' conduct could be said to have contributed to improving the production or distribution of goods, promoting technical or economic progress or how consumers could be said to have benefitted. In the circumstances, it is not necessary for the OFT to consider whether any of the remaining requirements for exemption under those provisions would have been met.
348. There is also no block exemption order under section 6 of the Act that would exempt the conduct of the Parties from the Chapter I prohibition. Nor is there any applicable EU Council or Commission Regulation by virtue of which the conduct of the Parties would be exempt from Article 101 and would benefit from a parallel exemption from the Chapter I prohibition under section 10 of the Act.

³⁶⁹ n4.

349. Finally, none of the exclusions from the Chapter I prohibition provided for by section 3 of the Act apply.

J. Conclusions on the application of the Chapter I prohibition and Article 101

350. On the basis of careful consideration of the evidence set out in Section III, the OFT concludes that the Parties infringed the Chapter I prohibition and/or Article 101 by participating between October 2007 and at least February or March 2008 in a single overall agreement and/or concerted practice which had as its object the prevention, restriction, or distortion of competition in relation to the supply of loan products to Large Professional Services Firms.

351. The Infringement took the form of the provision of confidential, commercially sensitive pricing information, by RBS to Barclays, during the course of a number of contacts over a period of months. The information provided was comprised of both generic and customer-specific information, in each case with the object of facilitating the co-ordination of the Parties' respective pricing on loans supplied to Large Professional Services Firms. By the contacts between them, the Parties substituted practical co-operation for the risks of competition.

SECTION VI – THE OFT’S ACTION

352. Section VI sets out the enforcement action which the OFT is taking and its reasons for taking that action.

A. The OFT's decision

353. The OFT finds, on the basis of the evidence set out in Section III above, that RBS and Barclays infringed the Chapter I prohibition and/or Article 101.

354. The OFT finds that the Parties infringed Article 101 and/or the Chapter I prohibition by participating between October 2007 and at least February or March 2008 in an agreement and/or concerted practice which had as its object the prevention, restriction, or distortion of competition in relation to the supply of loan products to Large Professional Services Firms. The Infringement took the form of the provision of confidential, commercially sensitive pricing information, by RBS to Barclays, during the course of a number of contacts over a period of months. The information provided was comprised of both generic and customer-specific information, in each case with the object of facilitating the co-ordination of the Parties’ respective pricing on loans supplied to Large Professional Services Firms. By the contacts between them, the Parties substituted practical co-operation for the risks of competition.

B. Directions

355. Section 32(1) of the Act provides that, if the OFT has made a decision that an agreement infringes the Chapter I prohibition or Article 101, it may give to such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end. As the OFT considers that the Infringement has already come to an end it is not issuing directions in this case.

C. Financial penalties

i. Introduction

356. Under section 36(1) of the Act the OFT may, on making a decision that an agreement or concerted practice has infringed the Chapter I prohibition or Article 101, require an undertaking which is a party to the agreement or concerted practice to pay the OFT a penalty in respect of the infringement. For the avoidance of doubt, the OFT notes that for the purposes of imposing a penalty on the Parties concerned, it is immaterial whether the Infringement was capable of affecting trade between Member States within the meaning of Article 101.

ii. Intention/negligence

357. The OFT may impose a penalty on an undertaking that has infringed the Chapter I prohibition or Article 101 only if it is satisfied that the infringement has been committed intentionally or negligently by the

undertaking,³⁷⁰ although the OFT is not obliged to specify whether it considers the infringement to be intentional or negligent. The CAT has stated that:

*'an infringement is committed intentionally for the purposes of the Act if the undertaking must have been aware that its conduct was of such a nature as to encourage a restriction or distortion of competition[.] ... It is sufficient that the undertaking could not have been unaware that its conduct had the object or would have the effect of restricting competition'.*³⁷¹

358. The OFT considers that serious infringements of the Chapter I prohibition and Article 101 which have as their object the prevention, restriction or distortion of competition are by their very nature committed intentionally.³⁷² Ignorance or a mistake of law is no bar to a finding of intentional infringement.
359. In this case, the Parties participated in an agreement and/or concerted practice with the object of facilitating the co-ordination of the Parties' respective pricing on loans supplied to Large Professional Services Firms, thereby substituting practical co-operation for the risks of competition through the provision of confidential, commercially sensitive pricing information.
360. The OFT considers the Parties to be highly-sophisticated organisations which have, or ought to have, an awareness of the competition implications of their conduct.
361. The OFT considers that, by the very nature of the agreement and/or concerted practice, each of the Parties could not have been unaware that the agreement and/or concerted practice in which they participated had the object of preventing, restricting or distorting competition.
362. Therefore, the OFT is satisfied that the Infringement was intentional or negligent.

iii. Penalty to be imposed on RBS

363. The OFT is imposing on RBS financial penalties under section 36 of the Act in respect of the Infringement. The amount to be imposed on RBS was agreed by way of early resolution on 29 March 2010.³⁷³

³⁷⁰ Section 36(3) of the Act.

