

Competition Act 1998

Decision of Director General of Fair Trading

No. CA98/18/2002

Agreements between Hasbro UK Ltd and distributors fixing the price of Hasbro toys and games

28 November 2002

(Case CP/0239-01)

SUMMARY

The Director General of Fair Trading has concluded that Hasbro UK Ltd (Hasbro), one of the largest toy and games suppliers in the UK, has entered into a number of price fixing agreements that infringe section 2 (the Chapter I prohibition) of the Competition Act 1998 (the Act).

Hasbro and ten distributors have entered into agreements to fix prices which restrict the distributors' ability to sell at prices other than Hasbro's wholesale list price. The agreements were entered into at the beginning of 2001 and came to an end when in July 2001 Hasbro wrote to its distributors to inform them that they did not have to keep to Hasbro's wholesale list prices. The Director takes the view that these agreements had, as their object and effect, the prevention, restriction or distortion of competition in the supply of Hasbro toys and games in the UK and are in breach of the Chapter I prohibition.

The Director considers that agreements between undertakings that fix prices are among the most serious infringements caught under the Chapter I prohibition. He will therefore impose a financial penalty on Hasbro. However, the Director will not impose financial penalties on any of the ten distributors as Hasbro had taken the initiative in fixing prices and the distributors were in a substantially weaker position.

I THE FACTS

A Parties

HASBRO

- 1 Hasbro is based in Uxbridge, Middlesex and is one of the largest toy and games suppliers in the UK. It is a subsidiary of Hasbro Inc, a US company. It supplies such well-known toys and games as 'Action Man', 'Monopoly' and 'Furby'. Hasbro's UK turnover in 2001 was £123.8 million.¹

DISTRIBUTORS

- 2 The following distributors are involved:
- (a) Lewison Ltd, of Birmingham;
 - (b) A.B. Gee of Ripley Ltd, of Belper, Derbyshire;
 - (c) Sellicks (Plymouth) Ltd, of Ivybridge, Devon;
 - (d) George Clapperton & Son Ltd, of Edinburgh;
 - (e) J A Magson Ltd, of York;
 - (f) L B Group Ltd, of Glasgow;
 - (g) Newswell Ltd t/a Kardwell Hobbs Distributors, of Basildon and Enfield;
 - (h) Williams of Swansea Ltd, of Swansea;
 - (i) Youngsters Ltd, of Wallingford, Oxfordshire;
 - (j) Esdevium Games Ltd, of Aldershot.

These ten companies are hereinafter referred to collectively as the 'Distributors'.

- 3 The companies listed from (a) to (h) belong to a wholesale buying group called 'The Club Group', a buying group of about 30 wholesalers, most of whom sell stationery and some of whom sell toys and games. Of the remaining Distributors, Youngsters Ltd ('Youngsters') is a buyers' organisation that acts as a wholesaler on behalf of its members and Esdevium Games Ltd ('Esdevium') acts as a distributor in more specialist sectors.

¹ FAME (Financial Analysis Made Easy) – online publisher (Bureau van Dijk).

B Supply of toys and games

GLOBAL INDUSTRY

- 4 The toy industry is a global business with world-wide retail sales of around \$55 billion (about £35 billion) in 2000.² The leading manufacturers include Mattel and Hasbro of the USA, Interlego AG based in Switzerland, and Tomy of Japan.
- 5 Since 1990 there has been increasing concentration in the market with the major firms acquiring smaller rivals. For example, Hasbro bought Parker Brothers (manufacturers of Tonka) in 1991 and the rights to a number of Waddingtons' games (Subbuteo, Cluedo and Monopoly) in 1994. Mattel purchased the US firm Fisher-Price in 1993.
- 6 The market is reliant on branding, and many toy sales are currently being driven by film tie-ins such as to Toy Story, Pokémon and Harry Potter. However, the success of these licensing arrangements is dependent on predicting short-term trends.

UNITED KINGDOM

- 7 The international position is reflected at the UK level, except that Hasbro is the leading manufacturer. In 2001 it had a UK turnover of £123.8 million (£197.8 million in 2000) compared to Mattel's £108.4 million (£85.7 million in 2000).³ The UK toy and games market is estimated at £1.85 billion in 2001 (£1.76 billion in 2000).⁴ Toy sales are highly seasonal and the majority of sales are made in the few months up to Christmas.⁵
- 8 At the retail level, toys and games are sold through a variety of outlets including specialist toy stores, mixed retailers and catalogue showrooms. In 2001, each of the three retail formats accounted for around a quarter of the £1.85 billion market.⁶ Supermarkets currently only have a small presence in the market, but according to Mintel Market Intelligence "this is a key growth area as the large grocery retailers are expanding their non-food brands to conquer this valuable

² Source: www.toy-icti.org – 'World Toys Facts and Figures – March 2001'. This excludes video games which account for sales of around \$14 billion (about £9 billion).

³ FAME (Financial Analysis Made Easy) – online publisher (Bureau van Dijk).

⁴ Key Note, 'Toys & Games – 2001 Market Report', page 9.

⁵ In 2000, 55% of sales were made in the final quarter (Mintel, 'Toy Retailing, Retail Intelligence – UK Report', November 2001, page 13, figure 5).

⁶ Key Note, 'Toys & Games – 2001 Market Report', page 19.

sector. Selling toys and games is increasingly taken more seriously and the large grocery retailers now employ dedicated toy buyers".⁷

- 9 The leading UK retailers of toys and games are Argos Ltd and Woolworths plc. Other major retailers are the US specialist chain Toys "R" Us, Early Learning Centre and Littlewoods plc with its Index catalogue shops. Many independent specialist retailers are finding it increasingly difficult to compete against the large chains.

C Investigation

- 10 The Director received a copy of a circular sent by Youngsters on 9 February 2001 to its customers which contained the following statement:

"All distributors, that is the Club Group and Youngsters, have had to sign new distributor contracts that forbid any discounting off Hasbro list prices. This means that no-one, Youngsters included, can offer any settlements, retrospective rebates or ordinary discount off Hasbro list prices."

