

Competition Act 1998

Decision of the Office of Fair Trading
No. CA98/8/2003

Agreements between Hasbro U.K. Ltd, Argos Ltd and Littlewoods Ltd fixing the price of Hasbro toys and games

21 November 2003

(Case CP/0480-01)

SUMMARY

The Office of Fair Trading ('OFT') has concluded that Hasbro U.K. Ltd ('Hasbro'), one of the largest toy and games suppliers in the UK, Argos Ltd ('Argos') and Littlewoods Ltd ('Littlewoods') have entered into price-fixing agreements that infringe section 2 ('the Chapter I prohibition') of the Competition Act 1998 ('the Act').

Hasbro, Argos and Littlewoods have entered into an overall agreement and/or concerted practice to fix the price of certain Hasbro toys and games. This overall agreement included two bilateral price-fixing agreements and/or concerted practices which in themselves constitute infringements: one between Hasbro and Argos and the other between Hasbro and Littlewoods. The agreements were entered into in 1999 and infringed the Chapter I prohibition from 1 March 2000 (when the prohibition came into force). The agreements came to an end no earlier than 15 May 2001 and no later than 14 September 2001. The OFT takes the view that these agreements may have affected trade within the UK and had, as their object and effect, the prevention, restriction or distortion of competition in the supply of certain Hasbro toys and games in the UK and are in breach of the Chapter I prohibition.

The OFT considers that agreements between undertakings that fix prices are among the most serious infringements caught under the Chapter I prohibition. It is therefore imposing financial penalties on Hasbro, Argos and Littlewoods. However, Hasbro has been granted 100% leniency since it was the first to provide the Director General of Fair Trading (as he then was) with evidence of the infringing agreements before the investigation commenced. Hasbro also co-operated fully. Therefore its penalty will be reduced to nil.

This decision replaces the then Director General of Fair Trading's decision of 19 February 2003 (No. CA98/2/2003).

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ANNEX B – List of statements and documents submitted by Hasbro, Argos and Littlewoods as part of their representations on the original Rule 14 Notices

NOTE: WHERE TEXT APPEARS AS [*] THIS INDICATES THAT A FIGURE OR PASSAGE HAS BEEN REDACTED ON GROUNDS OF CONFIDENTIALITY

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 turnover in 2001 was £123.8 million.¹

ARGOS

- 2 Argos is a multi-channel retailer and forms part of the GUS plc ('GUS') retail and business services group. Argos's main business comprises the Argos catalogue showroom chain. Its headquarters are in Milton Keynes. Argos has around 450 stores and is the UK's largest catalogue retailer. In the twelve months up to the end of March 2002, it had a UK turnover of £2.7 billion.² Another member of the GUS group was, at the relevant time, GUS Home Shopping which operates as a home shopping catalogue without connection to high street showrooms. It is a separate business from Argos. It is not alleged that GUS Home Shopping was party to any agreement and/or concerted practice infringing the Chapter I prohibition.

LITTLEWOODS

- 3 Littlewoods is a multi-channel retailer with its headquarters in Liverpool. Its retailing operations include Littlewoods stores, Index stores and home shopping catalogue business. It has around 250 stores, including 135 Index catalogue stores. In the twelve months up to the end of April 2002, it had a UK turnover of £1.9 billion.³ In its Notice of Appeal (see paragraph 19 below) Littlewoods for the first time contended that the Decision being appealed (and the rule 14 notice that had preceded it) had been addressed to the wrong company within the Littlewoods group (Littlewoods Ltd rather than Littlewoods Retail Ltd). The OFT was and remains of the view that the Decision being appealed was appropriately addressed to Littlewoods Ltd. In order to accord Littlewoods Retail Ltd an opportunity to comment on this issue, the supplemental rule 14 notice, which followed the Competition Appeal Tribunal's order (see paragraph 19 below), was

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

² FAME (Financial Analysis Made Easy) - online publisher (Bureau van Dijk).

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

served on both Littlewoods Ltd and Littlewoods Retail Ltd. Only Littlewoods Ltd responded to the supplemental rule 14 notice and it submitted no argumentation that it was not an appropriate addressee of this notice. Littlewoods Ltd has not during the course of the administrative procedure (either in response to the original or to the supplemental rule 14 notices) adduced evidence sufficient to show that Littlewoods Retail Ltd and not Littlewoods Ltd should be the addressee of the Decision. There is no evidence that Littlewoods Ltd did not exercise decisive influence over Littlewoods Retail Ltd or that Littlewoods Retail Ltd acted autonomously. The presumption that Littlewoods Retail Ltd, as a wholly owned subsidiary of Littlewoods Ltd, followed the policy laid down by its parent has not been rebutted.⁴ In addition, at all stages prior to its Notice of Appeal, Littlewoods Ltd had encouraged the OFT to deal with it in relation to this matter and had dealt with the OFT as if it were the responsible and appropriate company. Since its Notice of Appeal, Littlewoods Ltd has continued to act in relation to this matter as if it were the appropriate company. Therefore, the OFT is of the view that this Decision should be addressed to Littlewoods Ltd only.

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 £34 billion) in 2000.⁵ 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.

⁴ European Court of Justice, Case C-286/98P *Stora Kopparbergs v Commission* [2000] ECR I-9925, paragraph 26.

⁵ 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 £8.7 billion).

UNITED KINGDOM

- 7 The international position is reflected at the UK level, except that Hasbro is the leading manufacturer. In 2001 it had a turnover of £123.8 million (£197.8 million in 2000) compared to Mattel's £108.4 million (£85.7 million in 2000).⁶ The UK toy and games market is estimated at £1.85 billion in 2001 (£1.76 billion in 2000).⁷ Toy sales are highly seasonal and the majority of sales are made in the few months up to Christmas.⁸
- 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.⁹ 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 sector. Selling toys and games is increasingly taken more seriously and the large grocery retailers now employ dedicated toy buyers'.¹⁰
- 9 The leading UK retailers of toys and games are Argos and Woolworths plc ('Woolworths'). Other major retailers are the US specialist chain Toys 'R' Us, Early Learning Centre and Littlewoods with its Index catalogue shops. Many independent specialist retailers are finding it increasingly difficult to compete against the large chains.
- 10 Argos and Littlewoods are the major high street catalogue retailers in the UK. They compete more directly with conventional high street retailers than with home shopping catalogue retailers, because the latter offer additional services, for example home delivery and credit terms. Catalogues are published for the Spring/Summer ('S/S') season and Autumn/Winter ('A/W') season. Prices for the catalogues need to be established at a relatively early stage. For example a typical A/W catalogue will be published in late July with final pricing in May at the latest. A similar process takes place six months later for the S/S catalogue. According to Littlewoods, catalogue retailing possesses certain specific characteristics:

'The catalogues for these seasons are produced well in advance, both reflecting the propensity of customers to buy in advance for forthcoming seasons,

⁶ FAME (Financial Analysis Made Easy) - online publisher (Bureau van Dijk).

⁷ Key Note, 'Toys & Games – 2001 Market Report', page 9.

⁸ In 2000, 55% of sales were made in the final quarter (Mintel, 'Toy Retailing, Retail Intelligence – UK Report', November 2001, page 13, figure 5).

⁹ Key Note, 'Toys & Games – 2001 Market Report', page 19.

¹⁰ Mintel, 'Toy Retailing, Retail Intelligence – UK Report', November 2001, page 86.

particularly in the case of clothing, but also ensuring the catalogue is available for the full potential sales period. High Street retailers, on the other hand, can alter their product and price offering at any time. Although catalogue retailers can produce supplemental leaflets or brochures containing special offers, the basis of the retail pitch must be the main catalogue itself. This means that catalogue operators, particularly if they are also discounters, must go to [the] market with prices which are as keen as possible. This may well have effects on market prices in the High Street. High Street retailers have the opportunity to undercut but may find it difficult to do so if the catalogue operators have adopted keenly competitive pricing in their catalogues.¹¹

C Investigation

- 11 The then Director General of Fair Trading (the 'Director') started an investigation into price-fixing by Hasbro in March 2001. The investigation looked first into possible price-fixing and/or resale price maintenance ('RPM') by Hasbro and a number of its distributors (this investigation resulted in the then Director's Decision CA98/18/2002 of 28 November 2002). As part of the process of investigating the distributors case information was sought from Hasbro about its dealings with retailers. Hasbro applied on 14 September 2001 under the then Director's leniency programme for total immunity from financial penalty in respect of its dealings with retailers or, in the alternative, a reduction in the level of penalty. Leniency was granted on the then Director's usual terms, and in particular on condition that Hasbro co-operated fully with the OFT's investigation. The investigation was then expanded to look at possible price-fixing agreements between Hasbro and retailers, in particular Argos and Littlewoods.

INVESTIGATION INTO HASBRO AND THE RETAILERS

- 12 On 10 August 2001, the OFT sent Notices under section 26 of the Competition Act 1998 to Hasbro and a number of retailers seeking information.
- 13 On 26 and 27 September 2001, OFT officials carried out on-site investigations under section 27(3) of the Act at the headquarters of Argos and Littlewoods. A large number of e-mails and other documents were obtained as part of the investigation.

¹¹ Report – produced by Littlewoods – 'Investigation into the Market for Toys: Points of General Clarification for the Office of Fair Trading' (21 December 2001).

INTERVIEWS GIVEN TO THE OFT

- 14 Between 10 October 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. Voluntary statements were also given by three Littlewoods employees on 16 October 2001 in Liverpool (although not as part of any leniency application).
- 15 The Hasbro statements are not entirely consistent with each other. However, many factors can lead to different people giving different versions of the same events, for example different powers of recollection and different amounts of background information. The statements by Hasbro employees were given voluntarily in an unpressurised context and in the presence of Hasbro's legal adviser. No employee had any incentive to describe an agreement that did not exist, but there may well have been some inhibition felt about describing an illegal agreement that did exist. The OFT takes the view that it is proper to place more weight on some of the statements than on others and, in particular, to regard statements that are consistent with the documentary evidence as additional good evidence of price-fixing agreements.
- 16 Much of the evidence relied upon in this Decision comprises internal e-mails produced and statements given by representatives of Hasbro. The OFT has no reason to believe that such documents and statements misrepresent the position. Hasbro's internal e-mails were contemporaneous with the events that are the subject of this Decision, and are supported by documents found at premises belonging to Littlewoods. For example, the e-mail of 18 May 2000 from Ian Thomson to Littlewoods staff was found in Hasbro's files and those of Littlewoods (see paragraph 69 below). Also, the content of these e-mails and the statements given by Hasbro representatives are fully consistent with each other. The OFT is therefore satisfied that they provide sufficient evidence not only against Hasbro but also against Argos and Littlewoods.

ORIGINAL RULE 14 NOTICES

- 17 On 1 May 2002 the then Director issued Notices ('the original rule 14 Notices') to Hasbro, Argos and Littlewoods in accordance with rule 14 of the OFT's procedural rules.¹² The original rule 14 Notices set out the basis on which the then Director proposed to find that the Chapter I prohibition had been infringed. All three companies subsequently made both written and oral representations in response to the rule 14 Notices. These representations included statements by

¹² Competition Act 1998 (Director's rules) Order 2000 (SI 2000/293).

employees of the three companies. The representations are assessed at part III below. For this case, versions of these representations appropriately edited for confidential and non-factual material were made available to the parties, which were given the opportunity to make further written representations. These representations are also assessed at part III below. After this process of representations on representations was over, in late January 2003 Littlewoods submitted a further four statements from non-toy buyers. The OFT had asked Littlewoods to provide these at an oral hearing the previous September.

ORIGINAL DECISION

- 18 On 19 February 2003 the then Director made a Decision (the 'original Decision') that Argos, Littlewoods and Hasbro had infringed the Chapter I prohibition. Penalties of £17.28 million and £5.37 million were imposed on Argos and Littlewoods respectively. The penalty on Hasbro was assessed at £15.59 million but this was reduced to nil as Hasbro had applied for and received 100% leniency.
- 19 On 17 April 2003 both Argos and Littlewoods appealed to the Competition Appeal Tribunal ('CAT') under section 46 of the Act. The appeals were against the findings of infringement and the penalties imposed. There followed a number of interlocutory pleadings and case management conferences dealing with procedural matters. One of the principal matters at issue was the status of three new witness statements by employees or ex-employees of Hasbro: David Bottomley, Neil Wilson and Ian Thomson, which were given subsequent to the appeals of Argos and Littlewoods, that the OFT sought to lodge as part of its defence. On 30 July 2003 the CAT made an order to the effect that the three witness statements were to be admitted in evidence but made subject to the rule 14 procedure. Rule 14 Notices in the form of a proposed amended decision were served on Argos, Littlewoods and Hasbro on 12 September 2003. Written representations were received from Argos and Littlewoods on 24 October 2003. Both declined the opportunity to have an oral hearing. In view of the nature of its representations (see at paragraphs 346 to 358 below), the OFT gave Argos the opportunity to make further representations. Argos and Littlewoods were also given the opportunity to respond to the other's representations. However, both declined. Hasbro made no representations. The OFT's response to the representations made is detailed at Part III of this Decision.
- 20 This Decision replaces the original Decision.

EVIDENCE

- 21 In this Decision, as evidence that the Chapter I prohibition has been infringed, the OFT relies on the evidence afforded, in whole or in part, by the interview

notes, statements, e-mails and documents that are listed in Annex A. Extracts from this evidence are quoted below but the whole of the evidence should be taken as forming part of this Decision. The statements made by employees of Argos and Littlewoods and submitted to the OFT subsequent to the issue of the original rule 14 Notices are listed at Annex B. All these statements have been reconsidered and evaluated in the light of the three new statements from David Bottomley, Neil Wilson and Ian Thomson before coming to the decision set out herein.

II LEGAL AND ECONOMIC ASSESSMENT

A Relevant market

- 22 The OFT is obliged to define the market when considering a possible infringement of the Chapter I prohibition 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.¹³ No such obligation arises in this case because it involves price-fixing agreements which have as their object the prevention, restriction or distortion of competition. Nevertheless market definition is the first step in the process of assessing penalties.¹⁴

RELEVANT PRODUCT MARKET

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

All toys and games v segmented toys and games

- 24 Toys are highly differentiated products and the nature of consumer demand is aptly summed up by the US Court of Appeals in the Toys 'R' Us appeal:

¹³ 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 OFT 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 OFT must also have regard to any relevant decision or statement of the European Commission (section 60 of the Act).

¹⁴ 'Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty', March 2000 (OFT 423), paragraph 2.3.

'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 also a very faddish product, as those old enough to recall the mania over Cabbage Patch Kids or Tickle Me Elmo dolls will attest.'¹⁵

25 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.¹⁶

26 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.'¹⁷

27 The OFT 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

¹⁵ Case No. 98-4107 Toys 'R' Us v Federal Trade Commission, US Court of Appeals (Seventh Circuit), decided 1 August 2000. The Court upheld the FTC's fining 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>.

¹⁶ 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>.

¹⁷ July 1997, 'Toys and Games', page 12.

- Construction
- Plush (soft toys)
- Ride-ons
- Electronic learning aids

- 28 There is also support for this categorisation amongst manufacturers and retailers. For example, [*] and Argos adopts a similar structure for its buying department.
- 29 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.
- 30 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

- 31 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.
- 32 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.'

33 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.'

34 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.'¹⁸

RELEVANT GEOGRAPHIC MARKET

35 As noted in paragraph 22 above in this case the OFT is under no obligation to come to a conclusion as to market definition for the purposes of establishing an infringement of Chapter I of the Act. However, market definition is the first step in assessing penalties. The OFT considers that it is unlikely that the market can be defined more narrowly than national. If a wider geographic definition were adopted this could have the effect of increasing the parties' relevant turnover and therefore penalty. For the purposes of calculating penalties the OFT is proceeding on the basis that the relevant market is that for toys and games in the UK.

CONCLUSION

36 In the circumstances of the present case, the OFT does not consider it necessary to choose between the wider definition of all toys and games or the narrower definition given below of separate markets for each separate category. It is not necessary in this case to arrive at a precise definition in order to demonstrate an infringement of the Chapter I prohibition. However, the calculation of level of penalties depends partly on definition of the relevant market. The OFT has taken a narrow view of the market which results in penalties which are lower than if a broader definition had been adopted. Therefore, for the purposes of this Decision and in particular for the purpose of assessing the level of penalties the OFT has considered the relevant turnover of the parties in each of the following 10 categories of toys and games:

1) Infant and pre-school

- Infant
- Pre-school

2) Boys' Toys

¹⁸ Key Note, 'Toys & Games – 2001 Market Report', page 10.

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

and is treating each of these 10 categories as a separate relevant product market for the purpose of the OFT's Guidance on Penalties.¹⁹ The OFT considers that the evidence and analysis in this Decision equally demonstrate an infringement of the Chapter I prohibition if a broader view of the relevant product market is adopted as the frame of reference. For the purposes of this Decision, Hasbro's Action Man range is in the category boys' toys and Hasbro's core games²⁰ are in the category games and puzzles.

¹⁹ 'Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty', March 2000 (OFT 423).

²⁰ These comprise Monopoly, Battleships, Trivial Pursuit Genus, Trivial Pursuit Family, Jenga, Pictionary, Mousetrap, Monopoly Jr, Cluedo, Guess Who?, Hungry Hippos, Twister, Buckaroo, Kerplunk, Frustration, Operation, Connect 4.

B UK market position - shares of supply

MANUFACTURERS - HASBRO

- 37 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.²¹ As can be seen from the table (Table 1) below, Hasbro's presence in the market categories identified in paragraph 36 above varies considerably. It is heavily influenced by the presence of particularly strong brands in some areas, such as Action Man in boys' toys category and Monopoly in the games and puzzles category.