³⁷¹ *Napp* (n308), paragraph 456.

³⁷² Enforcement Guidance (n225), paragraph 5.9, notes that the OFT might find that an infringement has been committed intentionally include circumstances where (i) an agreement or conduct has as its object the restriction of competition, (ii) the undertaking in question is aware that its actions will be, or are reasonably likely to be, restrictive of competition but still wants, or is prepared, to carry them out, or (iii) the undertaking could not have been unaware that its agreement or conduct would have the effect of restricting competition, even if it did not know that it would infringe the Chapter I prohibition and/or Article 101.

³⁷³ See paragraph 34 of this Decision; and the Letter of agreement between the OFT and RBS dated 29 March 2010, paragraph 5(b)(i) (OFT Document Reference 1054, page 4).

iv. Barclays' application for immunity

364. An undertaking will benefit from total immunity from financial penalties if it is the first to provide the OFT with evidence of cartel activity in a market before the OFT has commenced an investigation of the cartel activity and has complied with certain other conditions.³⁷⁴

365. As set out in paragraph 25 above, Barclays applied to the OFT for immunity under the OFT's leniency policy and was the first to do so in circumstances where there was no prior OFT investigation. As the relevant conditions as set out in the immunity agreement between Barclays and the OFT have been met, Barclays benefits from total immunity from financial penalties.

366. The OFT has not calculated the penalty that would otherwise be imposed on Barclays had it not benefitted from such immunity. The OFT does not consider that it needs to determine Barclays' penalty since it will not, as a successful immunity applicant, be required to pay a penalty to the OFT under section 36 of the Act.

v. Calculation of RBS's penalty

367. When setting the amount of a penalty, under section 38(8) of the Act, the OFT must have regard to the guidance as to the appropriate amount of any penalty, prepared and published under section 38(1) of the Act, that is for the time being in force.³⁷⁵ The OFT considers it to be immaterial to the level of the penalty whether trade between Member States was or could have been affected. The Penalty Guidance sets out five steps for determining the penalty.³⁷⁶

368. For the purpose of the penalty calculation, the OFT considers that the relevant turnover or total turnover applicable is the turnover of the undertaking that comprises the relevant single economic entity, as defined in paragraphs 215 to 217 above. The relevant economic entity for the purposes of the financial penalty to be imposed in this case is RBS.

369. The OFT has based its penalty calculation on the consolidated turnover of RBS.³⁷⁷ This includes the turnover of all wholly and majority-owned subsidiaries over which RBS exercises control.

(a) Step 1 – calculation of the starting point

370. Under the Penalty Guidance, the starting point for determining the level of penalty is calculated having regard to the seriousness of the infringement and the relevant turnover of the undertaking.³⁷⁸ The

³⁷⁴ Penalty Guidance (n6), paragraph 3.9.

³⁷⁵ n6.

³⁷⁶ Penalty Guidance (n6), paragraphs 2.1 to 2.20.

³⁷⁷ The applicable turnover of a credit institution and financial institution is defined in the Penalties Order (as amended) (n16), Schedule paragraph 5.

³⁷⁸ Penalty Guidance (n6), paragraph 2.3.

'relevant turnover' is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year.³⁷⁹ The last business year is the business year preceding the date on which the OFT's final decision is taken.³⁸⁰ In the case of the penalty for RBS, the OFT has taken the last business year to be 2008. This is because early resolution discussions with RBS commenced in 2009 and turnover figures for 2008 were the latest available when early resolution was reached in March 2010.³⁸¹

371. The starting point may be any amount up to a maximum of ten per cent of the undertaking's relevant turnover.³⁸²
372. Whilst the OFT is not required to formulate the starting point as a percentage rate of the undertaking's relevant turnover, in this case this is considered to be an appropriate way of having regard both to the seriousness of the Infringement and RBS's relevant turnover.
373. The actual percentage which is applied to the relevant turnover depends upon the nature of the infringement. The more serious and widespread the infringement, the higher the appropriate percentage rate.³⁸³ Cartel activities are amongst the most serious infringements. When making this assessment, the OFT will consider a number of factors, including the nature of the product or services, the structure of the market, the market shares of the undertakings involved in the infringement, entry conditions and the effect on competitors and third parties.³⁸⁴
374. The OFT notes the following factors in assessing the seriousness of the Infringement described in this Decision:
- cartel conduct is regarded to be among the most serious infringements of the Chapter I prohibition and/or Article 101;
 - in this case, the agreement and/or concerted practice related to the provision of confidential, commercially sensitive pricing information, through a number of contacts over a period of time, that facilitated the co-ordination of pricing on loans supplied to Large Professional Services Firms; and
 - the Parties were the two main providers operating in the relevant sector.
375. On the other hand, the OFT also notes that:

³⁷⁹ Penalty Guidance (n6), paragraph 2.7.