- 11 This gave the Director reasonable grounds to suspect that Hasbro was engaged in resale price maintenance ('RPM') and that the agreements between Hasbro and the Distributors infringed the Chapter I prohibition. Following the receipt of this information, OFT officials carried out on-site investigations under section 27(3) of the Act on 15 and 25 May 2001 at the premises of Hasbro in Uxbridge, Middlesex. An on-site investigation was also carried out at the premises of Youngsters in Wallingford, Oxfordshire on 15 May 2001 under section 27(3) of the Act. During these visits, relevant documentation, including copies of relevant agreements between Hasbro and the Distributors were obtained using the powers contained in section 27 of the Act. On 10 August 2001, the Office sent Notices under section 26 of the Act to Hasbro, the Distributors and a number of retailers seeking information. On 17 September 2001 Hasbro made an application under the OFT leniency arrangements. On 20 September partial leniency of 45 per cent was agreed in respect of any infringements arising from Hasbro's agreements with wholesalers. Between 10 and 15 October 2001, OFT officials interviewed 11 Hasbro employees. These interviews were given voluntarily by the employees concerned and were arranged by Hasbro as part of its commitment to co-operate with the OFT investigation.
- 12 On 1 May 2002 the Director issued Notices ('the rule 14 Notices') to Hasbro and each of the Distributors in accordance with rule 14 of the Director's procedural rules.⁸ The rule 14 Notices set out the basis on which the Director proposed to

⁷ Mintel, 'Toy Retailing, Retail Intelligence – UK Report', November 2001, page 86.

⁸ Competition Act 1998 (Director's rules) Order 2000 (SI 2000/293).

find that the Chapter I prohibition had been infringed. Hasbro and Esdevium subsequently made both written and oral representations in response to the rule 14 Notices. These are assessed in part III below. The other Distributors did not make representations, although they were given a reasonable opportunity to do so.

II LEGAL AND ECONOMIC ASSESSMENT

A Relevant market

- 13 The Director is obliged to define the market only where it is impossible, without such a definition, to determine whether the agreement is liable to affect trade in the UK and has, as its object or effect, the prevention, restriction or distortion of competition.⁹ No such obligation arises in this case because it involves a price fixing agreement which has as its object the prevention, restriction or distortion of competition. Nevertheless market definition is the first step in the process of assessing penalties.¹⁰

RELEVANT PRODUCT MARKET

- 14 The Director has considered the scope of the relevant product market for toys and games in the UK. In particular, he has looked at the degree of substitutability between different categories, or sectors, of toys and games. He has also considered the extent to which electronic games fall within the same market as traditional toys and games.

All toys and games v segmented toys and games

- 15 Toys are highly differentiated products and the reality of consumers' demand is aptly summed up by the US Court of Appeals in the Toys "R" Us appeal:

"The toys customers seek in all these stores are highly differentiated products. The little girl who wants Malibu Barbie is not likely to be satisfied with My First Barbie, and she certainly does not want Ken or Skipper. The boy who has his heart set on a figure of Anakin Skywalker will be disappointed if he receives Jar-Jar Binks, or a truck, or a baseball bat instead. Toy retailers naturally want to have available for their customers the season's hottest items, because toys are

⁹ European Court of First Instance, Case T-62/98 *Volkswagen AG v Commission* [2000] 5 CMLR 853, paragraph 230. In the application of the Chapter I prohibition the Director is required to ensure that there is no inconsistency with either the principles laid down by the EC Treaty and the European Courts or any relevant decision of the European Courts. The Director must also have regard to any relevant decision or statement of the European Commission (section 60 of the Act).

¹⁰ 'Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty', March 2000 (OFT 423), paragraph 2.3.

also a very faddish product, as those old enough to recall the mania over Cabbage Patch Kids or Tickle Me Elmo dolls will attest.”¹¹

- 16 Similarly, in a resale price maintenance case involving Mattel’s Barbie doll, the Conseil de la Concurrence in France considered that the market in which Barbie was found was no wider than fashion dolls, such as Barbie- and Sindy-style figures.¹²
- 17 Also, Mintel Market Intelligence, when discussing changes in the relative shares of various sectors, argues that
- “ ... to a large extent, the sectors work independently of each other. In other markets it is possible to state very clearly that one sector is taking share from another – chilled versus frozen foods, or power versus hand tools for example – but in the case of toys and games, this analysis is less relevant. Male action toys are not taking share from dolls, nor are infant and pre-school products suffering from the growth of games and puzzles.”¹³
- 18 The Director believes that the relevant market is certainly not as wide as all toys and games. The most commonly used broad categories for toys and games are as follows:
- Infant and pre-school
 - Boys’ toys
 - Girls’ toys
 - Games and puzzles
 - Creative
 - Construction
 - Plush (soft toys)
 - Ride-ons
 - Electronic learning aids

¹¹ Case No. 98-4107 *Toys “R” Us v Federal Trade Commission*, US Court of Appeal (Seventh Circuit), decided 1 August 2000. The Court upheld the FTC’s finding that Toys “R” Us had infringed US anti-trust rules by entering into a price fixing agreement with a number of toy manufacturers. See <http://www.ftc.gov/os/adjpro/d9278/toysrusvftc.htm>.

¹² Conseil de la Concurrence, Decision No. 99-D-45 of 30 June 1999. The Conseil states in relation to the market: “Considérant qu’il ressort de l’ensemble de ces éléments que le marché sur lequel doivent être appréciées les pratiques est celui des poupées-mannequins”. OFT translates this as: “Whereas one can conclude from all these factors that the market within which the practices must be considered is the market for character/fashion dolls.” See <http://www.finances.gouv.fr/reglementation/avis/conseilconcurrence/99d45.htm>.

¹³ July 1997, ‘Toys and Games’, page 12.

- 19 There is also support for this categorisation amongst manufacturers and retailers. For example, [*]¹⁴ adopt similar structures for their sales and/or buying departments.
- 20 Market research commissioned by Hasbro for its products focuses on individual categories or even individual brands and it also monitors competitors' sales within these categories.
- 21 It is unlikely that there is much scope for supply-side substitution between these categories. The intrinsic differences between the toys within the different categories listed above would indicate that there is little overlap in production or assembly. Also the need to meet the various safety regulations and the need to promote new brands heavily to establish them in the market all add to the time and cost of getting a toy to market.

Traditional games v electronic games

- 22 For the purpose of this Decision, "electronic games" are console games, hand-held electronic games and personal computer (PC) games. "Traditional games" are defined as all games excluding electronic games.
- 23 There are many clear differences between electronic games and traditional ones. Currently, there is little overlap between the suppliers of electronic games and the traditional toy manufacturers. Nintendo, Sony and Sega Enterprises Ltd dominate the market for electronic games. Electronic games are often supplied through different retailers, such as specialist electronic games retailers, audio-visual retailers or electrical goods retailers. Many such games require expensive hardware before they can be used. They are sold at price points that are much higher than those associated with most traditional games. Research conducted for Hasbro by Griffin Bacal states:

"principles of this [electronic games] differ from traditional board game play:
mainly solo play
manual dexterity/skill
pace, speed
mastery/control
fast moving visual images
visual and sound elements integrate as enhancers of excitement/ reward."