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	[*]	[*]	[*]
Boys' toys	[*]	[*]	[*]
Girls' toys	[*]	[*]	[*]
Construction	[*]	[*]	[*]
Games and puzzles	[*]	[*]	[*]
Creative	[*]	[*]	[*]
Plush (soft toys)	[*]	[*]	[*]
Ride-ons	[*]	[*]	[*]
All traditional toys and games	[*]	[*]	[*]

Source: Hasbro (NPD data).

* The 'Games and puzzles' and 'All traditional 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.

RETAILERS

- 38 Argos and Woolworths are the largest suppliers of traditional toys and games in the UK. Together they have a third of the market (see Table 2 below). Toys 'R' Us, with just under 10 per cent of the market, is the next largest retailer of traditional toys and games. Together with the Early Learning Centre ('ELC'), these top four retailers account for over 50 per cent of the retail supply of all

²¹ The wide variation in these figures from year to year is a reflection of the volatility of fashion and taste in the market. Hasbro's Pikachu range of toys was extremely popular during the first period.

traditional toys and games. Littlewoods is the fifth largest with a share of 4.3 per cent with its Index catalogue stores.

Table 2: Retailers' share of the supply of traditional toys and games in the UK in 2000

Undertaking	Market share (%)
Argos	17.6
Woolworths	15.1
Toys 'R' Us	9.6
ELC	8.2
Littlewoods (Index)	4.3

Source: NPD Consumer Panel Service.

C Chapter I Prohibition

- 39 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,²² and (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom, are prohibited'.
- 40 Hasbro, Argos and Littlewoods are all undertakings for the purposes of the Chapter I prohibition.
- 41 It is the OFT's view that a pricing initiative undertaken by Hasbro in 1998/99 led directly to an overall agreement and/or concerted practice between Hasbro, Argos and Littlewoods which included two bilateral agreements and/or concerted practices, between Hasbro and Argos and between Hasbro and Littlewoods. It is clear that at whatever point the agreements and/or concerted practice developed from the initiative, they were in place, at least as regards Action Man and core games, by 1 March 2000 (see paragraph 123 below).

AGREEMENTS INVOLVING HASBRO, ARGOS AND LITTLEWOODS: HASBRO'S PRICING INITIATIVE

Setting up the initiative

- 42 Hasbro manufactures some of the best known traditional toys and games. The overall position in respect of sales of toys and games, and in particular Hasbro's

²² 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.

product offering, can be seen from a report produced by Littlewoods for the OFT:

'margins in toys tend to be relatively low ... margins are even more limited in the case of highly promoted branded toys such as those produced by Hasbro ...'.²³

In this situation, Hasbro faces the risk that some of its products may be delisted in favour of those of other toy suppliers, own-brand offerings or even different products.

- 43 As is apparent from the evidence referred to below, in the period up to and including 1998 Hasbro management were aware that retailers were unhappy with the margins they were receiving and believed that this was mainly caused by [*].²⁴ In response, they put together a number of initiatives, which were in operation from 1999 onwards. These initiatives were designed to improve retail margins overall and consisted mainly of what was known by Hasbro as a 'pricing initiative' and a 'listing initiative'.²⁵ The listing initiative offered rebates in return for the listing of certain Hasbro products which were threatened to be delisted. The pricing initiative involved maintaining retail margins on Hasbro's toys and games range by persuading retailers to keep to recommended retail prices ('RRPs').²⁶ In his witness statement, David Bottomley, a Sales Director at Hasbro, says that it was:

'... a pricing initiative under which Hasbro would try to get retailers to list at RRP's'.²⁷

- 44 Towards the end of 1998 and the beginning of 1999, discussions took place between Hasbro's sales team and buyers of Argos and Littlewoods over Hasbro's initiative and adherence to RRP's. The involvement of Mike McCulloch, Head of Marketing and Sales at Hasbro, David Bottomley and Mike Brighty, Hasbro Sales Directors, as active participants in setting up the initiative, as set

²³ Report – produced by Littlewoods plc – 'Investigation into the Market for Toys: Points of General Clarification for the Office of Fair Trading' (21 December 2001).

²⁴ Witness statement of David Bottomley, paragraph 6; witness statement of Neil Wilson, paragraphs 4 and 5; witness statement of Ian Thomson, paragraph 14.

²⁵ Other initiatives included the introduction of clearance merchandise, an FOB programme and reducing cost prices (witness statement of Neil Wilson, paragraph 9).

²⁶ Witness statement of David Bottomley, paragraphs 8, 9 and 48; witness statement of Neil Wilson, paragraph 9; witness statement of Ian Thomson, paragraphs 33, 34 and 38 to 47.

²⁷ Witness statement of David Bottomley, paragraph 9.

out in McCulloch's statement to OFT officials and Bottomley's witness statement,²⁸ shows how Hasbro supported the initiative at a senior level.

- 45 The initiative was initially discussed internally at Hasbro. On 23 October 1998, a meeting was held at which Hasbro's 1999 trading terms strategy was presented by Jonathan Evans²⁹ and Mike Brighty.³⁰ The purpose of the meeting was to discuss how to increase margins on Hasbro products. Discussion took place about the listing and the pricing initiatives (under which Hasbro would try to get retailers to list at RRP's). Account managers were briefed to undertake audits of toy retailers and if they found that prices were not at RRP's they were to have conversations with them to try and persuade them to adopt RRP's. Bottomley calls this meeting 'the start of the process that led to Hasbro's pricing initiative/strategy'.³¹
- 46 At this stage, Hasbro's pricing initiative was limited to its core games and Action Man range. These were the products for which price-cutting had been most intense and which gave retailers the lowest margins. They were high-volume products that were advertised on television and whose brands were widely recognised.³² The pricing initiative was later expanded to include other key Hasbro brands (see from paragraph 62 below).
- 47 The involvement in the pricing initiative of Argos and to a lesser extent Littlewoods was essential.³³ Argos is generally accepted as the price setter and leader in the market (see further at paragraph 55 below). However, Hasbro considered that Argos would have been very unlikely to make a commitment to follow Hasbro's RRP's unless it was reassured that doing so would not result in its catalogue prices being undercut by those in the Index catalogue. Littlewoods is the main catalogue competitor to Argos. Littlewoods estimates that some [*]

²⁸ Witness statement of David Bottomley, paragraphs 11, 14, 15 and 17; similarly, witness statement of Neil Wilson, paragraphs 8 and 9, and witness statement of Ian Thomson, paragraphs 34 to 46 and 54.

²⁹ Jonathan Evans, Hasbro's Trade Marketing Director, left Hasbro shortly afterwards, in October or November 1998 (witness statement of Ian Thomson, paragraph 50).

³⁰ Witness statement of David Bottomley, paragraphs 8 and 9, and witness statement of Ian Thomson, paragraph 38. This presentation is set out in the document headed '1999 Trading Terms. A package for continued success', attached as Document D.1 of Annex A.

³¹ Witness statement of David Bottomley, paragraphs 8 and 9. This is the meeting which Bottomley described at lines 23 to 25 of the notes of his interview with OFT officials (paragraph 9 of his witness statement).

³² Witness statement of David Bottomley, paragraph 13; witness statement of Neil Wilson, paragraph 14 and witness statement of Ian Thomson, paragraphs 23 to 25, 39 and 42 to 44.

³³ Witness statement of David Bottomley, paragraphs 12 and 21; witness statement of Neil Wilson, paragraphs 27 and 59; witness statement of Ian Thomson, paragraphs 14 and 93.

million homes have copies of both catalogues. Catalogue retailers publish their prices early in the season and cannot modify their prices as easily as other high street retailers if they subsequently find they are being undercut.³⁴ Each must therefore attempt to price at a level which is not higher than its competitors' prices. Argos and Littlewoods monitor, in particular, each others' prices very closely and produce regular analyses showing how often each undercuts and is undercut by the other.³⁵ Since both companies offer a price-match guarantee,³⁶ neither can afford to have prices that are seriously out of step with the other. It was therefore necessary to reassure Argos that Littlewoods would also be committed to RRP. For its part Littlewoods required the same assurance of commitment by Argos (see further below, in particular at paragraph 96).

48 In his witness statement, David Bottomley specifically confirms Hasbro's view that the commitment of Argos and Index was necessary to make Hasbro's strategy work:

'Argos and Littlewoods were key to the success of the pricing initiative since they were the market leaders – if they could be persuaded to maintain prices at RRP then other retailers would follow suit.'³⁷

49 Hasbro discussed its strategy with both Littlewoods and Argos.³⁸ In his witness statement, Ian Thomson, Hasbro's Business Account Manager for Littlewoods, mentions a meeting with Littlewoods at its Liverpool head office in late 1998 or early 1999.³⁹ This meeting was attended by Mike McCulloch, David Bottomley and Ian Thomson of Hasbro, and John McMahon (Trading Director), Lesley Paisley (a Buying Manager) and Alan Burgess (Boys' Toys and Games Buyer) of Littlewoods. Littlewoods was concerned about the feasibility of Hasbro's pricing initiative and in particular expressed doubts about Hasbro's ability to prevent undercutting by Argos. Ian Thomson states in his witness statement:

'It was at this point that Mike McCulloch intimated to John McMahon that he had been having discussions with the major opposition (Argos) and they were of

³⁴ Witness statement of Neil Wilson, paragraph 60.

³⁵ Littlewoods in its report to the OFT states: 'Following the publication of the Argos and Index catalogues, Littlewoods produce a report demonstrating where Littlewoods have won, drawn or lost when compared with the prices in the Argos catalogue'

³⁶ For example the Index A/W catalogue for 2001 states on the inside front cover 'we're never beaten on price; find it cheaper elsewhere on similar terms, tell us within 7 days of purchase and we'll refund the difference'. Argos makes a similar commitment in its catalogues.

³⁷ Witness statement of David Bottomley, paragraph 12.

³⁸ Generally, witness statement of David Bottomley, paragraph 11; witness statement of Neil Wilson, paragraph 8; witness statement of Ian Thomson, paragraphs 9 to 14.

³⁹ Witness statement of Ian Thomson, paragraphs 52 to 64. See also witness statement of David Bottomley, paragraph 15.

the same opinion i.e. that they could not agree to the new pricing structure for fear of being undercut. It did need the agreement of both parties in order for the plan to work, but that if Index would agree to go along with it then Mike McCulloch, using this knowledge, was confident that he could persuade them to do the same.

John McMahon said that he would play ball and go along with the plan but if they (Argos) reneged on the deal and did not stick to the retail prices in their 1999 Autumn Winter Catalogue and he (Index) did, he would be seriously disadvantaged. If this happened as a result he would do some serious price cutting in the next Index catalogue launch.

... Mike McCulloch said that he would have to go and see Argos to get their buy in. ...

I was told shortly afterwards that Argos had agreed to go ahead. ... I do remember being asked to pass on the information to Index and I would have spoken directly to Alan Burgess as a result. Alan simply acknowledged this. ...

At that time I spoke to Alan Burgess to tell him that we had had an agreement from Argos that the Core Brand recommended retail prices would be adhered to.⁴⁰

- 50 Neil Wilson, Hasbro's Business Account Manager for Argos, mentions discussions between Mike McCulloch and Maria Thompson (Argos's Commercial Director), Sue Porritt (Argos's Senior Buyer/Trading Manager) and buyers at Argos in late 1998 and early 1999:

'... I understood that Mike McCulloch said that Hasbro could help stabilise RRP's (i.e. persuade other retailers to go out at RRP's), and that Argos was willing to go along with this in principle and price at RRP's, but would react if it was undercut and would never give any guarantees on pricing.'⁴¹

- 51 An example of Hasbro's discussions with Argos is shown in a paper prepared by Hasbro in relation to a meeting with Argos on 17 February 1999, which refers to:

'- Dialogue opened to stabilise RRP's (initially core Games, Action Man)
- Build in additional rebate earning'

It would appear from the evidence that this meeting was attended by Alistair Richards, Hasbro's Commercial Director Northern European Region, and Simon Gardner, Head of Hasbro Europe, and by Terry Duddy, Argos's Chief Executive Officer, and Maria Thompson, Argos's Commercial Director for toys and other products. A letter from Alistair Richards to Terry Duddy about this meeting,

⁴⁰ Witness statement of Ian Thomson, paragraphs 62 to 67.

⁴¹ Witness statement of Neil Wilson, paragraph 8.

dated 18 March 1999, refers to the desire on the part of Mr Duddy and Ms Thompson for 'extra focus by Hasbro' on 'product availability and particularly profitability'.⁴² Hasbro's pricing initiative was also discussed in this meeting, as is stated by David Bottomley in his witness statement⁴³ and as is shown by an e-mail that Sue Porritt, Argos's Senior Buyer/Trading Manager, sent to Argos's toys buyers on 19 February 1999. The e-mail has as its subject 'Hasbro Debrief from Terry Duddy Meeting' and, although the e-mail does not specify the date of the meeting, it can be reasonably inferred, given the immediate proximity of the e-mail to the meeting of 17 February 1999, that it refers to this meeting.⁴⁴

- 52 A 'contact report' prepared by Neil Wilson gives another example of a meeting between Hasbro and Argos in which Hasbro's pricing initiative was discussed. The meeting was held on 29 March 1999 and was attended by Neil Wilson for Hasbro and Sue Porritt for Argos. Wilson notes in his contact report:

'Hasbro's retail pricing strategy to increase trade brought [sic] in margin was discussed. Sue understands our strategy but categorically stated that Argos will react to competitor pricing and 'may be forced to react on price if sales are sluggish later in the year'. She implied that this would be out of her control!'⁴⁵

- 53 The Hasbro managers of the Argos and Littlewoods accounts (Neil Wilson and Ian Thomson respectively) were asked to enter into dialogue with the two retailers to try to ensure that they supported the pricing initiative.⁴⁶ Hasbro set the RRP's after separate discussions with Argos, Littlewoods- and other retailers. This is normal practice in the industry. Argos and Littlewoods then selected, independently from each other, the Hasbro products they would include in their catalogues. Neil Wilson, Hasbro's account manager for Argos, describes how the pricing initiative then worked in practice:

'When I was given the products selected for the catalogue, I established which were the common products carried by the majority of retailers (not specifically Index) and asked Argos what its price intentions were in relation to each of these products. I did not do this for products that were not common. I informed Argos what the Hasbro RRP's for the common products were and asked them whether any of our RRP's were a problem for them to match. Argos let me know whether they considered that a particular RRP was inappropriate. This was nearly always because Argos had spotted a different retailer charging a lower price, but it could also be because Argos felt the market would not stand the RRP and wanted to

⁴² Document D.2 of Annex A.

⁴³ Witness statement of David Bottomley, paragraph 11.

⁴⁴ Document D.3 of Annex A.

⁴⁵ Document D.4 of Annex A.

⁴⁶ Witness statement of David Bottomley, paragraph 17.

reduce the price to drive sales. [*] Occasionally their price would differ from the indication they had previously given.

At the same time, other account managers would go through the same process with their retailers. Once Argos had told me what their pricing intentions were, I passed on that information to other account managers within Hasbro to flag-up the products where the RRP was looking unlikely to be matched. It was then up to them to tell their accounts, and I do not know how they presented this information. However, I know that they did tell their accounts. ...

Having determined Argos' pricing intentions and passed these on to the other account managers within Hasbro, I received information from those account managers regarding the intentions of other retailers to go with RRP. I then reverted to Argos and said, without being specific, that it was my belief that the future retail price of a product would or would not be at the RRP. I told Argos which products this related to. I never mentioned the name of the retailer who was involved or quantified exactly the price that retailer would go out at. I simply said to Argos that it was my belief from what retailers told us that this or that product would or would not be at the RRP.⁴⁷

In addition, when it became clear, from Hasbro's own monitoring or from calls from retailers, that a retailer was undercutting Hasbro's RRP or, when lower, the price charged by Argos or Littlewoods, Hasbro would speak to the retailer in question and ask it to increase the price (see further below at paragraph 90).

- 54 Mike McCulloch claimed at his interview with OFT officials that in his discussions with Argos in late 1998/early 1999, Argos was not prepared to commit to selling at RRP as it was concerned about being undercut by other retailers. However, at his interview he went on to tell the OFT that the 'bought in margin initiative was taken up by Argos and Index'. The 'bought in margin' (or 'BIM') initiative was another name for the pricing initiative. The OFT understood McCulloch to be saying that both Argos and Littlewoods were interested in the pricing initiative and that their (particularly Argos's) agreement would be necessary to induce other retailers to follow suit. However, McCulloch sought to convey the impression that after his initial discussions, he had no further conversations with Argos, and he did not himself know how Argos or Littlewoods had come eventually to agree to go along with the BIM initiative. He sought to give the impression that in 2000 it just happened that 'everyone generally following our RRP's'. He claimed not to know about any agreement or arrangement which had brought that about. This is contradicted by the documentation as referred to above and below and by other Hasbro witnesses. David Bottomley, Neil Wilson and Ian Thomson made it clear at the time of their

⁴⁷ Witness statement of Neil Wilson, paragraphs 16 to 19. This is supported by the witness statements of David Bottomley, paragraphs 17 to 19, and Ian Thomson, paragraphs 67 to 69, and the evidence in their witness statements relating to specific catalogues, as assessed below.

interviews with OFT officials, and it is clear from their subsequent witness statements, that Argos's initial concerns about undercutting did not prevent it from subsequently indicating that it would go along with Hasbro's pricing initiative on the understanding that Hasbro would get Littlewoods to do likewise (see further at paragraph 96 below). David Bottomley states:

'... as a result of the discussions that Mike Brighty of Hasbro had with Sue Porritt of Argos, I came to understand that Argos had indicated that they too would go out at Hasbro RRPs.

... there was an understanding that retailers, including Argos and Littlewoods, would price at or near Hasbro's RRPs. ...'⁴⁸

Also, as shown below (paragraphs 57 and 58 below), in its A/W 1999 catalogue, with only one exception, Argos did in fact price the 17 common toys in the Action Man range and the 12 common products in core games at prices identical to Littlewoods's prices. In contrast, the previous catalogue (S/S 1999) had listed nine common products in core games, of which only five were priced at the same price. Of the 12 common toys in the Action Man range, none had been priced at the same price. The same disparity and lack of convergence had also been evident in the 1998 catalogues which therefore also contrasted with the sudden change to uniformity in A/W 1999 (see paragraph 56 below).