³⁸⁰ See Penalties Order (as amended) (n16), Article 3.

³⁸¹ In accordance with the Penalties Order (as amended) (n16), RBS prepared turnover data on a gross basis and it represents several adjustments made against the total revenue reported in the RBS Annual Report and Accounts 2008.

³⁸² Penalty Guidance (n6), paragraph 2.8.

³⁸³ Penalty Guidance (n6), paragraph 2.4.

³⁸⁴ Penalty Guidance (n6), paragraph 2.5. The damage caused to consumers whether directly or indirectly will also be an important consideration.

- the intensity of the contacts between the Parties was neither frequent nor highly structured;
- the conduct was carried out by a small number of relatively junior individuals; and
- the infringing conduct consisted of the unilateral disclosure of information rather than an exchange.

376. Taking these factors into account, the penalty agreed with RBS for the Infringement is based on a starting point of six per cent. This is above the midpoint of the scale (and below the maximum ten per cent of an undertaking's relevant turnover).

(b) Step 2 – adjustment for duration

377. The starting point under Step 1 may be increased or, in exceptional circumstances, decreased to take into account the duration of the infringement.³⁸⁵ 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.³⁸⁶

378. The OFT has concluded that the Infringement lasted between five to six months.

379. The OFT has concluded that the duration was less than a year. Thus, the penalty agreed with RBS does not include a multiplier at this step of the penalty calculation. The penalty also does not include any downward adjustment to reflect the fact that the activity lasted for less than one year, which the OFT does not consider would be appropriate given that the impact of the Infringement in this case will have continued beyond the end of the agreement or concerted practice and that, in any event, RBS cannot be given credit for the fact that the Infringement lasted less than one year, since it ceased its conduct only following the OFT's intervention.

(c) Step 3 – adjustment for other factors

380. At Step 3 of the penalty calculation, the penalty may be adjusted as appropriate to achieve the OFT's policy objectives, namely:

- (a) to impose penalties on infringing undertakings which reflect the seriousness of the infringement; and
- (b) to ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices.³⁸⁷

³⁸⁵ Penalty Guidance (n6), paragraph 2.10.

³⁸⁶ Ibid.

³⁸⁷ Penalty Guidance (n6), paragraphs 1.4 and 2.11.

381. In particular, the OFT will consider whether, after the calculations in Steps 1 and 2, any increase in penalty is necessary to deter other undertakings which might be considering activities that are contrary to the Chapter I prohibition and/or Article 101.³⁸⁸
382. The financial penalty calculated at the end of Steps 1 and 2 of the calculation will represent a relatively low proportion of RBS's total turnover because RBS is involved in significant economic activities that fall outside of the OFT's assessment of the relevant market. The OFT considers that such a sum, relative to the size of RBS, would be insufficient to act as a deterrent from engaging in anti-competitive practices, either for RBS or other undertakings.
383. Taking this into account, the penalty agreed with RBS includes an increase at Step 3 by way of a multiplier of two. The OFT considers that this is the minimum necessary in this particular case to achieve its policy objectives.

(d) Step 4 – adjustment for aggravating and mitigating factors

384. At Step 4 of the penalty calculation, the penalty may be adjusted to take account of any aggravating or mitigating factors.³⁸⁹ A non-exhaustive list of aggravating and mitigating factors is set out in paragraphs 2.15 and 2.16 respectively of the Penalty Guidance.

Aggravating factors

Role of the undertaking as leader/instigator

385. The OFT notes that the role of an undertaking as a leader in, or an instigator of, the infringement may be an aggravating factor.³⁹⁰ This is reflected in both UK and EU case law.³⁹¹
386. The OFT considers that 'instigation' in this context is something more than mere initiation of collusion by being the first party to make contact with others or being the first to suggest collusion in relation to a specific transaction.
387. The OFT considers that RBS's conduct went beyond initial contact or being the first to suggest collusion. RBS played the principal role in initiating all anti-competitive contacts with Barclays throughout the period.

³⁸⁸ Penalty Guidance (n6), paragraph 2.11.

³⁸⁹ Penalty Guidance (n6), paragraph 2.14.