¹⁴ [*] indicates throughout that a figure or short passage of text has been omitted for reasons of confidentiality under section 56(3)(a) of the Act.

- 24 The research goes on to say “Handheld electronics deliver similar styles and types of game play, but are generally viewed as separate additional items not substitutes.”
- 25 A comment from Hasbro in a Key Note report supports the view that traditional games form a separate market from electronic games. It believes board games will remain popular even in the internet age, stating that “the social interaction that board games bring is unique to home entertainment.”¹⁵

RELEVANT GEOGRAPHIC MARKET

- 26 As noted in paragraph 13 above in this case the Director is under no obligation to come to a decision as to market definition for the purposes of establishing an infringement of the Act. However, market definition is the first step in assessing penalties. The Director considers that it is unlikely that the market can be defined more narrowly than national. If a wider geographic definition were adopted this would have the effect of increasing Hasbro’s relevant turnover and therefore penalty. For the purposes of calculating penalties the Director is proceeding on the basis that the relevant market is that for toys and games in the UK.

CONCLUSION

- 27 In the circumstances of the present case, the Director does not consider it necessary to choose between the wider definition of all toys and games or the narrower definition given below of separate markets for each separate category. Since it is not necessary in this case to arrive at a precise definition in order to demonstrate an infringement of the Chapter I prohibition, the Director has adopted a narrower view of the market when assessing the level of penalties. Penalties are lower on this basis than if a broader definition had been adopted in the calculation of penalties. Therefore, for the purposes of this Decision and in particular for the purpose of assessing the level of penalties the Director considers the relevant turnover in each of the following ten categories of toys and games:

1) Infant and pre-school

- Infant
- Pre-school

2) Boys’ toys

- Action figures

¹⁵ Key Note, ‘Toys & Games – 2001 Market Report’, page 10.

- Vehicles
 - Outdoor action sport
- 3) **Girls' toys**
- Large dolls
 - Mini dolls
 - Collectables
- 4) **Games and puzzles**
- Family games
 - Children's' games
 - Adult games
 - Travel games
 - Puzzles
- 5) **Creative toys**
- 6) **Construction**
- 7) **Plush**
- 8) **Ride-ons**
- 9) **Electronic learning aids**
- 10) **Hand-held electronic games**

and is treating each of these categories as a separate relevant product market for the purposes of the Director's Guidance on Penalties.¹⁶ The Director considers that the evidence and analysis in this Decision equally demonstrate an infringement of the Chapter I prohibition if a broader view of the relevant product market is adopted as the frame of reference.

B UK market position – shares of supply

MANUFACTURERS - HASBRO

- 28 Hasbro's share of the supply of all traditional toys and games in the UK in 2000 was [*] per cent and in the year to June 2001 was [*] per cent. As can be seen from the table (Table 1) below, Hasbro's presence in the market categories identified in paragraph 27 above varies considerably. It is heavily influenced by

¹⁶ 'Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty', March 2000 (OFT 423).

the presence of particularly strong brands in some areas, such as Action Man in boys' toys and Monopoly in the games segment.

Table 1: Hasbro's share of the supply of traditional toys and games in the UK by category, 1999 – 2001

	1999	2000	2001*
Infant/pre-school	The figures in	this table have	been omitted
Boys' toys	for reasons of	confidentiality	
Girls' toys			
Construction			
Games and puzzles			
Creative			
Plush (soft toys)			
Ride-ons			
All toys and games			

Source: Hasbro (NPD data).

* The "Games and puzzles" and "All toys and games" data are for the year to June 2001. All the other categories are for the year to September 2001.

Note: These figures include the shares of all Hasbro Inc's UK subsidiaries.

DISTRIBUTORS

- 29 Hasbro mainly sells its product directly to retailers. However, it also has a network of distributors. The reason for this, according to the statement made by David Bottomley, a Hasbro sales director, to OFT officials, is that "distributors reach retailers that are not available to us directly" and that Hasbro "wanted to keep the distribution as wide as possible". This is confirmed by Hasbro in its written representations to the rule 14 Notice, in which it has stated that in or around 1996 it set up a distribution network to service small retailers to ensure as wide a distribution of its products as possible. These small retailers do not have the warehousing facilities or the volume of sales to purchase or stock large quantities or ranges of products.
- 30 The Distributors' combined turnover in Hasbro products amounts to around [*]¹⁷ per cent of Hasbro's total UK sales. It is clear that on this basis the market share of any of them individually either in Hasbro products or on a more general basis must be relatively small.

C Chapter I Prohibition

- 31 The Chapter I prohibition provides that “agreements between undertakings, decisions by associations of undertakings or concerted practices which (a) may affect trade within the United Kingdom,¹⁸ and (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom, are prohibited”.
- 32 Hasbro and the Distributors are all undertakings for the purposes of the Chapter I prohibition.

AGREEMENTS BETWEEN HASBRO AND THE DISTRIBUTORS

Agreement between Hasbro and Youngsters and the Club Group

- 33 Hasbro renewed its agreements with the Distributors in January and February 2001. During that period Roger Aldis, Hasbro Field Sales Manager, wrote to Youngsters and Chris Bullock, Hasbro Key Account Manager, wrote to Club Group members as follows:
- “I am sending this letter to clarify the terms of our distribution agreement.
- When Hasbro prices are presented, these are to be at net list prices therefore no settlement terms, retrospective rebates, or discounts are to be offered without prior agreement with Hasbro.”
- 34 This letter was acted upon and Youngsters sent a circular to its customers on 9 February 2001 explaining that no Hasbro distributors could offer any settlements, retrospective rebates or ordinary discounts off Hasbro list prices. A copy was sent to Roger Aldis on 9 February 2001. It is apparent from that letter that Youngsters accepted that its distribution agreement with Hasbro should be interpreted as Hasbro specified. There is no evidence of comparable action by the Club Group members. However, nor is there evidence that they made any efforts to dispute Hasbro’s interpretation of their agreements. The Director believes that such evidence, if it existed, would have emerged in response to the requests made under section 26 of the Act to the Club Group members to provide documents and information. Further, it is clear from the evidence obtained from the Distributors (see paragraph 11 above) that they continued to place orders with Hasbro after receipt of these letters from Hasbro. In the circumstances, the Director is of the view that the Club Group members tacitly accepted Hasbro’s interpretation of their distribution agreements.