55 Discussions were also held by Hasbro with other retailers, but they generally were known to follow Argos's and Littlewoods's lead. Mike McCulloch informed OFT officials:

'Initiative was discussed with other retailers. Other retailers were always going to follow prices of Argos and Index. So other retailer[s] felt whatever Argos and Index did was crucial to strategy.'

Hasbro also reported to Argos that the 'rest of [the] retailers were price followers'.⁴⁹ Hasbro felt that the involvement of Argos and Littlewoods would act as a signal to the rest of the industry that RRPs were being followed. Ian Thomson, Hasbro's Business Account Manager for Littlewoods, says in his witness statement: 'The impact of the new Hasbro 1999 terms by Argos and Index was felt throughout the trade and nearly all of our customers stuck to the price points because Argos and Index who were the price leaders had demonstrated that the new strategy was working'.⁵⁰ Other retailers would have been able to see easily from the catalogues that RRPs were being followed. From the statements made by Hasbro employees, it would seem that other retailers

⁴⁸ Witness statement of David Bottomley, paragraphs 16 and 18.

⁴⁹ Statement of Mike McCulloch to OFT officials; see also the witness statement of David Bottomley, paragraph 14.

⁵⁰ Witness statement of Ian Thomson, paragraph 75.

broadly followed Argos/Littlewoods pricing practices and that as a result there was little deviation from Hasbro RRP⁵¹. Mike McCulloch states:

'As far as other retailers [are] concerned, [there was] no need to communicate; they had bought into [the] initiative, and were happy to follow Argos price lead.'

56 Table 3 compares the prices charged by Argos and Littlewoods in their catalogues from Spring/Summer 1998, when Hasbro's pricing initiative did not yet exist, to Spring/Summer 2001, when the practice came to an end. This table is based on the lists of prices of the relevant Hasbro products in the relevant Argos and Littlewoods catalogues shown in Document D.5 of Annex A. It will be further referred to in the discussion of the specific catalogues below.

Table 3: Comparison of prices of core games, Action Man toys and toys mentioned in the e-mail of 18 May 2000 as charged by Argos and Littlewoods in their catalogues

Catalogue	Core Games	Action Man	Additional Toys*
S/S 1998	9 common products, none at same price	16 common products, none at same price	1 common product, not at same price
A/W 1998	13 common products, 4 at same price	17 common products, 3 at same price	6 common products, none at same price
S/S 1999	9 common products, 5 at same price	12 common products, none at same price	2 common products, neither at same price
Initial arrangements regarding Action Man and Core Games only (see from paragraph 42 above)			
A/W 1999	All 12 common products are at the same price	17 common products are at the same price, 1 (Walkie Talkie) is priced at £12.99 by Argos and £14.99 by Littlewoods	7 common products, only one of which is at the same price
S/S 2000	All 9 common products are at the same price	16 of 17 common products are at the same price	4 common products, only one of which is at the same price

⁵¹ Witness statement of David Bottomley, paragraphs 12 and 14; witness statement of Neil Wilson, paragraphs 27 and 30.

E-mails of May 2000 extending arrangements to products other than Action Man and Core Games (see from paragraph 62 below)			
A/W 2000	All 14 common products are at the same price	20 of the 21 common products are at the same price	17 common products, 14 of which are at the same price**
S/S 2001	All 8 common products are at the same price	13 of the 14 common products are at the same price	All 5 common products are at the same price***

Source: catalogues of Argos and Littlewoods, as summarised in Document D.5 of Annex A.

* 'Additional Toys' are the toys mentioned in the e-mail of 18 May 2000 from Hasbro to Littlewoods (see paragraph 69 below).

** This includes Interactive Pikachu which was priced by both Argos and Littlewoods at £23.75 (see paragraph 75 below).

*** This includes the two Tweenies dolls (Tweenies Pop Star Poseable Plush and Tweenies Doodles) that were the subject of discussions in the autumn of 2000 and which were subsequently priced by Argos and Littlewoods at the same price (see further at paragraph 107 below).

Autumn/Winter 1999 catalogues

57 The Argos and Littlewoods Autumn/Winter 1999 catalogues were the first catalogues for which the Hasbro account managers for Argos and Littlewoods had applied the process that is described in paragraph 53 above. When the catalogues were published in July 1999, it became clear to Hasbro that Argos and Littlewoods had priced nearly all the Action Man products and core games at the levels they had indicated to Hasbro, normally at Hasbro's RRP⁵². This had been very different in the three previous catalogues, as shown in Table 3 (paragraph 56 above).

58 Before the Autumn/Winter 1999 catalogues came out, there was uncertainty about whether Hasbro's pricing initiative would work. The actual price levels in the catalogues reassured both Hasbro and retailers that the price levels of Hasbro products would be at or close to RRP. As indicated at paragraph 55 above, Ian Thomson says in his witness statement:

'The impact of the new Hasbro 1999 Terms by Argos and Index was felt throughout the trade and nearly all of our customers stuck to the price points

⁵² Witness statement of David Bottomley, paragraph 22; witness statement of Neil Wilson, paragraph 34; witness statement of Ian Thomson, paragraphs 69 to 71.

because Argos and Index who were the price leaders had demonstrated that the new strategy was working.¹⁵³

Spring/Summer 2000 catalogues

59 It is clear that after A/W 1999, the arrangements for the Action Man range and core games were in operation for the S/S catalogues in 2000. However, there were fewer discussions on pricing between Hasbro and each of Argos and Littlewoods.⁵⁴ This was partly because the Autumn/Winter season is more important for toy sales than the Spring/Summer season, because the Autumn/Winter catalogue applies in the Christmas period, when the majority of toys is sold. In addition, at the time that the prices for the S/S 2000 catalogues had to be set, in November or December 1999 and hence before the Christmas period, Argos and Littlewoods were still concerned about possible undercutting of their prices. Neil Wilson says in his witness statement:

'... Hasbro and Argos could not have been confident that the pricing initiative had worked until after Christmas 1999. As the Christmas period is the most important period of the year for selling toys, Argos wanted to see if there was any undercutting during that period. This could be undercutting by Index in the form of flyers distributed after the A/W 1999 catalogue had come out in August 1999, or undercutting by other retailers. By the time we knew how the pricing initiative had worked after Christmas 1999, the prices for the Spring/Summer 2000 catalogue had already been set.'⁵⁵

60 In the autumn of 1999, during the preparation of the S/S 2000 catalogue, Ian Thomson spoke to Alan Cowley (Littlewoods's buyer for pre-school and musical toys). Thomson told Cowley that Argos were going out at the RRP of £14.99 for a Tweenies doll. Cowley on behalf of Littlewoods was at that time considering a price of £12.99 for the Tweenies doll, but Thomson told him it was safe to go out at £14.99 in view of Argos's intentions. When Cowley refused to confirm the higher price, Thomson pointed out that both Littlewoods and Argos had gone out at RRPs for the toys in the Action Man range in the last catalogue (i.e., A/W 1999), but Cowley said that was no guarantee. So Thomson told him to talk to his colleague, John McMahon (buying director of Littlewoods until end September 2000) who had been talking to Mike McCulloch about prices. Cowley then spoke to John McMahon who told him that they (i.e. he and Hasbro) had discussed prices, and recommended that Cowley go along with the suggestion

⁵³ Witness statement of Ian Thomson, paragraph 75. See also witness statement of David Bottomley, paragraph 23.

⁵⁴ Witness statement of David Bottomley, paragraph 23; witness statement of Neil Wilson, paragraphs 35 and 36; witness statement of Ian Thomson, paragraphs 83 to 99.

⁵⁵ Witness statement of Neil Wilson, paragraph 36.

of a £14.99 price point and see how it went along.⁵⁶ Both Argos and Littlewoods did in fact price the Tweenies doll at £14.99 in their S/S 2000 catalogues (see Document D.5 of Annex A). This evidence shows a high degree of co-operation and concerted action between Littlewoods and Hasbro, and is consistent with the existence of the price fixing agreements and/or concerted practices which the OFT has found were in existence.

- 61 That the arrangements did in fact continue is shown by Ian Thomson's internal e-mail of 18 May 2000, quoted at paragraph 67 below, which states 'Action Man and Games prices will be maintained as per earlier agreements.' Also, an analysis of the S/S 2000 catalogues, which came out in January 2000, demonstrates that both Argos and Littlewoods continued to price Hasbro's core games and Action Man range at identical prices in respect of all but one product (see Table 3 in paragraph 56): all 9 common products in the core games range were at the same price, while of the Action Man range, 16 were at the same price and only one was priced differently.⁵⁷

Extending the initiative beyond Action Man and core games

- 62 After the publication of the S/S 2000 catalogues, the initiative was extended to other products. Ian Thomson states:

'Encouraged by the success of the Core Brand initiatives that had been successful in 2 Catalogue launches (A/W 1999 and S/S 2000) we talked about expanding the range of products. ...'⁵⁸

- 63 At the end of 1999, an internal meeting was held at Hasbro in which the trading strategy for 2000 was discussed.⁵⁹ A presentation document, which has the initials of Mike McCulloch on its cover page, first notes the success of the strategy so far:

'Retail pricing initiative has worked – maintaining Action Man and Games price points at suggested levels in Argos/Index Catalogues and across the rest of our Distribution base.'⁶⁰

⁵⁶ Witness statement of Alan Cowley, submitted by Littlewoods with its written representations, paragraphs 7 to 9.

⁵⁷ See further paragraphs 97, 99 and 100 of Ian Thomson's witness statement. This is also the recollection of David Bottomley (paragraph 23 of his witness statement) and Neil Wilson (paragraph 37 of his witness statement).

⁵⁸ Witness statement of Ian Thomson, paragraph 100. In similar terms, witness statement of David Bottomley, paragraph 24, and witness statement of Neil Wilson, paragraph 38.

⁵⁹ Witness statement of Neil Wilson, paragraphs 39 to 43.

⁶⁰ Document D.6 of Annex A, first page headed 'The Story So Far'. This document is referred to in paragraph 39 of Neil Wilson's witness statement.

The presentation shows that Hasbro wanted to increase profitability on its products:

'How do we continue to drive retail profitability to a min. 25% for specific Accounts and continue our successful pricing initiative whilst addressing the key issues of:

1. Low BIM [i.e. bought-in margin] across the product range. ...'⁶¹

One of the strategies set out in the presentation is:

'Build significantly improved BIM across the portfolio, in line with the new segmentation ...'⁶²

64 This involved extending the pricing initiative to other Hasbro brands, which are indicated by the words 'new segmentation'.⁶³ These brands fell into three categories:

'*Core Boys*', covering Action Man, Star Wars, Transformers, Micro Machines and Batman; '*Games and Creative*', covering core games and creative play products; and '*Growth Drivers*', covering Tweenies, Pokemon, PlaySkool, Mr Potato Head, Barney, Nerf, Feature Dolls, Art Attack and Puzz 3D. The brands chosen were all key brands. ...'⁶⁴

Ian Thomson believes the initiative was extended to include only:

'3 POKeMON products, 2 Micro Machines products, 2 Hand Held Electronic Games products, 1 Girls product, 4 Get Set products, 2 Design and Draw products, and 8 Tweenies products. In choosing these ranges we had pulled together a list of products that had been subject to price promotion and included new ranges like POKeMON that would also suffer. New high profile product had been subject to severe price cutting in the past, which lead to complaints from the industry to us about the poor margins.'⁶⁵

The products mentioned by Ian Thomson are those listed in his e-mails of 18 May 2000 (see paragraphs 67 and 69 below).

65 Hasbro proposed to Argos and Littlewoods to extend the initiative. Both agreed, although they were still concerned about undercutting. Argos's reaction is shown in an internal Hasbro 'contact report' that Neil Wilson prepared shortly after he and Mike Brighty met Sue Porritt of Argos on 9 December 1999:

⁶¹ Document D.6 of Annex A, page headed 'Key Question'.

⁶² Document D.6 of Annex A, page headed '1. Trading Terms Strategy. Key 2000 Terms Strategies'.

⁶³ Witness statement of Neil Wilson, paragraph 40.

⁶⁴ Witness statement of Neil Wilson, paragraphs 41 and 42, and Document D.6 of Annex A, page headed 'Trading Terms Category Definition. Strategy 1'.

⁶⁵ Witness statement of Ian Thomson, paragraphs 103 and 104.

'SP [Sue Porritt] was very positive about the new terms and the impact they will have on Argos business. It is crucial that we can maintain retail price stability across our key brands so that the plan can succeed.'⁶⁶

In his witness statement, Neil Wilson explains what he meant:

'... Sue Porritt was very positive regarding the new terms and that the initiatives that had applied to Action Man and Core Games in 1999 would be extended to other categories. It was recognised in the meeting that it was crucial that we maintained retail price stability as far as possible across our key brands so that the initiatives could succeed. Sue Porritt felt it was great that Hasbro could help maintain retail price stability, but said that Argos would react if it was undercut in order to remain competitive. By 'retail price stability', I meant retailers going out at the same price, i.e. Hasbro's RRP.'⁶⁷

66 Littlewoods's reaction to Hasbro's proposal was similar to Argos's reaction: it was positive, but also concerned about undercutting. Ian Thomson states:

'In my dealings with the Buyers, except for Alan Cowley, I always got the impression that they were fully aware of the initiatives regarding Core Games and Action Man and while willing to go along with my new proposals were nervous of what would happen if they were left exposed.'⁶⁸

67 The same process of discussions co-ordinated by Hasbro (see paragraph 53 above) was then used on the wider range of products in the Autumn/Winter 2000 and Spring/Summer 2001 catalogues.⁶⁹ How the process worked can be seen from a series of e-mails circulated internally and externally around the time that Argos and Littlewoods were finalising their Autumn/Winter 2000 catalogues. On 18 May 2000, a joint e-mail was sent by Ian Thomson and Neil Wilson, Hasbro Business Account Managers for Littlewoods and Argos respectively, to other members of the Hasbro sales team explaining the current position and setting out the price points which Argos and Littlewoods had indicated that they would follow. The opening part of the e-mail states:

'Neil and I have spoken to our respective contacts at Argos and Index and put together a proposal regarding the maintenance of certain retails within our portfolio. This is a step in the right direction and it is fair to say that both Accounts are keen to improve margins but at the same time are taking a cautious approach in case either party reneges on a price agreement. ... It goes without

⁶⁶ Document D.7 of Annex A, second page. This document is referred to in paragraph 44 of Neil Wilson's witness statement.

⁶⁷ Witness statement of Neil Wilson, paragraph 44.

⁶⁸ Witness statement of Ian Thomson, paragraph 115. See also paragraphs 101 and 106 to 114 of Ian Thomson's witness statement.

⁶⁹ Witness statement of David Bottomley, paragraph 25; witness statement of Neil Wilson, paragraphs 46 to 48; witness statement of Ian Thomson, paragraphs 102 and 106 to 114.

saying that Action Man and Games prices will be maintained as per earlier agreements.'

There follows a list of products and prices and then the e-mail continues:

'Both accounts have agreed to the above price points so this information should be translated to other accounts.

The proof in the pudding will be when both Catalogues are published, but Neil and I are confident that they will play ball.'

68 The opening part of the e-mail is a reference to the extension of the existing arrangements on Action Man and core games to the products that are listed in the e-mail (see the list in paragraph 69 below).⁷⁰ In his witness statement, Neil Wilson says:

'... My recollection is that Ian Thomson had received indications from Index that it was likely to adopt the RRP for the products referred to in the e-mail and I had received similar indications from Argos in respect of those products. ...'⁷¹

The purpose of the e-mail was:

'... to pass these pricing indications received from Argos and Index on to the other account managers within Hasbro and effectively to ask them 'Is there any difficulty with these prices?' in relation to the other accounts, i.e. an indication of whether the other accounts would be prepared to follow these prices.'⁷²

The final part of the e-mail reflects that Ian Thomson and Neil Wilson were confident that Argos and Littlewoods would adopt the prices as listed in the e-mail, but were also concerned about undercutting.⁷³

69 Later on the same day, Ian Thomson circulated by e-mail most of the product and price information contained in the above e-mail to the buying team at Littlewoods (Lesley Paisley, Alan Burgess, Alan Cowley, Katharine Runciman and Phil Riley). The e-mail states:

'Following on from various conversations regarding Price Points and opportunities to make more margin I am able to confirm a list of products and prices that Argos have committed to. **Games and Action Man** prices will continue to be adhered to and the retails are on your range sheets provided by me as part of the selection proposal process.

⁷⁰ Witness statement of David Bottomley, paragraphs 27 and 28; witness statement of Neil Wilson, paragraphs 51 and 52; witness statement of Ian Thomson, paragraph 120.

⁷¹ Witness statement of Neil Wilson, paragraph 51.

⁷² Witness statement of Neil Wilson, paragraph 53. This is supported by the witness statement of Ian Thomson, paragraphs 119 and 122.

⁷³ Witness statement of David Bottomley, paragraph 29; witness statement of Neil Wilson, paragraph 55; witness statement of Ian Thomson, paragraphs 120 and 121.

Listed below are the products and prices.