³⁹⁰ Penalty Guidance (n6), paragraph 2.15.

³⁹¹ For example, *Umbro Holdings Limited, Manchester United plc, JJB Sports plc and Allsports Limited v Office of Fair Trading* [2005] CAT 22, paragraphs 157 and 168 to 171; Case T-410/03 *Hoechst GmbH v Commission of the European Communities* [2008] ECR II-881, paragraph 423; and Case T-15/02 *BASF v Commission of the European Communities* [2006] ECR II-497, paragraphs 280 to 282 and 464.

388. The penalty agreed with RBS therefore includes an uplift of ten per cent to take account of the fact that the Infringement involved instigation on its part.

Mitigating factors

389. The OFT considers that co-operation which enables the enforcement process to be concluded more effectively and/or speedily is a mitigating factor.³⁹² If any party has provided voluntary co-operation above and beyond its legal obligations, the OFT will consider whether it should reduce that party's penalty.

390. The OFT considers that RBS has provided voluntary co-operation additional to the co-operation provided as part of the early resolution agreement, which has enabled the enforcement process to be concluded more effectively. For example, RBS made key staff available for interview who provided the OFT with useful evidence, thereby enabling the OFT to obtain key information and progress the case efficiently. As such, that would warrant consideration as a mitigating factor. Accordingly, the penalty agreed with RBS includes a reduction in penalty of ten per cent at Step 4 for procedural co-operation.

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

391. At Step 5 of the penalty calculation, the final amount of the penalty calculated according to the method set out above is checked to ensure that it does not exceed ten per cent of the worldwide turnover of the undertaking in its last business year.³⁹³ In addition, if a penalty or fine has been imposed by the Commission or by a court or other body in another Member State in respect of an agreement or conduct, the OFT must take that penalty or fine into account when setting the amount of a penalty in relation to that agreement or conduct.³⁹⁴ There is no obligation to take into account penalties in relation to the conduct imposed by any court or other body outside the EU.

392. The OFT has assessed RBS's penalty against the tests set out in the preceding paragraph (as applicable). This assessment has not necessitated any reductions at Step 5 of the penalty calculation.

D. Application of the OFT's early resolution policy

393. As part of the OFT's early resolution agreement with RBS, it has been agreed that RBS's penalty for the Infringement described in this Decision will be £28.59 million.³⁹⁵ This figure was arrived at having had regard to the steps for determining the level of the financial penalty

³⁹² Penalty Guidance (n6), paragraph 2.16.

³⁹³ Penalty Guidance (n6), paragraph 2.17.

³⁹⁴ Penalty Guidance (n6), paragraph 2.20.

³⁹⁵ See paragraphs 34 and 363 of this Decision; and the Letter of agreement between the OFT and RBS dated 29 March 2010, paragraph 5(b)(i) (OFT Document Reference 1054, page 4).

as set out in the Penalty Guidance (as explained in paragraphs 367 to 392 above). The agreed penalty also includes a reduction of 15 per cent for early resolution.

E. Payment of penalty

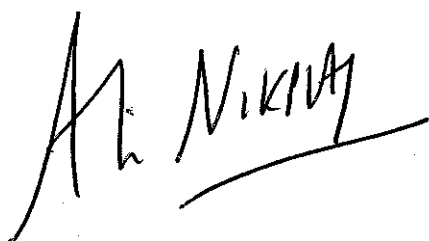
394. The OFT therefore requires RBS to pay the penalty as set out in the table below.

395. The penalty will become due to the OFT in its entirety on 25 March 2011 and must be paid to the OFT by close of banking business on that date.³⁹⁶ If the penalty is not paid and either an appeal against the imposition or amount of that penalty has not been made or such an appeal has been made and determined in the OFT's favour, the OFT may commence proceedings to recover the amount as a civil debt.

³⁹⁶ Details on how to pay will be set out in the letter accompanying this Decision.

RBS's penalty calculation

Penalty Component	Description	Amount
STEP 1	Relevant turnover year ended 31 December 2008	£[.....]
	Starting point (6%)	
	Penalty after Step 1	£[.....]
STEP 2	Duration multiplier (x1)	
	Penalty after Step 2	£[.....]
STEP 3	Adjustment (x2)	
	Penalty after Step 3	£[.....]
STEP 4	Aggravating factors (instigator + 10%)	-
	Mitigating factors (co-operation -10%)	
	Penalty after Step 4	£[.....]
STEP 5	No adjustment	-
	Penalty after Step 5	£[.....]
Leniency	Leniency discount (N/A)	-
Early Resolution	Early Resolution discount (15%)	£[.....]
FINAL PENALTY		£28.59 million



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20 January 2011

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