¹⁸ The United Kingdom means, in relation to an agreement which operates or is intended to operate only in part of the United Kingdom, that part.

35 The letters sent by Hasbro specifically state that they “clarify the terms of our distribution agreement” and this clarification of the terms was explicitly or implicitly accepted by Youngsters and the Club Group members. These letters therefore became part and parcel of Hasbro’s agreements with Youngsters and the Club Group members.¹⁹ The term was clearly aimed at preventing the Distributors from discounting below Hasbro’s list price and thereby driving down prices by competing. David Bottomley, Hasbro’s Sales Director, when asked by OFT officials if he had been involved in these dealings with the Distributors, gave the following answer:

“Yes, I was an instigator of it. [The] letter [was] driven by my approach to a problem with Club Group. [I] addressed [a] meeting of Club Group members, and this is the follow up letter. Had evidence that Club Group and distributors were trying to compete with each other.”

36 The Director considers that actions designed to interfere with a retailer’s or distributor’s freedom to compete, and in this case, to determine its own prices – unless it is imposing a maximum price²⁰ – amount to price fixing and therefore infringe the Chapter I prohibition.

Agreement between Hasbro and Esdevium

37 In respect of the agreement between Hasbro and Esdevium, signed on 15 February 2001, a specific clause was included to prevent Esdevium from discounting below Hasbro’s list price. Clause 7 provides:

“When Hasbro prices are presented, these are to be at net list prices, therefore no settlement terms, retrospective rebates, or discounts are to be offered without prior agreement with Hasbro.”

38 The clause is part of the agreement and as stated above was aimed at restricting Esdevium’s ability to set its own prices. It is therefore an infringement of the Chapter I prohibition.

Background to the agreements

39 The infringements were preceded by complaints to Hasbro from some of its direct customers, who felt they could get a better deal from the Distributors than directly from Hasbro. Hasbro’s reaction to these complaints was to instruct the Distributors only to sell at net list price, as shown above. This is demonstrated

¹⁹ According to the established case law of the European Court of Justice, admission to a distribution network implies that the contracting parties explicitly or implicitly accept the distribution policy of the manufacturer. See case 107/82 *AEG v Commission* [1983] ECR 3151 at 3195 and joined cases 25 and 26/84 *Ford v Commission* [1985] ECR 2725 at 2743.

²⁰ See paragraph 3.2 of OFT Guideline 419, ‘Vertical Agreements and Restraints’, February 2000.

by the letter which Hasbro sent to Youngsters and the members of the Club Group (see paragraph 33). This letter not only instructed them to sell only at net list prices, but also contained the following instruction:

“Hasbro Direct Accounts are not to be approached and offered Hasbro product at any time, if a Hasbro Direct account approaches the Distributor for, perhaps, product which is affected by poor availability, list prices must be quoted and charged, not the special pricing mentioned above. An up to date list of Hasbro direct Accounts will be forwarded next week to all distributors.”

The agreement between Hasbro and Esdevium contained a similar instruction at clause 7 (see paragraph 37).

- 40 Hasbro employees have confirmed that the Distributors dealing with Hasbro’s direct customers was the reason for Hasbro’s instruction. David Bottomley stated to OFT officials that the reason for Hasbro’s instruction to the Distributors was that he “had evidence that Club Group and distributors were trying to compete with each other”. According to Chris Bullock, Hasbro’s account manager for the Distributors, in his statement to OFT officials: “the special support we offered distributors was to enable wider distribution, but not [at the] expense of direct customers”.²¹ This is confirmed by Mike McCulloch, head of Hasbro’s UK Sales and Marketing, who – although he stated to OFT officials that he did not know of Hasbro’s instruction – was “aware that there would be problems if pricing to distributors gave their customers a competitive advantage. Hasbro always tried to have [a] level playing field on list prices whether to direct or non-direct retailers.” Hence, the Director believes that Hasbro’s instruction was primarily aimed at preventing its Distributors from competing for sales at a discount to Hasbro’s direct customers.

DURATION

- 41 The agreements between Hasbro and the Distributors were all entered into in January or February 2001 and came to an end when Hasbro wrote to its Distributors on 10 July 2001, explaining that they did not, as a term of their contract, have to keep to Hasbro’s wholesale list price.

OBJECT/EFFECT RESTRICTION OF COMPETITION

- 42 The object of all the agreements identified above was to maintain prices at higher levels than might otherwise have been the case. It is established in EC law that agreements whose object is to fix prices are clearly restrictive of

²¹ Chris Bullock goes on to say that Hasbro asked the Distributors not to sell at lower prices to Hasbro’s direct customers, but in fact the instruction was wider than that and regarded all of the Distributors’ customers.

competition.²² It is therefore not necessary for the Director to show that these agreements produced anti-competitive effects on the market.

APPRECIABILITY

43 An agreement will infringe the Chapter I prohibition if it has as its object or effect an appreciable prevention, restriction, or distortion of competition in the United Kingdom. The Director generally takes the view that an agreement will have no appreciable effect on competition if the parties' combined share of the relevant market does not exceed 25 per cent.²³ However, the Director will regard:

“any agreement between undertakings which:

- directly or indirectly fixes prices or shares markets ...; or
- imposes minimum resale prices; or
- is one of a network of similar agreements which have a cumulative effect on the market in question

as being capable of having an appreciable effect even where the combined market share falls below the 25% threshold. ...”²⁴

44 In relation to price fixing agreements specifically, the Director takes the view that:

“Agreements which explicitly and directly fix prices, or the resale prices of any product or service are likely to infringe the prohibition. The Director General believes that such price-fixing agreements have appreciable effects on competition.”²⁵

The agreements referred to above are price fixing agreements and therefore are considered by the Director to have an appreciable effect on competition.²⁶ The European Commission has recorded its view that “Market sharing and price fixing by their very nature restrict competition within the meaning of Article [81](1)”²⁷ There are various judgements of the European Courts where it has been held clearly that it is not necessary to consider whether there are effects on a market or how appreciable those effects might be when dealing with an agreement whose object is the restriction of competition:

²² See, for example, European Court of Justice case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125.

²³ OFT Guideline 401, ‘The Chapter I Prohibition’, March 1999, paragraphs 2.18 and 2.19.

²⁴ Paragraph 2.20 of OFT Guideline 401.

²⁵ Paragraph 3.5 of OFT Guideline 401.