POKeMON

Battle Figures 2 Pk 4.99

Pokeball Blaster 3 Pk 6.99

Interactive Pikachu 23.99

Micro Machines

Transforming Team Truck 29.99

Rally Race Track 19.99

Hand Held Electronic

Monopoly 29.99

Bop It 19.99

Girls

Baby All Gone

Get Set

Chocolate Factory 19.99

Egyptian Mystery 29.99

Mastering Mosaics 19.99

Gardens Galore 19.99 (Not listed in Argos)

Design & Draw

Spirograph 14.99

Super Sticker Factory 17.99

Tweenies

All Standard Plush 14.99

All Story Time Product 24.99

Cuddle and Squeeze Doodles 24.99

If you have any questions regarding the above please come back to me and I will do my best to answer them.' (emphasis in original)

It is clear from these e-mails that the agreement or understanding to adhere to RRP's was extended to cover, at the very least, the toys and games referred to therein. The toys listed in this e-mail are the additional toys to which the agreement was extended in the A/W 2000 catalogue. A copy of this e-mail was found by the OFT at Littlewoods during the course of the investigation. This copy had been printed by Alan Burgess, a Littlewoods toys buyer and one of the e-mail's addressees, and some of the prices had been ticked.⁷⁴ Alan Burgess says he does not remember the e-mail, but that it 'looks as if it was ticked by me or my assistant, presumably checking it against our own prices'.⁷⁵ Lesley Paisley, the e-mail's prime addressee, says she recalls receiving it, but remembers only feeling surprised to receive it.⁷⁶ Of the other recipients at

⁷⁴ Document D.9 of Annex A.

⁷⁵ Witness statement of Alan Burgess, submitted by Littlewoods with its written representations, paragraph 24; see also his interview with OFT officials.

⁷⁶ Witness statement of Lesley Paisley, submitted by Littlewoods with its written representations, paragraph 26; see also her interview with OFT officials.

Littlewoods, Alan Cowley says he did not attach importance to it;⁷⁷ Katharine Runciman says she does not remember it at all;⁷⁸ and Phil Riley says he does not remember receiving it at all.⁷⁹ This is also discussed at paragraph 118 below.

70 According to Ian Thomson, his e-mail to the Littlewoods buying team:

'... was sent to confirm that agreement had been reached with Argos (through Neil Wilson) and that they would price at the levels set out in the E-Mail. This was also to give them the confidence to go ahead and set the prices for these lines in the forthcoming Autumn Winter 2000 catalogue. ...'⁸⁰

The e-mail was marked 'Re: Urgent - Pricing Initiative'. The reason for this urgency must have been the impending final date (end of May 2000) for pricing the products in the Autumn/Winter 2000 catalogue.

71 Thomson had already informed Littlewoods that one of the products listed in his e-mail of 18 May 2000, 'Gardens Galore', would not be listed by Argos. In his e-mail sent on 4 May 2000 to Karen Sobers and Katharine Runciman of Littlewoods, he said:

'I would like to confirm that Gardens Galore has been reduced in [list] price to £13.67 and will retail at £19.99. The product has not been selected by your major opposition⁸¹ so it will be an excellent margin opportunity.'⁸²

72 David Bottomley and Neil Wilson say in their witness statements that Thomson's phrase 'I am able to confirm a list of products and prices that Argos have committed to' did not guarantee these prices but reflected Thomson's confidence, which was shared by Wilson and Bottomley and gleaned from discussions with Argos, that Argos would adopt these prices (see also from paragraph 101 below).⁸³ Argos did in fact charge these prices for 13 of the 17 listed products (and one of the remaining four products at a price later separately

⁷⁷ Witness statement of Alan Cowley, submitted by Littlewoods with its written representations, paragraph 14; see also his interview with OFT officials.

⁷⁸ Witness statement of Katharine Runciman, submitted by Littlewoods with its written representations, paragraph 16.

⁷⁹ Witness statement of Phil Riley, submitted by Littlewoods with its written representations, paragraph 21.

⁸⁰ Witness statement of Ian Thomson, paragraph 117. This is supported by the witness statement of David Bottomley, paragraph 30.

⁸¹ Ian Thomson notes in his witness statement that he used the terms 'the opposition' or 'the main competitor' to refer to Argos and that 'there was no doubt as to whom that meant' (paragraph 114).

⁸² Document D.8 of Annex A.

⁸³ Witness statement of David Bottomley, paragraphs 31 to 33; witness statement of Neil Wilson, paragraph 58.

communicated to Hasbro) and Littlewoods charged the prices for 15 of the 17 products (and one of the remaining two products at the price later communicated separately by Argos to Hasbro) (see further from paragraph 76 below).

- 73 The e-mail was copied to Hasbro's management including Mike Brighty, who was at that time a Sales Director alongside David Bottomley. Mike Brighty replied by e-mail on 19 May 2000:

'Ian ... This is a great initiative that you and Neil have instigated!!!!!!!!!!!! However, a word to the wise, never ever put anything in writing, its highly illegal and it could bite you right in the arse!!!! suggest you phone Lesley and tell her to trash? Talk to Dave. Mike'

- 74 When he received this e-mail, Ian Thomson says he 'panicked' and went to speak to Mike Brighty. Thomson says:

'... I told him that I knew we were doing something of a dubious nature but what did highly illegal mean. He explained that what we were doing was seriously illegal because it was price fixing and while we had been talking about it to our accounts, putting it in writing was a different matter entirely. ...'⁸⁴

Brighty told him to contact Lesley Paisley immediately and tell her to destroy the e-mail. According to Thomson, Lesley Paisley said she had been surprised that he had sent the e-mail and would destroy it. Thomson believes her surprise was due to the fact that he had referred to the agreement in writing, as she already knew about the pricing initiative and its extension to other products (see further at paragraph 118 below).⁸⁵

- 75 A few days later, on 25 May 2000, Neil Wilson e-mailed Ian Thomson and Mike Brighty to inform them that 'Argos have confirmed that Interactive Pikachu will be at 23.75 not 23.99 for A/W. Please advise Index accordingly.' In his witness statement, Neil Wilson describes this e-mail as:

'... an example of how information was passed to me by Argos and then passed on internally within Hasbro to be disseminated to other accounts. It is an example of the process I have described above.'⁸⁶ (Wilson's description is quoted at paragraph 53 above.)

Wilson says that he had been contacted by Andrew Needham, Argos's buyer of boys' toys, who had 'indicated that they were no longer proposing to go out at' the price of £23.99. The e-mail was meant to inform Ian Thomson, whom

⁸⁴ Witness statement of Ian Thomson, paragraph 126 and 127.

⁸⁵ Witness statement of Ian Thomson, paragraph 128.

⁸⁶ Witness statement of Neil Wilson, paragraph 66.

Wilson 'expected ... to contact Index to inform them that the prevailing market price for this product was likely to be below the Hasbro RRP, without mentioning Argos specifically.⁸⁷ Ian Thomson 'phoned Alan Burgess to make him aware of the issue and that he could change his pricing if he wanted to. He [Burgess] thanked me [Thomson] for passing on the information but did not commit on how he was going to act he was going to think about it.'⁸⁸ The Interactive Pikachu toy was priced at £23.75 in the A/W 2000 catalogues of both Argos and Littlewoods.⁸⁹ This is significant because it is not the original RRP nor a natural price point (such as £23.99), but the price which both Argos and Littlewoods arrived at by communication through Hasbro.

Autumn/Winter 2000 catalogues

- 76 The arrangements were extended to the other products around the time the Autumn/Winter 2000 catalogues were being prepared. The e-mails of 18 May 2000 (see paragraphs 67 and 69 above) were sent just before the catalogue prices were determined at the end of May 2000.⁹⁰ The Argos and Littlewoods Autumn/Winter 2000 catalogues, which came out in July 2000, show the effect of the arrangements referred to above.⁹¹ As can be seen from Table 3 (paragraph 56 above), the original arrangement on core games and the Action Man range were maintained: all 14 common products in core games were priced at the same price in both catalogues and 20 out of the 21 common toys in the Action Man range were priced at the same price.
- 77 Of the 17 products mentioned in the e-mails of 18 May 2000, Littlewoods went out at the price therein stated on all products, except:
1. Interactive Pikachu (£23.75 not £23.99), where the price originally specified had subsequently been changed from £23.99 to £23.75 after Argos notified its intention of listing it at the lower price (e-mail of 25 May 2000, see paragraph 75 above);
 2. Gardens Galore (£24.99 not £19.99), which the e-mail of 18 May 2000 specifically referred to as not being listed by Argos and which had been the subject of the e-mail of 4 May 2000 (see paragraph 71 above); the price in the e-mail of 18 May 2000 was the RRP of £19.99 but Littlewoods, secure in

⁸⁷ Witness statement of Neil Wilson, paragraphs 67 and 68.

⁸⁸ Witness statement of Ian Thomson, paragraph 130.

⁸⁹ Document D.5 of Annex A.

⁹⁰ Witness statement of David Bottomley, paragraph 26; witness statement of Neil Wilson, paragraph 46; witness statement of Ian Thomson, paragraph 117.

⁹¹ This was recognised by Hasbro at the time: witness statement of David Bottomley, paragraph 36, and witness statement of Ian Thomson, paragraph 131.

the knowledge that Argos would not list the item, took advantage of the 'excellent margin opportunity' and listed it at £24.99.

Littlewoods priced three out of the 17 products at a price different from the RRP: except for Interactive Pikachu and Gardens Galore, Littlewoods priced Super Sticker Factory at £17.99 (the price listed in the e-mail of 18 May 2000) rather than at the RRP of £19.99. However, that emphasises the fact that both Argos and Littlewoods went out in their A/W 2000 Catalogues at a price of £17.99 rather than the RRP of £19.99. This was either a complete co-incidence (to choose £17.99 independently) or it indicates that they both followed the agreement which was recorded in the e-mail to Littlewoods. The OFT considers the latter alternative the more likely.

78 Argos charged the prices listed in the e-mails of 18 May 2000 for 13 out of the 17 products. As to the remaining four products:

1. Interactive Pikachu (£23.75 not £23.99): both Littlewoods and Argos went out at the same lower price of £23.75; the contacts between them, via Hasbro, shortly after the e-mails of 18 May, led to an understanding that both would go out at £23.75, not at £23.99 (e-mail of 25 May 2000, see paragraph 75 above);
2. Pokeball Blaster (£6.95 not £6.99);
3. Transforming Team Truck (£28.99 not £29.99);
4. Rally Race Track (£18.99 not £19.99).

That leave three differences out of 17 products. The fact that Argos did not honour its 'commitment' in this regard is of lesser significance than the fact that it faithfully followed the agreement in the other 14 items. The OFT has never contended that the arrangements were one hundred percent effective. The object of the agreement or understanding was to agree prices, and in the overwhelming majority of cases, it succeeded.

Spring/Summer 2001 catalogues

79 Prices for the Spring/Summer 2001 catalogues were set in the autumn of 2000 and the catalogues came out in January 2001. The extended arrangement continued for these catalogues, but as the arrangement had been seen to be working, there was less discussion on prices.⁹² This was also what Neil Wilson told his colleague Charles Cooper when he transferred the Argos account to

⁹² Witness statement of David Bottomley, paragraph 40; witness statement of Ian Thomson, paragraphs 132, 133, 137 and 142.

him.⁹³ The continuation of the arrangement is also shown by the e-mails of November and December 2000 referred to in paragraphs 84 and 107 below. The prices of core games, the Action Man range and the additional toys listed in the e-mails of 18 May 2000 were again identical in the Argos and Littlewoods Spring/Summer 2001 catalogues in respect of all but one product (see Table 3 at paragraph 56).

Autumn/Winter 2001 catalogues

80 When the OFT visited Hasbro's premises on 15 May 2001, the prices for the Argos and Littlewoods Autumn/Winter 2001 catalogues were being finalised. The arrangement was still in place at that time, as is shown by an e-mail that David Snow, Hasbro's National Account Executive for Argos from June 2000, sent to Charles Cooper on 23 February 2001, which mentions 'the Argos/Index agreement for A/W 2001' (see further at paragraph 105).⁹⁴

81 This is also shown by an e-mail that Ian Thomson sent to Charles Cooper, who had replaced Neil Wilson as Hasbro Business Account Manager for Argos, on 3 April 2001. Thomson's e-mail states:

'Index are keen to price the Ferris Wheel at the Argos S/S price of £49.99 in their A/W 2001 catalogue.

Can you ensure that Argos will match the price and if you know of any retail price difference will you try and get them to comply.'

Charles Cooper replied the next day that 'no change planned' by Argos.⁹⁵

82 Also, on 24 April 2001, David Bottomley stated in an e-mail to Charles Cooper:

⁹³ Witness statement of Neil Wilson, paragraphs 71 and 72.

⁹⁴ See also witness statement of David Bottomley, paragraph 42.

⁹⁵ Ian Thomson's recollection of this e-mail exchange in his witness statement (paragraphs 143 and 144) is different. Thomson believes that Charles Cooper replied that Argos would not be listing the Ferris Wheel in its Autumn/Winter 2001 catalogue. Ian Thomson then informed Garry Smith of Littlewoods (an assistant to Alan Burgess) that it would be safe to price the Ferris Wheel at £49.99. Both Argos and Littlewoods charged this price for the Ferris Wheel in their Autumn/Winter 2001 catalogues.

'Re: ARGOS ACCOUNT UPDATE

Charles,
please follow this up urgently, as we can not allow a £14.99 price on the dinghy.⁹⁶
thanks
DB'

David Bottomley explains in his witness statement that designers, who were contracted by Hasbro, had incorrectly priced the dinghy at £14.99 in 'a double page spread for the Argos catalogue for Action Man which included the dinghy'. Bottomley states:

'... As a result of this e-mail, the error was corrected and the dinghy was priced at the RRP. I was the person who spotted that potentially we could have had a retailer undercutting RRP, which we could not allow given the arrangements which were then in place and working well.'⁹⁷

83 After the OFT's visit the Hasbro account managers were told by their management to 'cease discussing any form of Retail Price Maintenance with our accounts'.⁹⁸ This is confirmed by the e-mail from David Snow to Charles Cooper of 22 May 2001, quoted at paragraph 88 below, which reads:

'I had a call today from Jacqui Wray at Argos stating that the following items are on sale in the trade at prices lower than recommended retail prices. ... I stated that Hasbro cannot control retail prices due to it being illegal.'

Monitoring of the arrangement

84 All parties to these arrangements were astute to monitor the conduct of the other parties and competing retailers to ensure that the arrangements were successful in fixing prices. Thus, Hasbro tried to ensure that RRPs were adhered to and that Argos and Littlewoods were not undercut by their competitors. The consequence [*] for Littlewoods of its pricing being out of line is clearly spelt out by Alan Cowley, a Littlewoods buyer of toys, in an e-mail to Ian Thomson of 28 December 2000 (see further at paragraph 107 below):

'Reference our conversation pre Christmas regarding Hasbro's late decision to reduce the price of the Tweenies soft toys featured in the Index SS01 catalogue.

Fortunately for both of us we were in fact able to amend the selling prices at the last minute due to an unexpected delay in catalogue production. This however literally meant 'holding up the presses', entailing an additional cost of £4000 which will be debited to your account shortly.

⁹⁶ This refers to the 'Amazon Dinghy', a toy in Hasbro's Action Man range.

⁹⁷ Witness statement of David Bottomley, paragraph 42.

⁹⁸ Witness statement of Ian Thomson, paragraph 152.

I will not elaborate on the consequences if we had been unable to do so, resulting in our being undercut by Argos and other High St outlets, especially when you had earlier been so insistent that we all went out at the same price!⁹⁹

85 Hasbro conducted its own monitoring to detect undercutting by retailers. Ian Thomson states in his witness statement:

'We had always monitored Retail pricing to understand what our customer's margins were in order to see their profitability when selling Hasbro merchandise. ...

The emphasis on price monitoring now was to ensure that our other customers would fall in line so that Argos and Index would be confident that our plan was working throughout the UK. This would reduce the risk of them going back to price cutting in the following catalogues.'¹⁰⁰

86 Argos for its part monitored the arrangements by seeking to make Hasbro aware of undercutting by other retailers. Neil Wilson states in his witness statement:

'... Argos monitored other retailers' prices. If they found out that a retailer was not at the Hasbro RRP, they contacted me to find out why there was a difference.

When Argos called me about the apparently lower price of another retailer, they contacted me to see if Hasbro could do something about it, i.e. get the other retailer to go back to RRP. The understanding was that if Hasbro could give Argos an assurance that the other retailer would put the price back up to the RRP, Argos would also remain at the RRP. If not, Argos would have to make a decision about how it would price the product – usually by matching the competitor's price.'¹⁰¹

87 Wilson specifically names Andrew Needham and Vanessa Clarkson, both toys buyers at Argos, as persons who contacted him about undercutting:

'... Andrew Needham was certainly aware that Hasbro was communicating with retailers with a view to increasing margins by moving towards RRP. I know this from conversations I had with him, including when he would pick up the telephone, say that he had seen an Action Man product for, say, £2 less than the RRP, and could Hasbro do anything about it. His purpose in calling me was that he wanted Hasbro to persuade the retailer to go back to RRP or, if we could

⁹⁹ Alan Cowley noted on his print-out of this e-mail: 'Lesley, The charge has been accepted by Ian' (Document D.11 of Annex A).

¹⁰⁰ Witness statement of Ian Thomson, paragraphs 77 and 78; see also paragraph 132 of his witness statement.

¹⁰¹ Witness statement of Neil Wilson, paragraphs 22 and 23; see also paragraph 61 of his witness statement. This is supported by David Bottomley at paragraph 46 of his witness statement.

not do that, to tell him so he could take account of that in his pricing. It was clear from this that he knew that Hasbro was persuading accounts to go to RRP.'

'I understand that Vanessa Clarkson of Argos is suggesting that when she made a call such as this to me, it was to enquire about whether or not we had a special deal on cost price with that retailer (i.e. was this retailer being treated by Hasbro in a more advantageous way as compared with Argos). That may have been the case. However, in my conversations with Argos representatives, including Vanessa Clarkson and Andrew Needham, focus was more on retail price than cost price. They wanted to know if Hasbro could get the other retailer to move up to the RRP.'¹⁰²

- 88 Further evidence of Argos's monitoring can be found in an e-mail of 22 May 2001 sent by David Snow, Hasbro's National Account Executive for Argos, shortly after the first OFT visit to Hasbro. In his e-mail, he reports to Charles Cooper on a conversation with his Argos counterpart:

'I had a call today from Jacqui Wray at Argos stating that the following items are on sale in the trade at prices lower than recommended retail prices. They are as follows

Walmart

Jnr Monopoly £9.88

Pictionary £17.72

Payday £13.44

Twister £6.81

Asda

Kart Extreme £19.98

Motorbike Extrme £14.47

I stated that Hasbro cannot control retail prices due to it being illegal.'