²⁶ The Director does not consider the agreements and/or concerted practices produce only insignificant effects in the sense outlined in case C-5/69 *Volk v Vervaeke* [1969] ECR 295.

"It must be borne in mind that in assessing an agreement under Article [81](1) of the Treaty, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned ... unless it is an agreement containing obvious restrictions of competition such as price-fixing, market sharing or the control of outlets ..."²⁸ (emphasis added)

"It is clear from case law that, for the purposes of applying Article [81](1) of the Treaty, there is no need to take account of the concrete effects of an agreement when it is apparent, as in this case, that it had as its object the prevention, restriction or distortion of competition within the common market (Case T-142/89 *Boel v Commission* [1995] ECR II-867, paragraph 89; Case T-152/89 *ILRO v Commission* [1995] ECR II-1197, paragraph 32)."²⁹

"The Court points out that, in order to find that an agreement is contrary to Article [81](1) of the Treaty, it is not necessary to establish that the agreement in question had an anti-competitive effect. A finding that an agreement pursued an anti-competitive object is sufficient for it to be declared contrary to Article [81](1) of the Treaty"³⁰

- 45 Although there may be circumstances, which will be limited, in which price fixing agreements may not have an appreciable effect on competition, this is clearly not the case here given Hasbro's strong position in the market. Therefore it is not necessary for the Director to state at what market share, if any, he might take the view that a price-fixing agreement does not have an appreciable effect on competition. In any case, he believes that it would be well below the combined market shares of the parties in this case.

EFFECT ON TRADE WITHIN THE UK

- 46 The products that are the subject of these agreements were to be sold in the UK. As can be seen from the analysis above, the agreements between the parties had as their object the prevention, restriction or distortion of competition in these products. The agreements may therefore affect trade within the UK for the purpose of the Chapter I prohibition.

²⁷ Commission Decision in *Pre-Insulated Pipe Cartel* (OJ L24 30.1.99 p.1).

²⁸ Cases T-374/94 etc *European Night Services v Commission* [1998] ECR II- 3141, paragraph 136.

²⁹ Cases T202/98 etc *Tate & Lyle v Commission* [2001] ECR II-2035, paragraph 72.

³⁰ Cases T25/95 etc *Cimenteries CBR v Commission* [2000] ECR II-491, paragraph 4862.

EXCLUSION

- 47 Article 3 of the Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000 ('the Exclusion Order'),³¹ states that the "Chapter I prohibition shall not apply to an agreement to the extent that it is a vertical agreement". Agreements between manufacturers and retailers/distributors are considered as vertical agreements for the purposes of the Exclusion Order. However, the benefit of the exclusion does not apply to vertical agreements that restrict the buyer's ability to determine its sale price (article 4 of the Exclusion Order). None of the agreements therefore benefits from the exclusion.
- 48 There are no other relevant exclusions from which these agreements could benefit.

EXEMPTION

- 49 Price fixing does not contribute to improving the production or distribution of goods. Also there are no resulting benefits of which consumers receive a fair share. Indeed they would have to pay more for the toys and games subject to price fixing. The Director has therefore concluded that if an exemption were to be sought for the agreements they would fail to meet the exemption criteria.

III ANALYSIS OF REPRESENTATIONS

- 50 Hasbro and Esdevium have both made written and oral representations in response to the rule 14 Notices. The other Distributors did not make representations. The Director has given full and detailed consideration to all the representations that have been made to him, both written and oral, and has given appropriate weight to them in making this Decision. The Director's analysis of the representations is detailed below.

A Response to the representations of Hasbro

- 51 Hasbro has accepted that it attempted to maintain resale prices in its agreements with the Distributors in breach of the Chapter I prohibition. Hence, Hasbro has made representations only regarding the appropriate amount of a penalty. These representations are addressed in part V of this Decision (see paragraphs 69-78, 84-88 and 90-93).

³¹ The Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000 (SI 2000/310). For further information see OFT Guideline 419, 'Vertical Agreements and Restraints', February 2000.

B Response to the representations of Esdevium

52 This text has been omitted pursuant to section 56(3)(a) of the Act.

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IV DECISION

56 The evidence set out at part II of this Decision formed the basis of the rule 14 Notices sent to Hasbro and the Distributors. The Director's assessment of the representations made in response to the rule 14 Notices as regards the infringement of the Chapter I prohibition is set out at part III of this Decision. Having reviewed the evidence and analysed the representations, the Director finds that the agreements between Hasbro and each of the ten Distributors infringed the Chapter I prohibition in the period from early February until July 2001 by fixing prices for Hasbro products.

V PROPOSED ACTION

57 This part sets out the action which the Director intends to take and his reasons for it.

A Directions

58 Section 32(1) of the Act provides that if the Director has made a decision that an agreement infringes the Chapter I prohibition, he may give to such person or persons as he considers appropriate such directions as he considers appropriate to bring the infringement to an end. No directions are necessary in this case, as the Director is satisfied that the price fixing clauses in the agreements between Hasbro and the Distributors have ceased.

B Financial penalties

59 Section 36(1) of the Act provides that on making a decision that an agreement has infringed the Chapter I prohibition, the Director may require the undertaking which is a party to an agreement to pay him a penalty in respect of the infringement. The parties to the agreements are Hasbro and each of the Distributors.

60 The Director may impose a penalty on an undertaking which has infringed the Chapter I prohibition only if he is satisfied that the infringement has been committed intentionally or negligently but is under no obligation to determine specifically whether there was intention or negligence.³² The Director is satisfied that Hasbro and the Distributors have intentionally or negligently infringed the Chapter I prohibition. The agreements clearly were intended to fix the resale prices of certain Hasbro products and the parties could not have been unaware that price fixing amounted to a restriction of competition. Therefore, the Director intends to impose a penalty on Hasbro. The Director does not intend to impose a penalty on any of the Distributors, for the reasons set out below.

IMMUNITY FROM PENALTIES

61 Section 39(1) of the Act provides for limited immunity from penalties for small agreements where the agreement is not a price fixing agreement. The agreements between the parties in question are price fixing agreements and therefore this limited immunity from penalties does not apply to the parties. In addition, the agreements do not fall within the category prescribed for the purpose of section 39(1) of the Act, as the combined turnover of the parties for the relevant business year exceeded £20 million (see paragraph 1).³³

CALCULATION OF THE PENALTIES

62 In accordance with section 38(8) of the Act, the Director must have regard to the guidance on penalties issued under section 38(1) of the Act when setting the amount of the penalty.³⁴

Step 1 – starting point

63 The starting point for determining the level of penalty is calculated by applying a percentage rate to the 'relevant turnover' of an undertaking, up to a maximum of 10 per cent. The 'relevant turnover' is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the last financial year.³⁵ To be consistent with the Competition

³² Section 36(3) of the Act: see Competition Commission Appeal Tribunal in its judgement of 15 January 2002 in *Napp Pharmaceutical Holdings Limited v. Director General of Fair Trading*, paragraph 455.