David Bottomley explains in his witness statement that Jacqui Wray of Argos:

'... rang Hasbro on a number of occasions complaining about retail prices. ... She would want to know why other retailers were pricing differently from Argos. The reason she would contact Hasbro about it was because she would expect us to do something about it, i.e. persuade those other retailers to price at Hasbro's RRP.'¹⁰³

¹⁰² Witness statement of Neil Wilson, paragraphs 32 and 25.

¹⁰³ Witness statement of David Bottomley, paragraph 46.

89 Argos and Littlewoods would also often inform Hasbro if they intended to reduce the price of a Hasbro product during a catalogue season.¹⁰⁴

90 As indicated above, if Hasbro became aware of possible undercutting, Hasbro's Account Managers would speak to their respective contacts in the different retailers. Neil Wilson describes the process:

'... once I had spoken to Argos, I contacted the account manager in Hasbro who dealt with the retailer in question. He or she in turn called the buyer of the retailer who had the lower price. The account manager sought to find out why the price was lower and to persuade the retailer to go back to the RRP. Often the lower price turned out to be a temporary promotion, for instance to clear out stock, or a simple mistake, as most retailers were eager to charge RRP. I then informed Argos whether we were able to do anything and either provided the reassurance they sought or said that we could do nothing. Argos knew that this was the process that was going on.'¹⁰⁵

91 In his witness statement, Ian Thomson gives an example:

'During the Autumn Winter sales period of 2000 Woolworth's had decided to price Standard Tweenies at £12.99 (?). (This may not have been the price but it was around £2.00 less than everyone else and did happen.) I was asked to go back to Index (this was either by David Bottomley or Mike Brighty) and warn them that this was either happening or had happened and that we would be talking to Woolworth's in order to get them to put the price back up. I phoned Alan Cowley [a Littlewoods toys buyer] and passed on the news that it was only a temporary problem and that someone was talking to Woolworth's and I was sure that the retail price would go back up. Woolworth's did put the price back up very soon after.'¹⁰⁶

OVERALL AGREEMENT AND/OR CONCERTED PRACTICE BETWEEN HASBRO, ARGOS AND LITTLEWOODS

92 An 'agreement' does not have to be a formal written agreement to be covered by the Chapter I prohibition. The prohibition is intended to catch a wide range of agreements and concerted practices including oral agreements and gentlemen's agreements as, by their nature, anti-competitive agreements are rarely written down.¹⁰⁷ There is no requirement for the agreements to be legally binding or

¹⁰⁴ Witness statement of Ian Thomson, paragraph 136; witness statement of Neil Wilson, paragraph 61.

¹⁰⁵ Witness statement of Neil Wilson, paragraph 24. This process is also described by Ian Thomson in paragraphs 79 to 81 of his witness statement.

¹⁰⁶ Witness statement of Ian Thomson, paragraph 135.

¹⁰⁷ See paragraph 2.7 of OFT Guideline 401, 'The Chapter I Prohibition', March 1999. See also the judgment of the European Court of Justice regarding gentlemen's agreements in Case C-42/69 *ACF Chemiefarma NV v Commission* [1970] ECR 661 (in particular paragraphs 106-114).

formal. As held by the European Court of First Instance, for an agreement to exist 'it is sufficient if the undertakings in question have expressed their joint intention to conduct themselves on the market in a specific way.'¹⁰⁸

93 A 'concerted practice' has been defined by the European Court of Justice as:

'... a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition.'¹⁰⁹

94 The European Court of Justice has also confirmed that it is not necessary to characterise, particularly in the case of complex infringements, an arrangement as either an agreement or a concerted practice.¹¹⁰ These concepts are intended 'to catch forms of collusion having the same nature and only distinguishable from each other by their intensity and the forms in which they manifest themselves.'¹¹¹ Given the level of collusion facilitated by Hasbro but the absence of evidence of direct contact between Argos and Littlewoods, the collusion between the parties may better be characterised as a concerted practice. However, it is not necessary for the OFT to come to a conclusion on the issue in order to demonstrate an infringement of the Chapter I prohibition.

95 It is the OFT's view that Hasbro's pricing initiative led directly to an overall infringing agreement and/or concerted practice between Hasbro, Argos and Littlewoods. This overall agreement included two bilateral infringing agreements and/or concerted practices, contingent on each other, between Hasbro and Argos and between Hasbro and Littlewoods, which formed part of a pattern of continuous conduct with a common objective. These agreements and/or concerted practices may thus be read together as one agreement and/or concerted practice.¹¹² The OFT contends in each case that where there was no

Also the European Commission in, for example, its decision in *Citric Acid Cartel* ([2002] OJ L239/18, 6 September 2002), paragraph 137.

¹⁰⁸ Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, paragraph 256; Case T-41/96 *Bayer v Commission* [2000] ECR II-3383, paragraph 69.

¹⁰⁹ Cases 48/69 *ICI v Commission* (otherwise known as 'Dyestuffs') [1972] ECR 619, paragraph 64.

¹¹⁰ Cases T-305/94 etc *NV Limburgse Vinyl Maatschappij v Commission* [1999] ECR II-931, paras 695-699; Case C-49/92 [1999] ECR I-4125, paragraphs 132 and 133. Also the European Commission in, for example, its decision in *Citric Acid Cartel* ([2002] OJ L239/18, 6 September 2002), paragraph 143.

¹¹¹ Case C-49/92P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, paragraph 131.

¹¹² The European Court of First Instance has held that a series of connected agreements that pursue a common objective may be read together as one agreement (Case T-25/95 etc *Cimenteries CBR v Commission* [2000] ECR II-491, paragraphs 4019-4058).

specific 'agreement', there was a concerted practice, but, for the sake of brevity and convenience, the word 'agreement' will be used to refer to both or either.

96 The agreements between Hasbro and Argos and between Hasbro and Littlewoods were inter-linked and each retailer specifically entered into and maintained the agreement on the understanding with Hasbro that the other would as well (see paragraphs 49 to 52 above). Both Argos and Littlewoods were concerned about undercutting by any retailer, but each had a special concern about undercutting by the other. This was because they were the largest catalogue retailers, directly competing with each other, and because their retailing formats meant that they both had to commit themselves to a price for a forthcoming season without knowledge of the other's intention except for the previous catalogue which was, by definition, out of date.¹¹³ Further, unlike with ordinary retailers where an agreement to price at X could be given public effect on the next day or within a very short space of time, any 'agreement' or 'understanding' that the other catalogue retailer would price at an agreed price (say RRP) would not be seen to be implemented until much later when it would be too late to change one's own catalogue. Ian Thomson writes in his internal Hasbro e-mail of 18 May 2000 (see paragraph 67 above): '... it is fair to say that both Accounts are keen to improve margins but at the same time are taking a cautious approach in case either party reneges on a price agreement.' David Bottomley states that Ian Thomson

'... was referring to the concern of both those parties that each would be prepared to price at RRP's, but only so long as the other did so.'¹¹⁴

Ian Thomson says in his witness statement:

'In my dealings with the [Littlewoods] Buyers, except for Alan Cowley, I always got the impression that they were fully aware of the initiatives regarding Core Games and Action Man and while willing to go along with my new proposals [to extend the initiatives] were nervous of what would happen if they were left exposed.

I felt that the enhanced proposal covering other products would be accepted if I could tell them [the Littlewoods buyers] that Argos was going to agree to it as well.'¹¹⁵

Neil Wilson notes the concerns of Argos in his witness statement:

¹¹³ See witness statement of Neil Wilson, paragraph 28.

¹¹⁴ Witness statement of David Bottomley, paragraph 33.

¹¹⁵ Witness statement of Ian Thomson, paragraphs 115 and 116; see also at paragraphs 107 and 114, at paragraphs 59 to 63 regarding the beginning of the initiative, and at paragraphs 90 to 92 regarding the Spring/Summer 2000 catalogue. The witness statement of David Bottomley notes Lesley Paisley's concerns at paragraph 29.

'Argos was concerned about undercutting by any retailer and because they competed directly with Index they would be very concerned with how Index was pricing products. ...'¹¹⁶

97 The witness statements of David Bottomley, Neil Wilson and Ian Thomson clearly show that Argos and Littlewoods took part in the pricing initiative (to price agreed products at or near Hasbro's RRP) on the understanding with Hasbro that Hasbro would get the other retailer to do the same. David Bottomley states this in his witness statement: '... What I meant by agreement was that there was an understanding that retailers, including Argos and Littlewoods, would price at or near Hasbro's RRP. ...'¹¹⁷ He states that Argos gave indications of its intention to price at RRP on certain products to Neil Wilson.¹¹⁸ Bottomley also says:

'... It is incorrect to suggest that Neil [Wilson] and Ian [Thomson] were acting unilaterally in putting together this proposal: it was based on detailed discussions and conversations that they had had with Argos and Littlewoods about pricing at RRPs. Each [i.e. Argos and Littlewoods] was aware that similar discussions were taking place with the other and that a big effort was being made to get all retailers to price at RRP. ...

When Ian Thomson said in his email [of 18 May 2000] that both Littlewoods and Argos were cautious lest the other 'reneges on a price agreement', he was referring to the concern of both those parties that each would be prepared to price at RRPs, *but only so long as the other did so*. Obviously, we could not guarantee anything and depended on their co-operation. Until we actually saw the A/W 1999 catalogues we could not be sure that Argos and Littlewoods would in fact price at RRPs as they had led us to believe they would do *provided the other also did so ...*.'¹¹⁹ (emphasis added)

Neil Wilson states:

'Argos were fully aware that the pricing initiative involved Hasbro talking to other retailers. Argos monitored other retailers' prices. If they found out that a retailer was not at the Hasbro RRP, they contacted me to find out why there was a difference.

When Argos called me about the apparently lower price of another retailer, they contacted me to see if Hasbro could do something about it, i.e. get the other retailer to go back to RRP. The understanding was that if Hasbro could give Argos an assurance that the other retailer would put the price back up to the

¹¹⁶ Witness statement of Neil Wilson, paragraph 28. This is supported by Ian Thomson's witness statement at paragraph 91.

¹¹⁷ Witness statement of David Bottomley, paragraph 18.

¹¹⁸ Witness statement of David Bottomley, paragraph 19.

¹¹⁹ Witness statement of David Bottomley, paragraphs 28 and 33.

RRP, Argos would also remain at the RRP. If not, Argos would have to make a decision about how it would price the product – usually by matching the competitor's price.

... I cannot recall being specific about Index in my conversations with Andrew Needham [Argos's buyer of boys' toys]. ... I would not be specific to Argos about any retailer or any retailer's price. Similarly, Andrew Needham would not specifically ask about Index. However, we would talk about the future anticipated market price and we were both aware that the Index price would be crucial to the outcome of the market price of any particular product.

... Andrew Needham was certainly aware that Hasbro was communicating with retailers with a view to increasing margins by moving towards RRP's. I know this from conversations I had with him, including when he would pick up the telephone, say that he had seen an Action Man product for, say, £2 less than the RRP, and could Hasbro do anything about it. His purpose in calling me was that he wanted Hasbro to persuade the retailer to go back to RRP or, if we could not do that, to tell him so he could take account of that in his pricing. It was clear from this that he knew that Hasbro was persuading accounts to go to RRP.¹²⁰

Ian Thomson states:

'... There was no doubt that Alan Burgess [Littlewoods's buyer of boys' toys] knew that I was passing on to the Argos account handler (Neil Wilson) the contents of our discussion and that I would confirm the Argos intentions back to him after Neil had concluded his discussions with Argos.'¹²¹

Evidence is also provided by Ian Thomson's e-mail to Littlewoods of 18 May 2000 (see paragraph 69 above) where he lists products and prices that 'Argos have committed to.'

- 98 The agreements also had the same clear objective of fixing the prices of Hasbro's toys and games and were entered into by Hasbro, Argos and Littlewoods as a joint operation. This is clear from the evidence as a whole, as set out above, and David Bottomley's witness statement:

'... The listing and pricing initiatives came about as a result of low margins that were a concern across the entire industry and shared by Argos and Littlewoods. Argos was sympathetic to both initiatives and was actively involved in

¹²⁰ Witness statement of Neil Wilson, paragraphs 22, 23, 30 and 32.

¹²¹ Witness statement of Ian Thomson, paragraph 108 (with regard to the proposal to extend the pricing initiative); see also at paragraphs 65 and 67 regarding the beginning of the initiative and at paragraphs 86 and 87 regarding the Spring/Summer 2000 catalogue.

discussions on pricing. Littlewoods followed Argos' lead, but was also involved in discussions with Hasbro about pricing ...¹²²

99 Although the OFT has no evidence that Argos and Littlewoods spoke directly, confidential information was exchanged between them with Hasbro acting as the fixer or middleman. This is supported, in particular, by the witness statement of Neil Wilson:

'... Hasbro acted as middlemen Hasbro asked its accounts for an indication of whether or not they would adopt the RRP for individual products, this indication was given, it was then passed on to other account managers within Hasbro and then general indications were passed back to our accounts. There was a two-way dialogue between Hasbro and Argos on pricing intentions. Whilst it is fair to say that Hasbro led this dialogue, it was not a question of Hasbro forcing this information from Argos or Argos not being clear about what this information was to be used for. There was an open dialogue, although Argos would only give an indication, not a guarantee, and would sometimes change a price without any consultation with Hasbro. Argos knew that Hasbro was talking to its other accounts in order to increase retail margins and was using indications received on prices for this purpose.'¹²³

100 Hasbro's, Argos's and Littlewoods's direct and close involvement is clearly shown by the series of e-mails sent around 18 May 2000 and in particular the two e-mails sent by Ian Thomson (see paragraphs 67 and 69 above). In the first e-mail (circulated internally), he states: 'Neil and I have spoken to our respective contacts at Argos and Index and put together a proposal regarding the maintenance of certain retails within our portfolio' and '... Action Man and Games prices will be maintained as per earlier agreements'. In the second e-mail sent to Littlewoods he states: 'Following on from various conversations regarding Price Points and opportunities to make more margin I am able to confirm a list of products and prices that Argos have committed to.'

101 The witness statements of Ian Thomson, Neil Wilson and David Bottomley show that Argos and Littlewoods did not 'commit' themselves to price at or near Hasbro's RRP's in the sense that they formally bound themselves or guaranteed to adhere to them. In particular, they reserved the option to react to undercutting by another retailer. However, as is demonstrated by the evidence above, Argos and Littlewoods did inform Hasbro of their pricing intentions and Hasbro felt confident that they would price accordingly and in line with its RRP's. David Bottomley speaks of 'an understanding'.¹²⁴ Even though there were no

¹²² Witness statement of David Bottomley, paragraph 48.

¹²³ Witness statement of Neil Wilson, paragraph 69.

¹²⁴ Witness statement of David Bottomley, paragraph 47.

sanctions applied by Hasbro in the event of Argos and Littlewoods failing to adhere to the prices they had indicated, Argos and Littlewoods had a clear incentive not to deviate from Hasbro's RRP's, in the form of higher margins. Moreover, the risk associated with pricing at or near Hasbro's RRP's in the printed catalogues was substantially reduced by Hasbro's role as the middleman.¹²⁵ Hasbro's confidence in being able to bring about uniform prices increased when the catalogues came out and the prices corresponded to the prices indicated by Argos and Littlewoods in advance (see paragraphs 58, 61 and 76 to 79 above), thus strengthening its ability going forward to persuade the participants to continue the arrangement and then to expand it. For example, Neil Wilson explains in his witness statement:

'... Argos had told me what their pricing intentions were and that they were intending to price at Hasbro's RRP's. However, they never formally guaranteed that they would go out at those prices. There were no documents that set out these arrangements. If Argos chose not to charge RRP's there was nothing we could do, as we knew it was illegal to, for example, offer incentives to Argos to adhere to RRP's. That is why we only knew what the actual price would be (and whether Argos had kept to the price they had indicated to me) when we looked at the prices in Argos' catalogue. ...

... In July 1999, the Argos A/W 1999 catalogue was published. ... Argos had priced Core Games and the Action Man range more or less at Hasbro's RRP's. We were therefore reassured that the initiative was working and that, although they had offered no guarantees, Argos had priced [in the Autumn/Winter 1999 catalogue] at the levels that it had indicated to me in the vast majority of cases (i.e. in line with Hasbro's RRP's).

... in 2000 the pricing initiative 'was extended into other brands'. The extension of the pricing initiative to other products came about because the initial trial period had been successful.

... I noted in my report that it was recognised that margins were going in the right direction. Sue Porritt [of Argos] was very positive regarding the new terms and that the initiatives that had applied to Action Man and Core Games in 1999 would be extended to other categories. It was recognised in the meeting [in December 1999] that it was crucial that we maintained retail price stability as far as possible across our key brands so that the initiatives could succeed. Sue Porritt felt it was great that Hasbro could help maintain retail price stability, but said that Argos would react if it was undercut in order to remain competitive. By

¹²⁵ Witness statement of David Bottomley, paragraphs 18, 19, 31 to 33 and 47; witness statement of Neil Wilson, paragraphs 16, 21, 33, 34, 55, 58 and 69; witness statement of Ian Thomson, paragraphs 69, 112, 120, 123 and 124.

'retail price stability', I meant retailers going out at the same price, i.e. Hasbro's RRP.¹²⁶

102 As well as being evidence of Argos's and Littlewoods's commitment to Hasbro's prices (in the sense indicated in paragraph 101 above), the information about Argos's pricing intentions in the e-mail from Hasbro to Littlewoods of 18 May 2000 also had the effect, at the very least, of substantially reducing in advance any uncertainty that Littlewoods would have had as to Argos's pricing policy for the products in question. In this respect the OFT relies on the presumption arising from the judgment of the European Court of First Instance in the *Cement* case, that:

'... it must be held that, subject to proof to the contrary, which the parties concerned must adduce, undertakings participating in the concerted action and which remain active on the market take into account the information exchanged with their competitors in determining their conduct on that market ...'¹²⁷

103 The denial by Mike McCulloch and some of the Argos and Littlewoods personnel of any commitment or guarantee between the parties may be correct if they are referring to some formal and binding agreement with Hasbro (it could not be binding in any event in view of its illegality). David Bottomley, Neil Wilson and Ian Thomson in their statements make it very clear that neither Littlewoods nor Argos gave them (Hasbro) a commitment to enable them to guarantee to the other party that the former would definitely price at RRP (or any price) in its catalogue. However, they also make it clear that there was an informal agreement, understanding or tacit arrangement whereby Argos and Littlewoods co-operated with Hasbro by indicating that they would or might price the particular products in question at or near RRP on the understanding that the other retailer would also do so, at the same time making it clear again and again that if the other reneged, the former would immediately respond.

104 Once it was seen (in the A/W 1999 Catalogue) that both parties had in fact carried out their part of the arrangement, this built up trust, so that they could go forward with the same arrangement in connection with the next catalogue, with more confidence. Once confidence built up, they felt able to extend the arrangements to other products (as happened), secure in the knowledge that the arrangement was working well and would be just as successful in relation to the new products as it had been in relation to the initial products.

105 Further evidence of an overall agreement can be found in the e-mail from David Snow to Charles Cooper dated 23 February 2001. In the e-mail David Snow,

¹²⁶ Witness statement of Neil Wilson, paragraphs 21, 34, 38 and 44.

¹²⁷ Case T-25/95 etc *Cimenteries CBR v Commission* [2000] ECR-II 491, paragraph 1910.

Hasbro's National Account Executive for Argos from June 2000, expressly refers to an 'Argos/Index agreement' when he reports on a conversation he had with Sharon Clark at GUS – the home shopping catalogue arm of Argos. He explains in his e-mail that he told her that Hasbro tried to ensure that Littlewoods and GUS were going out at the right price. Sharon Clark had agreed that this was something she was keen to do. However, she indicated that she would not be telling Hasbro her retails for the next catalogue. David Snow states that this contradicted earlier practice and concludes in his report that:

'If we cannot ensure level pricing between GUS and Littlewoods for A/W I would suggest there will be cause for concern on the Argos/Index agreement for A/W 2001.'

- 106 The GUS home shopping catalogue business is separate from Argos (see paragraph 2 above) and the OFT has not alleged that it formed part of the agreements. Sharon Clarke's statement that she would not be telling David Snow her retail prices is in contrast to the practice followed by Argos and Littlewoods, who would inform Hasbro of their intended retail prices (see, for example, paragraph 99 above). Apparently, David Snow was not aware of the different position of the GUS home shopping catalogue business. In his oral statement to OFT officials, in response to a question as to whether he was aware of what was described as an agreement on RRP's with Argos and Index, David Snow says:

'Yes. Discussions with GUS on home shopping were just a continuation of that.'

David Snow may have thought they were a continuation of the agreement on RRP's, but it is clear that Sharon Clarke did not know about them or was not willing to involve GUS Home Shopping in this price fixing arrangement.

- 107 It is also clear that without both Argos's and Littlewoods's involvement the move towards recommended prices would not have succeeded, since they were in a special position as catalogue retailers to provide a signal to the market that margins would not be eroded. This is clearly demonstrated by an exchange of e-mails within Hasbro about a last-minute reduction in Hasbro's RRP for Tweenies toys that was made around the time that Littlewoods was finalising the prices for its Spring/Summer 2001 catalogue (this price change resulted in Alan Cowley's e-mail at paragraph 84 above). An e-mail from Ian Thomson to Henry Foulds of Hasbro's marketing department of 30 November 2000 contains the following passage:

'The whole point of making Argos and Index toe the line on Retails was to set a precedent that the rest of the trade would follow.'

Ian Thomson also indicates in his witness statement what the result could be if Littlewoods charged a higher price than competing retailers:

'... This would mean that our policy of using the catalogues to set the price points would backfire and could potentially lead to the start of price-cutting again.'¹²⁸

This is confirmed by a reply e-mail from David Bottomley that was sent on the same day:

'... given the huge amount of work we have put into retail pricing in the last 2 years, the last thing we need is for 2 major customers to be out of line.'¹²⁹

In his witness statement, David Bottomley explains this phrase:

'For the two market leaders to ... fall out of line, i.e. not adopt RRP, would have had repercussions throughout the industry. It could have meant that margins would plunge to the pre-1998 period, which retailers did not want.'¹³⁰

It is also confirmed by the response from Alan Cowley to Ian Thomson that is quoted at paragraph 84 above:

'I will not elaborate on the consequences if we [had not been able to include the reduced price in our catalogue], resulting in our being undercut by Argos and other High St outlets, especially when you had earlier been so insistent that we all went out at the same price!'

- 108 On the basis of the evidence taken as a whole, it is the OFT's view that there was collusion between Hasbro, Argos and Littlewoods which pursued a common objective regarding the price of certain Hasbro toys and games. Each was aware of the others' involvement and the nature of its intentions regarding its conduct in the relevant markets. The OFT concludes that this conduct constituted an overall agreement and/or concerted practice between these three undertakings.

INDIVIDUAL AGREEMENTS AND/OR CONCERTED PRACTICES BETWEEN HASBRO AND ARGOS AND BETWEEN HASBRO AND LITTLEWOODS

- 109 Based on the evidence referred to above and below, the OFT also proposes to find that the overall agreement identified above included two bilateral price-fixing agreements, entered into respectively by Hasbro and Argos and by Hasbro and Littlewoods, which in themselves constituted infringements of the Chapter I prohibition. As already stated (paragraph 95 above), the finding of a price-fixing agreement also includes a concerted practice to fix prices.

¹²⁸ Witness statement of Ian Thomson, paragraph 139.

¹²⁹ Document D.10 of Annex A.

¹³⁰ Witness statement of David Bottomley, paragraph 39.

Agreement and/or concerted practice between Hasbro and Argos

- 110 The existence of an agreement between Hasbro and Argos is clear from the statements made by Hasbro employees and in particular the following sections of the witness statement of Neil Wilson, Hasbro's Business Account Manager for Argos:

'Argos (and other retailers) were asked by Hasbro whether they were happy to match Hasbro's RRP's. Argos said it was prepared to match RRP's as long as it was not undercut by its competitors.

... Andrew Needham [Argos's buyer of boys' toys] was certainly aware that Hasbro was communicating with retailers with a view to increasing margins by moving towards RRP's. I know this from conversations I had with him, including when he would pick up the telephone, say that he had seen an Action Man product for, say, £2 less than the RRP, and could Hasbro do anything about it. His purpose in calling me was that he wanted Hasbro to persuade the retailer to go back to RRP or, if we could not do that, to tell him so he could take account of that in his pricing. It was clear from this that he knew that Hasbro was persuading accounts to go to RRP.

... Sue Porritt [Argos's Senior Buyer/Trading Manager] felt it was great that Hasbro could help maintain retail price stability, but said that Argos would react if it was undercut in order to remain competitive. By 'retail price stability', I meant retailers going out at the same price, i.e. Hasbro's RRP.

... There was a two-way dialogue between Hasbro and Argos on pricing intentions. Whilst it is fair to say that Hasbro led this dialogue, it was not a question of Hasbro forcing this information from Argos or Argos not being clear about what this information was to be used for. There was an open dialogue, although Argos would only give an indication, not a guarantee, and would sometimes change a price without any consultation with Hasbro. Argos knew that Hasbro was talking to its other accounts in order to increase retail margins and was using indications received on prices for this purpose.¹³¹

- 111 There is also other strong evidence that Hasbro agreed to fix prices with Argos. The paper prepared for the meeting between Hasbro and Argos on 17 February 1999 refers to 'Dialogue opened to stabilise RRP's' (see paragraph 51 above). An internal Hasbro report of a meeting between Neil Wilson and Sue Porritt on 29 March 1999 states: 'Hasbro's retail pricing strategy to increase trade brought [sic] in margin was discussed. Sue understands our strategy but categorically stated that Argos will react to competitor pricing ...' (see paragraph 52 above).

¹³¹ Witness statement of Neil Wilson, paragraphs 10, 32, 44 and 69 (see further at paragraphs 22 to 25, 30, 46, 51 and 67 of his witness statement). This is supported by the witness statements of David Bottomley (at paragraphs 16, 19, 25, 28, 33, 46 and 48) and Ian Thomson (at paragraphs 65, 69, 86 and 98).

Another internal Hasbro report of a meeting between Neil Wilson and Sue Porritt on 9 December 1999 states: 'SP was very positive about the new terms and the impact they will have on Argos business. It is crucial that we can maintain retail price stability across our key brands so that the plan can succeed ...' (see paragraph 65 above).

- 112 In addition, Ian Thomson's internal e-mail of 18 May 2000 (see paragraph 67 above) states:

'Neil and I have spoken to our respective contacts at Argos and Index ...
... both Accounts are keen to improve margins but at the same time are taking a cautious approach in case either party reneges on a price agreement.
... Action Man and Games prices will be maintained as per earlier agreements. ...
Both Accounts have agreed to the above price points ...
The proof in the pudding will be when both Catalogues are published, but Neil and I are confident that they will play ball.'

The e-mail by Ian Thomson to Littlewoods personnel dated 18 May 2000 (see paragraph 69 above) states:

'... I am able to confirm a list of products and prices that Argos have committed to.'

Ian Thomson states that he sent this e-mail '... to confirm that agreement had been reached with Argos (through Neil Wilson) and that they would price at the levels set out in the E-Mail. ...'.¹³² Argos did, as predicted by Thomson, 'play ball', in the prices for the relevant products in its Autumn/Winter 2000 catalogue, to which these two e-mails relate (see paragraph 78 above), as well as in the prices for the relevant products in its other catalogues from the Autumn/Winter 1999 catalogue onwards (see paragraphs 58, 61, 76 and 79 above).

- 113 Further, the e-mail from Neil Wilson to Ian Thomson and Mike Brighty to inform them that 'Argos have confirmed that Interactive Pikachu will be at 23.75 not 23.99 for A/W. Please advise Index accordingly' (see paragraph 75 above) and the e-mails between Ian Thomson and Charles Cooper regarding the price of a Ferris Wheel (see paragraph 81 above) go to show that Argos was party to a price-fixing agreement with Hasbro.
- 114 Finally the e-mail of 22 May 2001 from David Snow reporting on a phone conversation with Jacqui Wray is further evidence of monitoring a price-fixing agreement between Hasbro and Argos (see paragraph 88 above).

¹³² Witness statement of Ian Thomson, paragraph 117.

Agreement and/or concerted practice between Hasbro and Littlewoods

115 As with the agreement between Hasbro and Argos, there is clear evidence that Hasbro and Littlewoods agreed to fix prices. See for example paragraphs 62 and 63 (quoted at paragraph 49 above) of the witness statement of Ian Thomson, Hasbro's Business Account Manager for Littlewoods, as well as the following sections of his witness statement:

'My understanding was that the agreement to stick to the Core Brand [i.e., Hasbro's core games and Action Man range] pricing was still being monitored internally in Index by their senior management whom I took to be Lesley Paisley and John McMahon. ...

Even though I was given the understanding from Alan Burgess that he intended to go with the Retails I could not be sure this happened until the catalogue was published.

... There was no doubt that Alan Burgess knew that I was passing on to the Argos account handler (Neil Wilson) the contents of our discussion and that I would confirm the Argos intentions back to him after Neil had concluded his discussions with Argos.

In my dealings with the Buyers, except for Alan Cowley, I always got the impression that they were fully aware of the initiatives regarding Core Games and Action Man and while willing to go along with my new proposals were nervous of what would happen if they were left exposed.¹³³

116 Thomson's witness statement is supported by the wording of his internal e-mail of 18 May 2000 (see paragraph 67 above):

'Neil and I have spoken to our respective contacts at Argos and Index ...

... both Accounts are keen to improve margins but at the same time are taking a cautious approach in case either party reneges on a price agreement.

... Action Man and Games prices will be maintained as per earlier agreements. ...

Both Accounts have agreed to the above price points ...

The proof in the pudding will be when both Catalogues are published, but Neil and I are confident that they will play ball.'

Littlewoods did, as predicted by Thomson, 'play ball', in the prices for the relevant products in its Autumn/Winter 2000 catalogue, to which this e-mail relates (see paragraph 77 above), as well as in the prices for the relevant

¹³³ Witness statement of Ian Thomson, paragraphs 88, 96, 108 and 115 (see further at paragraphs 65, 67, 69 and 98 of his witness statement). This is supported by the witness statements of David Bottomley (at paragraphs 18, 25, 28, 29, 33 and 48) and Neil Wilson (at paragraphs 29 and 51).

products in its other catalogues from the Autumn/Winter 1999 catalogue onwards (see paragraphs 58, 61, 76 and 79 above).

- 117 The existence of the agreement between Hasbro and Littlewoods to fix prices is also evident from the e-mail sent by Ian Thomson on 18 May 2000 to his contacts at Littlewoods setting out prices that Argos had committed to (see paragraph 69 above). It is hard to see why such an e-mail would possibly have been sent in the absence of an agreement that Littlewoods had made with Hasbro that it would adhere to the same prices as Argos. Ian Thomson says that '[t]he contents of my E-Mail should not have come as any surprise [to Littlewoods] because as I have explained we had previously discussed the initiatives involved.'¹³⁴ Further evidence of an agreement can be found in the e-mail from Alan Cowley of Littlewoods sent to Ian Thomson on 28 December 2000 where he states 'I will not elaborate on the consequences if we had been unable to do so, resulting in our being undercut by Argos and other High St outlets, especially when you had earlier been so insistent that we all went out at the same price!' (see paragraphs 84 and 107 above).
- 118 A number of the e-mails referred to evidencing price-fixing were found at the premises of Littlewoods during the on-site visit. Littlewoods subsequently asked OFT officials to speak to its employees about the allegations of price-fixing and in particular about the e-mails of 18 May 2000 and 28 December 2000. On 16 October 2001, OFT officials interviewed Lesley Paisley, Index Buying Manager, and Alan Cowley and Alan Burgess, both buyers of toys at Littlewoods. They all denied that there was a price-fixing agreement between Hasbro and Littlewoods. In relation to the e-mail of 18 May 2000 containing a list of price points, Alan Cowley stated that he did not remember receiving it but he did confirm that his products went out at the prices;¹³⁵ Alan Burgess could not remember it;¹³⁶ and Lesley Paisley did remember receiving it but indicated that she did not see it as improper but rather as a list of retail prices that Hasbro was recommending to Littlewoods; she did not remember if Ian Thomson asked her to delete it. Ian Thomson does remember asking Lesley Paisley to delete the e-mail and describes her reaction in his witness statement:

¹³⁴ Witness statement of Ian Thomson, paragraph 117. David Bottomley, at paragraph 34 of his witness statement, also says that '... she [Lesley Paisley] was aware that discussions about RRP's had taken place because I had spoken to her about them.'

¹³⁵ In his witness statement (paragraph 14), submitted by Littlewoods with its written representations, Alan Cowley says he did not attach importance to the e-mail (see paragraph 66 above).

¹³⁶ However, the OFT found a copy of the e-mail that had been printed by Alan Burgess and on which some of the listed products had been ticked (see Document D.9 of Annex A).

'... Her reply was along the lines that she was surprised that I had sent it and that she would destroy it and would tell the other Buyers to do the same. She did not clarify what her surprise was but I believed it was due to the fact that I had put an agreement in writing. She did know that the initiative had taken place on the extended products because I had told her in one of my meetings in Index previously.'¹³⁷

- 119 Following the OFT's visits, Littlewoods carried out an internal investigation with the assistance of its external legal advisers. A report was provided to the OFT on 21 December 2001 giving background information on the sector and setting out the conclusions of the internal investigation. The report concludes:

'Littlewoods and its employees are unaware of any attempt by suppliers, such as Hasbro, to orchestrate, as opposed to guide, retail pricing. There is no contact between retailers which would afford an opportunity for prices to be fixed between them on a horizontal basis. Nor has any employee of Littlewoods attempted to engage in such practices. Littlewoods believes that any attempt to orchestrate or maintain retail prices in this way in the toy sector would be wholly impractical and would lack fundamental credibility. It is well known to suppliers that buyers themselves do not fix final catalogue prices and anything they said to a supplier or anyone else would be unreliable. Furthermore no buyer would wish any accurate information on pricing to pass to a competitor because it would afford that competitor the opportunity to engage in strategic undercutting.'¹³⁸

- 120 Despite these assertions by Littlewoods, the OFT considers that there is considerable evidence supporting a finding that Littlewoods and its employees were involved in an agreement to fix retail prices. Littlewoods was clearly aware – as a result of Hasbro's actions as a middleman – of Argos's pricing policy on Hasbro toys and games and its 'commitment' to keep to those prices. It therefore did not have to worry about undercutting by a main competitor. The OFT therefore cannot agree with the statements made by Littlewoods employees and the conclusions in the report denying the existence of a price-fixing agreement.

- 121 The OFT has regard, in particular, to the e-mail from Ian Thomson of 18 May 2000 and the statement that it contained:

'a list of products and prices that Argos have committed to'

which Littlewoods is presumed to have relied on when determining its own conduct on the market (see paragraph 69 above).

¹³⁷ Witness statement of Ian Thomson, paragraph 128.

¹³⁸ Report – produced by Littlewoods – 'Investigation into the Market for Toys: Points of General Clarification for the Office of Fair Trading' (21 December 2001).