³³ Regulation 3 of Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262).

³⁴ 'Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty', March 2000 (OFT 423).

³⁵ Paragraph 2.3 of OFT 423.

Act 1998 (Determination of Turnover for Penalties) Order 2000,³⁶ the Director considers that the last financial year is the business year preceding the date when the infringement ended. The Director is of the view that the agreements between Hasbro and the Distributors ended on 10 July 2001 when Hasbro wrote to the Distributors to inform them that they did not have to keep to Hasbro's wholesale list prices. It is this date that the Director will use in calculating the appropriate level of penalty in this case.

- 64 The actual percentage rate which is applied to the relevant turnover depends upon the nature of the infringement.³⁷ The more serious the infringement, the higher the likely percentage rate. When making his assessment, the Director will also consider a number of other factors, including the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect on competitors and third parties.³⁸ The damage caused to consumers whether directly or indirectly will also be an important consideration. An assessment of the appropriate starting point is carried out for each of the undertakings concerned, in order to take account of the real impact of the infringing activity of each undertaking on competition.³⁹
- 65 The Director considers price fixing agreements to be among the most serious infringements caught under the Chapter I prohibition. "The starting point for such activities and conduct will be calculated by applying a percentage likely to be at or near 10% of the "relevant turnover" of the infringing undertakings."⁴⁰
- 66 The products concerned are consumer goods sold to a mass market through an established retail environment. They are very familiar, branded toys and games, that are aimed directly at children. Parents are under pressure to accede to the growing demands of children for the latest fad or trend. The heavy promotion and advertising of many such toys means that non-branded, cheaper alternatives are not viable substitutes for many parents.
- 67 Hasbro is one of the two leading toy manufacturers in the world, supplying many of the leading brand names in toys and games, such as Action Man and Monopoly. Many leading brands are considered "must have" products, with retailers believing that they cannot be seen as a viable toy retailer without stocking these brands, regardless of how low the margins are on such toys. This

³⁶ Section 36(8) of the Act and SI 2000/309.

³⁷ Paragraph 2.4 of OFT 423.

³⁸ Paragraph 2.5 of OFT 423.

³⁹ Paragraph 2.6 of OFT 423.

⁴⁰ Paragraph 2.4 of OFT 423.

necessarily reflects the desirability of such brands to the consumer, with substitution to a non-branded alternative unlikely. While small-scale entry is clearly possible in the supply of toys and games, in reality the promotion and advertising costs associated with making a large scale entry with a product that could compete with brands such as Action Man or Monopoly are likely to be very difficult to overcome.

- 68 As stated at paragraph 29, Hasbro mainly sells its products directly to retailers. Its sales through the Distributors were meant to reach small retailers, representing about [*] per cent of Hasbro's turnover. However, Hasbro's instruction to the Distributors only to sell at net list prices had a wider effect than merely on the prices charged to these small retailers. The statements of Hasbro employees quoted at paragraph 40 show that certain of Hasbro's direct customers were buying or trying to buy Hasbro products from the Distributors rather than from Hasbro directly. This evidence and the letters quoted at paragraph 39 show that Hasbro's instruction to the Distributors was primarily aimed at preventing them from competing for sales to Hasbro's direct customers at a discount. As Hasbro's instruction removed the incentive for its direct customers to buy from the Distributors (by preventing discounts), the instruction had a wider effect than merely on the prices charged to the small retailers. It also reduced the ability of larger retailers usually supplied by Hasbro directly to purchase Hasbro products for a lower price.
- 69 In its written representations to the rule 14 Notice, Hasbro has tried to explain the background of the agreements with the Distributors. It was concerned that smaller retailers were discouraged from stocking its products because of the low margins they were making on Hasbro products. These margins were unattractive because not only were the overheads of smaller retailers relatively higher than those of larger retailers, but distributors were not generally passing on any of their commission to retailers. In response, in 2000 Hasbro introduced a [*] per cent special discount off the wholesale list price on its [*] products, which was to be passed on to the small retailers. According to Hasbro, its instruction to the Distributors not to sell on to the small retailers at below list prices ostensibly made it impossible for the Distributors to pass on their own commission to their retail customers by way of lower wholesale prices.
- 70 The Director considers that this explanation is inconsistent and incomplete. Hasbro's instruction to the Distributors would have made it more difficult to achieve what Hasbro states was its goal, to improve the margins of the small retailers. The instruction is, however, consistent with the reason indicated in the letter containing the instruction and given by Hasbro's employees in their interviews with the OFT. The Hasbro employees who are quoted in paragraph 40 stated that Hasbro's instruction was primarily aimed at preventing the

Distributors from selling at a discount to Hasbro's direct customers. Hasbro has not addressed this issue and in the Director's view Hasbro's actions cannot be justified in any other way on any reasonable interpretation of the facts and evidence.

- 71 In its written representations, Hasbro has asserted that there is no evidence that the Distributors generally sought to compete with each other on prices to small retailers before the infringement. No Distributor before or after the infringement sought Hasbro's approval to sell at or below list prices. Therefore, no Distributor would have sought to use its commission to discount and there was no (serious) impact on competition among Distributors.
- 72 However, the Director does not find Hasbro's argument persuasive. First, David Bottomley, one of Hasbro's sales directors, admits that competition among the Distributors was the main reason for issuing Hasbro's instruction. Secondly, if the Distributors did not seek Hasbro's approval to grant discounts, this does not lead to the conclusion that they did not want to compete. Before Hasbro's instruction, there was no need for the Distributors to seek Hasbro's approval and no reason for them to do so. Also it is in the Director's view self evident that the very nature of Hasbro's instruction would lead to a strong perception that Hasbro would refuse approval and that there was no point in asking for it.
- 73 Hasbro has also claimed that if the Distributors had passed on all of their commission and had sold to the small retailers entirely at cost, then the cost of the products would have been reduced by a little under [*].⁴¹ Consumers were not harmed; even if the retailers had obtained lower wholesale prices without the infringement, there is no evidence that they would have passed this benefit on to consumers, particularly given the low margins on Hasbro products.
- 74 The Director considers that, in view of David Bottomley's statement that Distributors were trying to compete before the infringement, it can be reasonably inferred that without the infringement the Distributors may have charged lower wholesale prices to retailers. The amount by which the prices were lower is not necessarily limited to just under [*]. First, if the Distributors had been able to sell at a lower price than the net list price, their sales may have been higher than they were without this freedom, because, for example, they could have made sales to customers who used to buy their products directly from Hasbro. Secondly, the Distributors may not only have reduced the net list price charged