SUMMARY OF FINDINGS AS TO AGREEMENTS AND/OR CONCERTED PRACTICES

- 122 The OFT's case is that Hasbro, Littlewoods and Argos entered into an overall agreement and/or concerted practice to fix the price of certain Hasbro toys and games. This overall agreement included two bilateral price-fixing agreements and/or concerted practices to fix prices which in themselves constitute infringements: one between Hasbro and Argos and the other between Hasbro and Littlewoods. For the avoidance of doubt where reference is made in this decision to 'agreements' between or involving the parties this should be taken to include the agreements and/or concerted practices where appropriate.

DURATION

- 123 The agreements between Hasbro, Argos and Littlewoods were entered into before the Chapter I prohibition came into effect (1 March 2000). Therefore it is not necessary for the OFT to identify precisely the starting date of the agreements. However, the OFT considers that the parties entered into the agreements around the time that Argos and Littlewoods were preparing their 1999 editions of the Autumn/Winter catalogues (see, for example, the evidence on the start of the agreements discussed from paragraph 42 above and the witness statements of David Bottomley, Neil Wilson, and Ian Thomson¹³⁹). In any event it is clear that agreements must have been in place no later than July 1999, when the A/W 1999 catalogues were published. The agreements came to an end no earlier than 15 May 2001 when OFT visited Hasbro's premises in Uxbridge under section 27(3) of the Act and no later than 14 September 2001 when Hasbro applied for leniency. However, it is likely that the agreements continued to affect prices after the first of these dates - during the Spring/Summer season - as the catalogues had been published and prices were already agreed by that date and were likely to be followed. Duration of agreements must be taken into account in calculating penalties. For the purposes of this Decision the OFT is proceeding on the basis that the agreements were terminated at the earliest credible date of 15 May 2001. This approach gives the parties the benefit of any doubt that there may be.
- 124 The agreements initially covered Action Man and core games but were extended in time for the publication of the Autumn/Winter catalogue 2000 to cover a wider range of Hasbro products. It is therefore the view of the OFT that from 1 March 2000, there were agreements between the parties to fix prices covering Action Man and core games, which were extended at the time the

¹³⁹ For example, paragraph 22 of the witness statement of David Bottomley, paragraph 34 of the witness statement of Neil Wilson, and paragraphs 69 to 71 of the witness statement of Ian Thomson.

Autumn/Winter 2000 catalogues were being prepared to cover a wider range of products including at the very least the products listed in Ian Thomson's e-mails of 18 May 2000 (see paragraphs 67 and 69 above).

OBJECT/EFFECT RESTRICTION OF COMPETITION

- 125 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 competition.¹⁴⁰ It is therefore not necessary for the OFT to show that these agreements produced anti-competitive effects on the market.

APPRECIABILITY

- 126 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 OFT takes the view that an agreement will generally have no appreciable effect on competition if the parties' combined share of the relevant market does not exceed 25 per cent, although there will be circumstances where this is not the case.¹⁴¹
- 127 The OFT will, in addition, regard any agreement between undertakings which directly or indirectly fixes the prices of any product or service as being capable of having an appreciable effect even where the combined market share falls below the 25 per cent threshold.
- 128 The agreements referred to above are price-fixing agreements which have the object of preventing, restricting or distorting competition and there are no special circumstances to justify making an exception to the OFT's general position on appreciability. Accordingly, the OFT takes the view that they had the object of preventing, restricting or distorting competition to an appreciable extent.¹⁴²
- 129 Although there may be circumstances, which will be very limited, in which price-fixing agreements may not have as their object or effect an appreciable restriction of competition, this is clearly not the case here given Hasbro's strong position in the market and the relative importance as retailers of the other two parties to the agreements. Therefore it is not necessary for the OFT to state at

¹⁴⁰ See, for example, European Court of Justice case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125.

¹⁴¹ OFT Guideline 401, 'The Chapter I Prohibition', March 1999, paragraphs 2.18 and 2.19.

¹⁴² For the purposes of the object test only, the OFT does not consider that the agreements produced only insignificant effects in the sense outlined in *Völk v Vervaecke* (Case C-5/69) [1969] ECR 295.

what market share, if any, it might take the view that a price-fixing agreement does not have as its object or effect an appreciable restriction of competition. In any case, the OFT believes that it would be well below the market shares of the parties in this case.

EFFECT ON TRADE WITHIN THE UK

- 130 The products that are the subject of these agreements were to be sold throughout 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.

EXCLUSION

- 131 Article 3 of the Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000¹⁴³ ('the Exclusion Order') 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 have the object or effect of restricting the buyer's ability to determine its sale price (article 4 of the Exclusion Order). None of the agreements therefore benefits from the exclusion.
- 132 There are no other relevant exclusions from which these agreements could benefit.

EXEMPTION

- 133 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 are likely to have to pay more for the toys and games subject to price fixing. The OFT 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

- 134 The OFT has given full and detailed consideration to all the representations that have been made to it, both written and oral, and has given appropriate weight to

¹⁴³ 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.

them in making this Decision. The OFT's analysis of the representations is detailed below.

A Lack of supporting documents

- 135 Both Littlewoods and Argos submitted written representations to the OFT supported by documents where possible. Littlewoods subsequently submitted two press cuttings in support of its written representations. Both Littlewoods and Argos were asked if there were any further documents available that would support the arguments they were putting forward that related to a general move towards pricing at higher levels. Littlewoods submitted witness statements, one with attached documents, from non-toy buyers. Subsequently, Argos produced a witness statement by Terry Duddy, Argos's Chief Executive Officer, which refers to and exhibits some further documents which, it is claimed, clearly reflect the independent change in pricing policy which took place within Argos (see from paragraph 284 below for Argos's representations on this subject and the OFT's response). These documents are at Annex C to Argos's Notice of Appeal. The OFT has considered these documents and does not believe that they assist Argos's case at all. Not one of them refers to a policy to [*], let alone a move to RRP's. Also, the Argos board presentation (see Annex C to Argos's Notice of Appeal) to the GUS Executive Committee on 18 January 1999 (i.e. three months after Maria Thompson claims that the policy had already been implemented) refers to 'Catalogue pricing strategy' which is detailed on the following page as: [*].
- 136 Far from supporting the contention of Mr Duddy that Argos changed its policy to adopt RRP's at the direction of GUS, the material exhibited by him only emphasises once again that there is nothing, not even a single Board Minute, to record this momentous change of policy on the part of Argos. The OFT has concluded that where there are statements in the written and oral representations of Littlewoods and Argos that are not supported by other documentary material, no such documents exist.
- 137 Littlewoods and Argos have produced witness statements in support of their argument that there was no agreement to fix the prices of Hasbro toys and games at the recommended retail prices. They have also referred to some of the statements made by Hasbro employees in their interviews with the OFT in support of their arguments. The OFT accepts that there is not complete consistency across the interview notes and witness statements from Hasbro employees. Littlewoods and Argos appear to have accepted the veracity of those parts of those statements that lend support to the contention that no agreements existed. However, the OFT has noted that whereas the statements relied upon by the OFT in support of its case that agreements did exist are

supported by the contemporaneous documents that are referred to in this Decision, there is no documentary evidence in support of those statements relied on by Littlewoods and Argos that contradict this view. The OFT takes the view that more weight should be placed on the statements, or parts of statements, supported by contemporaneous documents than on those not so supported.

B Review of contrary evidence

138 In their representations, the parties have claimed that the OFT has not given sufficient consideration to the evidence that contradicts its case. However, in taking this Decision, the OFT has considered fully the entire body of evidence it has gathered, taken as a whole. As already indicated in paragraphs 15, 16 and 137, where there are clear contradictions in the oral statements, the OFT has relied on those statements supported by other evidence, in particular contemporaneous documentary evidence. Below, the OFT has specifically considered the oral statements taken from Hasbro and Littlewoods employees by the OFT (see paragraph 14) which might seem to contradict its case.

139 The three Littlewoods employees interviewed by the OFT all denied that there was an agreement with Hasbro and Argos to fix prices. Lesley Paisley, Index buying manager, and Alan Burgess and Alan Cowley, both buyers of toys at Littlewoods, all stated that Littlewoods did not inform Hasbro of the prices it intended to charge and did not commit to any prices suggested by Hasbro. This is also the conclusion of a report that Littlewoods produced after an internal investigation. Hasbro's Head of Sales and Marketing, Mike McCulloch, also denied that there was an agreement with Argos to fix prices, nor did he concede that there was an agreement with Littlewoods. He stated that the e-mails which the OFT uses as evidence, 'look worse than they actually are' and show an 'over zealous approach by the account managers'. According to Mike McCulloch, Argos priced how it wanted and Ian Thomson, Hasbro's account manager for Littlewoods, could not possibly have guaranteed Argos's prices to Littlewoods. This seems also to be asserted by other Hasbro employees, who mentioned that they were not certain about the prices that Argos and Littlewoods would use until their catalogues were published. This has been construed as evidence of the non-existence of the agreement.

140 However, in the OFT's view the Littlewoods employees and Mike McCulloch are contradicted by several other Hasbro employees, who were more closely involved in the Argos and Littlewoods accounts than Mike McCulloch. David Bottomley, a Hasbro Sales Director who was in the management hierarchy between Mike McCulloch and the account managers, states that '[w]hat existed between Hasbro and Argos and Hasbro and Littlewoods was an understanding

that, because of the obvious benefit to everyone in the industry, prices would be at or near RRP.¹⁴⁴ As set out in detail above, the existence of the agreements is further confirmed by Neil Wilson and Ian Thomson, Hasbro's Business Account Managers for Argos and Littlewoods respectively.

- 141 The statement of Charles Cooper, Neil Wilson's successor as Hasbro's Business Account Manager for Argos, is ambiguous. On the one hand, Charles Cooper confirms that when he took over from Neil Wilson, Neil Wilson explained to him about the existence of a 'gentlemans understanding'. On the other hand, Charles Cooper goes on to say that he presents 'RRPs to Argos, but there is no understanding to commit to those prices by Argos as far as I am aware. The first time I know their retail prices is when I see their catalogue.' This does not contradict what the other witnesses have said, because the OFT does not suggest that Argos gave Hasbro a 'guarantee' or that it 'committed' to prices in the way denied by Cooper (see further paragraphs 101 to 103 above). However, the involvement of Argos in the arrangement was obviously known to Cooper as shown by his reply to an e-mail from Ian Thomson as late as April 2001 (see paragraph 81 above). Ian Thomson told Charles Cooper that in the Autumn/Winter 2001 catalogue Littlewoods wanted to price a Hasbro product at the level of Argos's Spring/Summer 2001 catalogue and asked him to 'ensure that Argos will match the price and ... get them to comply'. Charles Cooper replies: 'no change planned' by Argos. If Cooper had been ignorant of the arrangements between Argos and Hasbro, he would have responded by expressing surprise and asking Thomson what he was talking about. This shows that Charles Cooper must have known about the continuation of the 'gentlemans understanding' and that this involved being aware of how Argos intended to price in the forthcoming catalogue. Knowledge of these intentions was consistent with Hasbro's role of middleman and with a commitment, in the sense indicated in paragraph 101 above, by Argos to price at RRP's. Also, in his witness statement, Neil Wilson confirms that when he transferred the Argos account to Charles Cooper in October 2000, he gave him 'a detailed account of how the account was run', including the implementation of Hasbro's pricing initiative. Wilson also comments on Cooper's statement to OFT officials that '[d]ialogue [with Argos] had closed down' when he took over from Wilson. Wilson understands this to mean that for Cooper 'there was less need to get involved in passing on information' because '[b]y October 2000, the initiatives had been successful.'¹⁴⁵

¹⁴⁴ Witness statement of David Bottomley, paragraph 47.

¹⁴⁵ Witness statement of Neil Wilson, paragraphs 71 and 72.

- 142 The witness statements of Ian Thomson, Neil Wilson and David Bottomley are supported by several e-mails which were written at the time of the agreement. The e-mail sent by Neil Wilson and Ian Thomson on 18 May 2000 specifically mentions 'a price agreement' and that 'prices will be maintained as per earlier agreements' concerning Argos and Littlewoods. Although this e-mail was also sent to Mike McCulloch, the OFT has no evidence to indicate that he objected to the wording of this e-mail at the time. On the same day, Ian Thomson sent an e-mail to Littlewoods listing prices 'that Argos have committed to'. Although this e-mail was copied to Mike McCulloch as well, a reply was sent only by Mike Brighty, a Hasbro Sales Director who also received a copy. His reply shows that Hasbro was fully aware of the 'highly illegal' nature of the agreement. Another example is the e-mail of Alan Cowley of Littlewoods of 28 December 2000, who reminds Ian Thomson that Ian Thomson 'had earlier been so insistent that we all went out at the same price'. In addition, several further e-mails show how Hasbro acted as middleman between Argos and Littlewoods.
- 143 Similarly, Hasbro's uncertainty about the prices that Argos and Littlewoods would actually use does not contradict the existence of agreements. In fact, the comments about uncertainty were mostly made by employees who admitted that the agreements existed. David Bottomley, Neil Wilson and Ian Thomson all state that Argos and Littlewoods did not guarantee that the prices that they would actually charge would always correspond with the prices they had indicated to Hasbro (see paragraph 101 above). In that sense they are consistent with the statements of McCulloch and other Hasbro employees to OFT officials when these employees say that Hasbro could not guarantee the prices of Argos or Littlewoods in advance. The uncertainty about the actual prices can be explained by the nature of price-fixing agreements, where inherently the parties can never be certain that the other parties will fully implement the agreements. They can only expect rather than rely absolutely on implementation, as shown by David Bottomley's witness statement that Ian Thomson would have had 'a clear expectation that Argos would adhere' to the prices communicated by Hasbro.¹⁴⁶

C Response to the representations made by Littlewoods on the original rule 14 Notice

LEGAL EVIDENCE REQUIRED TO SHOW THE EXISTENCE OF AN AGREEMENT

- 144 Representations: The OFT needs to define correctly the concept of an agreement. This is set out in the CFI's judgment in *Bayer*¹⁴⁷ and involves bi-

¹⁴⁶ Witness statement of David Bottomley, paragraph 19.

¹⁴⁷ European Court of First Instance, Case T-41/96 *Bayer v Commission* [2000] ECR II-3383.

lateral or multi-lateral conduct. Unilateral conduct is not prohibited. The undertakings should have expressed their joint intention to conduct themselves on the market in a specific way. There needs to be a concurrence of wills and the OFT must show that Hasbro agreed with Argos and Hasbro agreed with Littlewoods and that all would acquiesce in the exchange of information as reassurance that they could fix prices. The judgment of the CCAT in *Napp*¹⁴⁸ indicates that the evidence needs to be strong and compelling. From *Bayer*, the following elements are not evidence of an agreement: unilateral conduct; not interrupting commercial relations with supplier; a supplier refusing supplies unless there is an agreement; a supplier monitoring adherence; obtaining information from the customer to facilitate the agreement; discussions of market conditions; the fact that the customer is aware that the supplier wants an agreement. Evidence of an agreement includes: a clause in the contract (*Sandoz*);¹⁴⁹ a dealer verbally agreeing not to resell into another Member State (*Tippex*);¹⁵⁰ the conduct of the dealers subsequent to the imposition of pressure was capable of being interpreted as 'de facto' acquiescence (*Sandoz* and *Tippex*).

- 145 OFT's response: The OFT does not accept all the above representations on the nature of an agreement. It accepts that unilateral conduct is not prohibited by Chapter I of the Act and that concurrence of wills between the parties is required for the existence of an agreement. However, the European Court of First Instance did not hold in *Bayer* that the elements listed by Littlewoods are not relevant in establishing the existence of an agreement. Most of these elements can contribute to the proof of the existence of an agreement. The OFT believes that the evidence it has brought forward in this Decision is consistent with this interpretation of the case law. The OFT has evidence that there was a concurrence of wills between Hasbro, Littlewoods and Argos, in the form of oral statements and e-mails, as presented earlier in this Decision. The OFT believes that this forms strong and compelling evidence of the existence of the agreements between the parties. Where there is evidence of systematic monitoring of the agreements, or of discussions about general market conditions, the OFT relies on this evidence as being entirely consistent with, and indeed supportive of, the existence of agreements.

¹⁴⁸ Competition Commission Appeal Tribunal, Case No 1001/1/1/01 *Napp Pharmaceutical Holdings Limited and Subsidiaries v The Director General of Fair Trading*, 15 January 2002, [2002] CAT 1 at [109], [2001] CompAR 1.

¹⁴⁹ European Court of Justice, Case C-277/87 *Sandoz Prodottie Farmaceutici v Commission* [1990] ECR I-45.

¹⁵⁰ European Court of Justice, Case C-279/87 *Tipp-Ex v Commission* [1990] ECR I-261.

CLARITY OF THE ALLEGATIONS AGAINST LITTLEWOODS

- 146 Representations: Littlewoods states that the original rule 14 Notice is confused as to whether the OFT is alleging against Littlewoods an agreement to fix prices simpliciter or alternatively an agreement to fix prices at the level of the RRP of Hasbro.
- 147 OFT's response: It has always been the OFT's case that there was agreement to fix the retail prices of toys and games normally at RRP. This can be seen from the e-mails of 18 May 2000 and the follow up e-mail of the 25 May 2000. The prices set out in the first e-mail are generally at the RRP, but it is clear that they could be agreed at a different level – e.g., Interactive Pikachu had an RRP of £23.99, but it was subsequently agreed that the price would be fixed at £23.75, a price that was below the RRP. Also, David Bottomley speaks in his witness statement of 'an understanding that ... prices would be *at or near* RRP' (emphasis added).¹⁵¹
- 148 Representations: Littlewoods argues that the factual allegations made are very superficial. There is, for example, no identification of who at Littlewoods is alleged to have engaged in an agreement with Ian Thomson of Hasbro.
- 149 OFT's response: The OFT does not agree that the allegations are not specific enough. The names of the Littlewoods buyers in receipt of, and sending out, e-mails that constitute evidence of agreements are clearly set out in this Decision (see paragraphs 69 and 84). In addition, in his witness statement Ian Thomson identifies who he spoke with at Littlewoods.¹⁵² The authority of these buyers to commit to certain retail prices is discussed below (see paragraphs 194 to 199). Furthermore the OFT does not concede that it is always necessary for it to identify the precise individuals within an undertaking who took part in negotiating the infringing agreement; it is sufficient for the OFT to show that an agreement or concerted practice existed.
- 150 Representations: Littlewoods asserts that the need for any agreement to fix prices at RRP had been overtaken by events, since in 2000 most retailers were following RRP as a matter of market necessity.
- 151 OFT's response: The OFT agrees that many retailers had begun to move towards RRP in 2000, but this does not alter the OFT's case. It is the OFT's case that this change in policy was facilitated by the Hasbro/Argos/Littlewoods agreements. Furthermore, the evidence shows that the agreements in relation to

¹⁵¹ Witness statement of David Bottomley, paragraph 47.