⁴¹ Hasbro has based this figure on its sales to the Distributors during the period of the infringement as an approximation for the sales that the Distributors would have made to the retailers (Hasbro does not have this information). The Distributors' total commission was between [*] per cent and [*] per cent of Hasbro's sales to the Distributors, which amounts to total commission of between £[*] and £[*].

to their customers with the amount of their commission, but they may have sold Hasbro products at an even lower price and even below cost if it appeared to them to be to their commercial advantage. Thirdly, if the Distributors had cut prices, there might have been consequent price cuts by others.

- 75 As Hasbro instructed the Distributors only to sell at net list prices, the Director believes the infringement harmed the Distributors, retailers and consumers. Even if the margins on Hasbro products were low, retailers may well have passed part of any price fall on to consumers, as the retail toy market is competitive.
- 76 In normal circumstances, since the Director regards the imposition of fixed or minimum resale prices as a serious infringement, this would warrant a starting point at or around 10 per cent. However, in this case the products involved amount to less than five per cent of Hasbro's total UK sales of those products. Given the low market share of the Distributors involved in the infringement and hence its limited impact, the Director has decided exceptionally that a starting point of **[between five and eight]**⁴² per cent of the relevant turnover in the markets affected is appropriate.

Step 2 – adjustment for duration

- 77 The starting point for the penalty may be increased to take into account the duration of the infringement. In this respect, part years may be treated as full years for the purpose of calculating the number of years of the infringement.⁴³ The agreements between Hasbro and the Distributors were all entered into in January or February 2001 and came to an end in July 2001. Hasbro has asserted that in assessing the seriousness of the infringement's effects, the Director should take into account that the duration of the infringement was short, from 8 February to 10 July 2001.
- 78 The Director does not accept this representation. He notes that it was two months after the OFT visit to Hasbro under section 27 of the Act before Hasbro took the step of writing to the Distributors in order to put an end to the infringing agreements. The Director has therefore decided not to reduce the starting point for the penalty.

⁴² If the precise percentage figure was given here or elsewhere it would be straightforward to calculate the confidential turnover figure from the details of this Decision.

⁴³ Paragraph 2.7 of OFT 423.

Step 3 – adjustment for other factors

- 79 The penalty may be adjusted as appropriate to achieve policy objectives, such as deterring undertakings from engaging in anti-competitive practices.⁴⁴ Indicated below is the Director’s decision on whether it is appropriate to adjust any penalty on these grounds.

Step 4 – adjustment for further aggravating and mitigating factors

- 80 The Director has the power to increase the penalty where there are other aggravating factors, or decrease it where there are mitigating factors.⁴⁵ It is indicated below which adjustments the Director has decided are appropriate on the grounds of aggravating or mitigating factors.

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

- 81 No penalty which has been fixed by the Director may exceed 10 per cent of the turnover of the undertaking calculated in accordance with the provisions of the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000.⁴⁶ The section 36(8) turnover of an undertaking is not restricted to the turnover in the relevant product market and relevant geographic market.⁴⁷ The Director has considered below whether the penalty would exceed 10 per cent of the section 36(8) turnover.

PENALTY FOR HASBRO

Step 1 – starting point

- 82 Hasbro’s turnover in the relevant product and geographic markets in the financial year preceding the termination of the agreements (1 January 2000 to 31 December 2000) was £[*] million. In view of the seriousness of the infringement as shown above, the Director has decided that a starting point of **[between five and eight]** per cent of the relevant turnover is appropriate. The starting point for Hasbro is therefore £[*] million.

⁴⁴ Paragraph 2.8 of OFT 423.

⁴⁵ Paragraph 2.10 of OFT 423.

⁴⁶ Section 36(8) of the Act and SI 2000/309.

⁴⁷ Footnote 6 of OFT 423.

Step 2 – adjustment for duration

83 As indicated above (paragraphs 77 and 78), the duration of the infringement was less than one year and there is therefore no need to make any adjustment for duration.

Step 3 – adjustment for other factors

84 In its written representations, Hasbro has claimed that it is not necessary to deter Hasbro from further infringements. Hasbro accepts that it infringed the Chapter I prohibition and it takes compliance with competition laws very seriously. Also, Hasbro has asserted that it made no financial gain from the infringement.

85 One of the objectives of the Director's policy on financial penalties is to ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices. The Director notes that the deterrent is not solely aimed at the undertakings which are subject to the decision – in this instance Hasbro – but also at other undertakings which might be considering infringements.⁴⁸

86 Hasbro provides no evidence for its assertion that it did not make financial gain from the infringement. It seems a reasonable assumption that Hasbro did make some gain as otherwise it would have had no reason to make the infringement. The statement of Chris Bullock (see paragraph 40 above) makes it clear that Hasbro wanted to avoid a situation where its direct customers would receive more favourable terms from the Distributors, resulting in demands from the direct customers on Hasbro to offer similar terms. At the same time, Hasbro wanted to continue using small retailers as an outlet, which made it necessary to continue supplying the Distributors. Hence, Hasbro's gain was to avoid the possibility of wholesale price reductions to all customers for its products.

87 It is extremely difficult to estimate the extent of any such gain for Hasbro, as it is not possible to know what might have happened to its wholesale price levels, its sales levels and margins without the infringement. The small share of the Distributors in Hasbro's turnover of [*] per cent seems to make it reasonable to assume that any gain was limited. However, arithmetical calculation of a gain should not form the sole or even the main means of marking the seriousness of an infringement except in the clearest cases.⁴⁹ Also, as indicated in paragraph

⁴⁸ Paragraphs 1.8 and 2.8 of OFT 423. Also Competition Commission Appeal Tribunal in its judgement of 15 January 2002 in *Napp Pharmaceutical Holdings Limited v. Director General of Fair Trading*, paragraph 502.

⁴⁹ *Napp Pharmaceutical Holdings Limited v. Director General of Fair Trading*, paragraph 511.

68, Hasbro may also have gained by avoiding claims from its direct customers for lower prices.⁵⁰

- 88 In spite of the factors above, the Director considers that the penalty as calculated in step 1 would act as an adequate deterrent. He has therefore decided not to adjust the amount of the penalty for the purpose of deterrence.

Step 4 – adjustment for further aggravating and mitigating factors

- 89 The Director believes that Hasbro’s senior management had knowledge of, and was involved in, the agreements with the Distributors. Chris Bullock, account manager for the Distributors, stated to OFT officials that he and Roger Aldis, his manager, would send out the instructions to the Distributors “subject to management approval”. This is also indicated by Roger Aldis, who stated to OFT officials that the distributors’ contracts “[would be] signed off by directors”. David Bottomley, UK Sales Director, admitted in his statement to OFT officials that he “was an instigator”. Mike McCulloch, directly in line above Bottomley, stated to OFT officials that he did not know the background or content of the agreements with the Distributors, although he was aware of the reason why Hasbro would give an instruction only to sell at net list price. It is the Director’s view that, in the person of David Bottomley, Hasbro’s senior management was fully aware of what the Distributors’ agreements involved and actively encouraged their implementation.
- 90 In its written representations, Hasbro accepts that David Bottomley was involved in the agreement. Still, Hasbro claims that the agreement did not involve a “corporate sanctioned infringement” of the Act. However, the Director considers that for management involvement to be an aggravating factor it is not necessary for the top management at main board director level to be involved. The involvement of senior management, especially where it was the driving force behind the infringement, is sufficiently serious to warrant taking this into consideration as an aggravating factor. Hasbro also submits that the fact that senior management ignored Hasbro’s compliance programme should lead the Director to conclude that senior management involvement is not an aggravating factor. However, the Director does not see how senior management expressly ignoring its company’s own compliance programme can lead to the consideration that the involvement of senior management is less serious. Therefore, the Director has decided to take account of this aggravating factor by increasing the amount of the penalty by 10 per cent.

⁵⁰ See generally *Napp Pharmaceutical Holdings Limited v. Director General of Fair Trading*, paragraph 510.

- 91 The Director also considers the method by which Hasbro imposed the restrictions on the Distributors to be a serious aggravating factor. It would appear from the evidence of David Bottomley that as soon as Hasbro noticed that several distributors were starting to compete with each other, it took prompt steps to prevent this. It wrote to the Distributors (apart from Esdevium where a clause to the same effect was inserted in the agreement itself) imposing a revised interpretation of their distribution agreements to the effect that no departure from the Hasbro list price was allowed without Hasbro's permission. The Director is satisfied that Hasbro took the initiative to impose upon the Distributors the terms which had the object of fixing prices and that the Distributors were in a substantially weaker economic position. This leads the Director to increase the amount of the penalty by 20 per cent.
- 92 Hasbro has made representations to the effect that it had in place a thorough and complete compliance programme and that its being ignored by senior management should not be regarded as an aggravating factor. In many cases the Director is likely to find that the existence of an effective compliance programme is a mitigating factor and might make an appropriate downward adjustment to the level of penalty. In this case the existence of the compliance programme is offset by the fact that it was blatantly ignored at a very senior level within Hasbro and no adjustment is appropriate. However, the Director is also aware that following the infringement, Hasbro organised a specific competition law training programme for its senior management and sales staff and training in competition law for new staff. This leads the Director to reduce the amount of the penalty by 10 per cent.
- 93 The Director is normally minded to give a reduction in a penalty when a party has co-operated with his investigation. However, as Hasbro benefits from the leniency programme and as a condition of being granted leniency Hasbro agreed to co-operate with the Director, he does not consider that there should be an additional reduction in the penalties under this head to reflect co-operation.
- 94 After the OFT visited Hasbro's premises on 15 May 2001, Hasbro terminated the infringement by writing to the Distributors on 10 July 2001, explaining that they did not, as a term of their contract, have to keep to Hasbro's wholesale list price. In view of this remedial action taken by Hasbro, the Director has reduced the amount of the penalty by 10 per cent.
- 95 The Director believes that Hasbro committed the infringement intentionally. Hasbro's actions were intended to prevent Distributors selling below net list prices and Hasbro cannot have been unaware that this would result in a restriction of competition. As Hasbro did not commit the infringement merely negligently, this cannot be a mitigating factor.

96 As a result, the total percentage added to the penalty for aggravating circumstances is 30 per cent. The total percentage deducted for mitigating circumstances is 20 per cent. The penalty for Hasbro is therefore determined at [*] per cent of its relevant turnover, or £9.00⁵¹ million.

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

97 There are no further adjustments since the penalty does not exceed the section 36(8) turnover of Hasbro.

Leniency

98 Hasbro applied for leniency and was given 45 per cent reduction in the amount of penalty in respect of its agreements with the Distributors. The resultant penalty imposed on Hasbro is therefore £4.95 million.

PENALTY FOR THE DISTRIBUTORS

Steps 1, 2 and 3 – starting point and adjustment for duration or other factors

99 As the Director has decided not to impose a penalty on the Distributors because of mitigating factors (see step 4 below), it is not necessary to calculate the starting point of the penalty or make an adjustment for duration or other factors.

Step 4 – adjustment for further aggravating and mitigating factors

100 The Director is satisfied that Hasbro took the initiative to impose the terms which had the object of fixing prices and the Distributors were in a substantially weaker economic position. The process by which Hasbro imposed the revised terms on the Distributors is described at paragraph 91. Given that this initiative was Hasbro's and was in response to attempts by some of the Distributors to compete with each other, the Director has decided not to impose a penalty on any of the Distributors.

101 However, each case will be decided by the Director on its merits and he may decide in future cases to impose financial penalties on companies that are parties to infringing agreements even where they did not take any initiative and were in a weaker position than the other parties to the agreement.

⁵¹ While the penalty has been calculated using non-rounded turnover figures as provided by Hasbro, in this Decision only rounded figures are mentioned.

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

- 102 As the Director has decided not to impose a penalty on any of the Distributors, this step is not relevant.

PAYMENT OF PENALTY

- 103 The Director requires Hasbro to pay him a penalty of £4.95 million ([*] per cent of its relevant turnover). The penalty must be paid within three months of the date of this Decision.
- 104 If Hasbro fails to pay the penalty within the deadline specified above, and has not brought an appeal against the imposition or amount of the penalty within the time allowed or such an appeal has been made and determined, the Director can commence proceedings to recover the required amount as a civil debt.

John Vickers

Director General of Fair Trading