¹⁵² See in particular paragraphs 12, 67 and 106 to 114 of Ian Thomson's witness statement.

prices were still in place at that time and were extended in May 2000 to cover more products. Also, even where the market is moving towards RRP generally, undertakings cannot be certain that this will remain the case and therefore, even in such circumstances, there remains an incentive for them to seek to eliminate uncertainty from the market.

HASBRO SOUGHT ADHERENCE TO RRPs

- 152 Representations: Active encouragement by Hasbro to adhere to RRPs is not evidence of an agreement.
- 153 OFT's response: The OFT accepts in the overall context of this case that unilateral conduct on the part of Hasbro to try and encourage Littlewoods to adhere to RRP is not on its own compelling evidence of an agreement. However, as shown in this Decision, the OFT has evidence that Hasbro's behaviour and its co-ordination between itself, Littlewoods and Argos involved much more than unilateral conduct.
- 154 Representations: Littlewoods has accepted that Hasbro did have a policy of seeking to encourage adherence to its RRPs. Alan Burgess implies that this was done through 'encouragement', rather than threats or coercion. Alan Cowley states that he was aware that Ian Thomson of Hasbro wanted Littlewoods to adhere to RRPs.
- 155 Littlewoods has accepted too that Hasbro discussed RRPs with it to ensure that those chosen were acceptable to the retailers concerned.
- 156 Furthermore, Alan Burgess in his statement goes on to say that it was suggested to him by Ian Thomson of Hasbro that Argos intended to adhere to Hasbro's RRPs. He also states that Ian Thomson asked him for information as to his intentions in relation to forthcoming catalogue prices for Hasbro toys.
- 157 Littlewoods similarly accepts that it gained confidence that prices could be set at the supplier's RRP and that assurances that Argos would be selling at the RRP were more likely to turn out to be true towards the end of 1999 and the beginning of 2000.
- 158 OFT's response: The OFT accepts that Hasbro sought adherence to RRPs; discussed RRPs with Littlewoods; assured Littlewoods that Argos intended to adhere to RRPs; sought information about pricing intentions from Littlewoods; and that these assurances were generally more credible for Littlewoods towards the end of 1999 and the beginning of 2000. The OFT does not consider it necessary to its case for Hasbro to have threatened or coerced Littlewoods to adhere to RRPs. Indeed the OFT accepts that Hasbro was not in a position to

coerce any of the major retailers. It would be in Littlewoods's interests to agree to Hasbro's promptings to adhere to RRP's once it realised that it was not likely to have its prices undercut if it did so.

LITTLEWOODS ACQUIESCED IN HASBRO'S POLICY TO SEEK ADHERENCE TO RRP's

159 Representations: Littlewoods argues that the OFT has failed to demonstrate that Littlewoods acquiesced in Hasbro's policy to seek adherence to RRP's.

160 OFT's response: It is the OFT's case that the following evidence in particular shows acquiescence on the part of Littlewoods:

- the witness statements of the Hasbro employees; for example, Ian Thomson's statement as quoted at paragraph 115 above; David Bottomley's statement that 'it is incorrect to suggest that Neil [Wilson] and Ian [Thomson] were acting unilaterally in putting together this proposal [to extend the pricing initiative]: it was based on detailed discussions and conversations that they had had with Argos and Littlewoods about pricing at RRP's. Each was aware that similar discussions were taking place with the other ...',¹⁵³ also, Neil Wilson's statement that 'Ian Thomson had received indications from Index that it was likely to adopt the RRP for the products referred to in the e-mail [of 18 May 2000]';¹⁵⁴
- the e-mail from Alan Cowley to Ian Thomson of 28 December 2000 (see paragraph 84 above), where Alan Cowley's statement that he was annoyed at the last minute change in price of the Tweenies doll 'especially when you were earlier so insistent that we all went out at the same price' implies that he had acquiesced in an agreement to fix the price of certain Hasbro toys and games;
- the internal e-mail of 18 May 2000 from Ian Thomson and Neil Wilson (see paragraph 67 above), which says that both accounts (referring to Argos and Littlewoods) were being cautious 'in case either reneges on a price agreement,' implies that there was such an agreement for them to renege on;
- the e-mail of 18 May 2000 to Littlewoods buyers (see paragraph 69 above), saying that 'Games and Action Man prices will continue to be adhered to', thus suggesting that there was an agreement already in existence that Littlewoods was party to; the agreement is further evidenced by Littlewoods's failure to question this understanding and the existence of

¹⁵³ Witness statement of David Bottomley, paragraph 28.

¹⁵⁴ Witness statement of Neil Wilson, paragraph 51.

further correspondence from Hasbro updating the information contained in the e-mail of 18 May 2000, i.e. the further e-mail of 25 May 2000 (see paragraph 75 above).

- 161 Representations: The de facto adherence to such RRPs is not prima facie evidence of an agreement.
- 162 OFT's response: The OFT accepts that the mere fact that Littlewoods and Argos did adhere to RRPs is not prima facie evidence that the agreements existed. However, it is a factor which can go to show acquiescence by Argos and Littlewoods. Hence, it can constitute part of the evidence that agreements existed, particularly when the change in pricing policy coincided with the period when the agreements were initiated and the alternative commercial justifications put forward by Littlewoods and Argos for the change in behaviour are unsupported by documents (see further below).

THE EXCHANGE OF INFORMATION WITH ARGOS THROUGH HASBRO

- 163 Representations: The exchange of information about pricing intentions between a supplier and its customer is not illegal.
- 164 OFT's response: The OFT accepts that the exchange of information about pricing intentions between a supplier and its customer is not necessarily evidence of an agreement. It is the OFT's case that the exchange of information between a supplier and its customer relating to the pricing intentions of another competing customer to facilitate an agreement on the price is illegal.¹⁵⁵ The exchange of this type of information, such as the e-mail to Littlewoods of 18 May 2000, formed part of the price-fixing agreements between Hasbro, Argos and Littlewoods.
- 165 Representations: Alan Burgess states that he never questioned whether information about his pricing intentions would be passed on to Argos and that he would treat any information received from Hasbro about Argos's pricing intentions as a joke.
- 166 OFT's response: The OFT does not accept this representation. Alan Burgess had been aware that Hasbro wanted Littlewoods to adhere to RRPs; he had received

¹⁵⁵ See the European Commission in its decision in *Citric Acid Cartel* ([2002] OJ L239/18, 6 September 2002), paragraph 140: '[The requirement of independence] strictly precludes 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.'

confirmation that Argos was intending to do so and at what prices; and he had been asked what his pricing intentions were. In his witness statement, Ian Thomson states:

'From my discussions with Alan Burgess regarding commitment to the plan there was never any instruction not to pass on information to Argos. I would tell Alan that I would be having discussions with the Argos account handler (Neil Wilson) in order to confirm that they (Argos) would still honour the price commitments of Core Games and Action Man.

... Alan Burgess was concerned that if he agreed [to Thomson's proposal at the time of the preparation of the A/W 2000 catalogue to extend the range of products that the pricing initiative applied to] he would be increasing the risk of being undermined by Argos because he was not convinced that they would agree to any more lines being included.

I explained that the Argos account handler (Neil Wilson) was having similar discussions to gain agreement with Argos to accept the same proposal. I would let him know if the outcome would change. There was no doubt that Alan Burgess knew that I was passing on to the Argos account handler (Neil Wilson) the contents of our discussion and that I would confirm the Argos intentions back to him after Neil had concluded his discussions with Argos.¹⁵⁶

Also, Alan Burgess claims not to have acted upon the Argos information in making his own pricing decisions, despite his increasing confidence in the reliability of such information (see also paragraph 170¹⁵⁷). Therefore, a presumption arises that, subject to evidence to the contrary, Littlewoods must have taken into account the information on Argos's prices in determining its own conduct on the market.¹⁵⁸

167 Representations: Phil Riley has claimed that he does not recall whether Ian Thomson ever passed on information about Argos's pricing to him.

¹⁵⁶ Witness statement of Ian Thomson, paragraphs 87, 107 and 108. See also paragraph 115 of Thomson's witness statement.

¹⁵⁷ Alan Burgess states in effect that towards the end of 1999 and the beginning of 2000 he knew that suggestions that Argos would adhere to RRP's were more likely to turn out to be true. The OFT notes that it found a copy of the e-mail of 18 May 2000 (see paragraph 65 above) that had been printed by Alan Burgess and on which some of the listed products had been ticked (Document D.9 of Annex A) (see also paragraphs 68 and 107 above).

¹⁵⁸ See the European Commission in its decision in *Citric Acid Cartel* ([2002] OJ L239/18, 6 September 2002), paragraph 142: 'Although in terms of Article 81(1) of the Treaty the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period.'

- 168 OFT's response: However, the OFT notes the existence of an e-mail addressed to Phil Riley assuring him that Argos would be continuing to adhere to RRP on Action Man and games (see paragraph 69 above). In addition, even though Ian Thomson states that he and Phil Riley 'never really talked about pricing a great deal', Thomson spoke to Riley 'to confirm that [Hasbro's pricing] initiative was working and could I have his agreement that he would continue with the strategy'. Riley's response was that '[h]e was prepared to continue but was also very concerned should he be undercut when the next catalogues came out.'¹⁵⁹ Furthermore, Phil Riley has managed to describe in great detail in his witness statement how annoyed he would be if Hasbro had led him to believe that Argos was going to price in a certain way, he had then acted on that information and the result had been that he had been undercut.
- 169 Representations: All of the witness statements made by Littlewoods's employees state that where Hasbro account managers passed on information about the pricing intentions of Argos, they did not ask for this information and they would not have trusted it when received.
- 170 OFT's response: The e-mail of 18 May 2000 from Ian Thomson provides evidence that information on Argos's pricing intentions was certainly passed on to each of the employees in the copy list. Alan Burgess says that, at one time (he appears to be referring to the 1990s), he would have treated such information as a joke. However, he goes on to say that as the Argos policy to move towards higher margins and RRPs took effect (he suggests that this was towards the end of 1999 and the beginning of 2000) all retailers gained confidence that price could be set at the suppliers' RRPs: 'Suppliers' account managers would still suggest to us that recommended retail prices would be observed by Argos. However, we knew now that this was more likely to turn out to be true.' This increasing confidence that any assurances from suppliers about Argos's pricing intentions could be trusted seems to have occurred at or before the date of the e-mail referred to above, contradicting the suggestion that Alan Burgess would not have trusted the information it contained.
- 171 Similarly, Lesley Paisley says that from 2000 onwards it was very easy for suppliers to suggest that their RRPs would in practice be followed by Argos and other retailers. While Phil Riley also says he would not have believed an assurance from Hasbro that Argos were going to go out at the RRP, he nonetheless goes on to say how angry he would be if such an assurance later transpired to be wrong (see above). Alan Cowley, in his statement, says that he

¹⁵⁹ Witness statement of Ian Thomson, paragraph 114. See also paragraph 115 of Thomson's witness statement.

did not trust Ian Thomson when he assured him that Argos was going to charge the RRP for the Tweenies doll. However, when he checked with his manager, John McMahon told Alan Cowley that he had had a discussion with Mike McCulloch about prices and advised him to go out at the RRP. Hence, the OFT does not believe that all the information about Argos's pricing intentions that was passed from Hasbro to Littlewoods was mistrusted by those receiving it.

REASONS FOR LITTLEWOODS MOVE TO RRP'S

172 Representations: Littlewoods accepts that both it and Argos did, in the main, apply Hasbro's RRP's throughout the period 1999-2001, in contrast to the period preceding this. However, it states that this was 'for the single reason that it was commercially expedient to do so'. Littlewoods maintains that it did not acquiesce in any policy engineered by Hasbro (alone or with any other person) to adhere to Hasbro's RRP's. Littlewoods gives six main reasons for its decision to move to RRP's. These are summarised below:

1. the change in policy at Argos following the take-over by GUS in April 1998;
2. the low margins on Hasbro toys and games; they were brand leaders with 'must have' products, whose wholesale prices were very high relative to RRP;
3. the choice of price points by Hasbro for its RRP's;
4. the fact that the RRP's chosen by Hasbro were chosen to be at a level that retailers would naturally and independently fix upon;
5. television advertising tended to include the RRP for that product;
6. there was a general move to RRP's from 2000 onwards and this was self-perpetuating.

According to Littlewoods, it is for the reasons listed above that prices moved to RRP's from late 1999/early 2000 onwards.

173 OFT's response: All but the first and the last of the points apply equally well to the period preceding the events in question when Littlewoods accepts that Argos and Index had aggressive pricing policies, suggesting that their prices were often below RRP's. Hence, it cannot be these factors that brought about the change in policy referred to. The last of the points listed above cannot be responsible for the shift in policy, as the argument is necessarily circular without a starting point. As a result, the representation must be in essence that the move to RRP's in late 1999/early 2000, the period during which Hasbro was seeking to get Littlewoods to adhere to RRP's, was caused by the GUS take-over of Argos (see detailed analysis of this point at paragraphs 179 to 193 below).

- 174 Representations: Littlewoods states that Hasbro took care to ensure that its selected RRPs were fixed at price points which would coincide with the price retailers would themselves naturally choose as their retail price.
- 175 OFT's response: The OFT accepts that Hasbro's RRPs and retailers' retail prices are going to be at natural price points.¹⁶⁰ However, this is entirely consistent with, and does not negate, the evidence that there was an agreement on prices, as demonstrated in this Decision.
- 176 Representations: Littlewoods says that the commercial reality of its situation was that it had little choice but to price at RRP for most of the Hasbro toys it stocked.
- 177 OFT's response: This representation as stated in paragraph 176 is not inconsistent with a situation where Littlewoods wanted to price at RRPs and was given reassurance in doing so by the knowledge that its main competitor was going to do the same. In addition, this representation is contradicted at times by the statements of those involved, who refer explicitly to incentives to undercut their competitors and the fear of being undercut. An example is Alan Cowley's concern about the possibility of being undercut by Argos on the Tweenies dolls: 'At that time Argos and Index were competing quite strongly on price particularly on TV promoted products.' This was a concern that was echoed in John McMahon's statement. However, John McMahon did advise sticking to the RRP in this example. He had said earlier in his statement that his policy prior to the GUS take-over had been to compete with Argos on pricing and to try to beat Argos on price on as many lines as possible, despite the difficulties of this strategy as implied by the points made above.
- 178 Lesley Paisley also refers to the incentives to go out below RRP, saying that on highly branded goods, buyers cannot be certain a proposed price at RRP will be approved. On occasion, she says, there would be a possibility that they would undercut and try to increase volumes on high profile products. Later in her statement she points out how important it is for Littlewoods to be seen as a discounter. 'If we are undercut on high profile lines it can jeopardise Index's whole trading position.'

GUS TAKE-OVER OF ARGOS - IMPROVING MARGINS

- 179 Representations: Littlewoods suggests that even before the take-over by GUS, Argos had been reported in the press as seeking to increase margins and

¹⁶⁰ Prices such as £9.99 and £19.99 are regarded as strong price points. £14.99 and £7.99 are weaker price points.

submitted press cuttings in support of this point. Littlewoods assumed that this would imply a move by Argos away from discounting towards RRP's. Furthermore, it asserts that this was a belief commonly held throughout the toy industry at that time. These points are expanded in Littlewoods's oral representations where it is suggested that the purpose behind Argos's and GUS's statements on price was that these were specifically intended to signal to the remainder of the market that it was safer to keep prices higher and to follow RRP's.

180 Littlewoods refers to the statements of a number of its buyers of toys to support its claim. In addition, in response to a request from OFT at the oral hearing for more documents on Argos's alleged change in policy, on 28 and 31 January 2003, Littlewoods submitted written statements from four members of Littlewoods's buying staff who were not involved with toys. Littlewoods contends that these statements demonstrate that buyers throughout Littlewoods were aware of the change in Argos's pricing policy following the GUS take-over and that Littlewoods's policy in general and not just in toys and games was adjusted either by trying to increase margins or by undercutting.

181 OFT's response: Again, the representation as stated at paragraph 179 does not negate the existence of the agreements between Littlewoods, Hasbro and Argos and is not inconsistent with a situation where Littlewoods wanted to price at RRP's and was given reassurance in doing so by the knowledge that its main competitor was going to do the same. In addition, the OFT has examined each of the press cuttings produced as evidence in support of these statements. Whilst they clearly confirm that Argos and GUS intended to seek to increase margins, they do not suggest at any point that this would be achieved by moving away from Argos's traditional position as a discounter.

182 Instead, the cuttings feature the falling sales and disappointing profits of Argos and the poor share performance of GUS. They refer at different times to various non-price based measures designed to increase profitability across their Group:

- expanding their product range in high street stores;
- reducing the number of product lines;
- adding some higher value and more own label products;
- increasing the number of direct imports;
- improving customer service and shortening queues.

183 With regard to any actual improvements in margins, their existence suggests that they were driven by better buying terms from combining the sourcing of Argos's products with GUS's home shopping channel and by cost cutting

measures arising from the integration of the distribution arms of Argos and home shopping. They even suggest that the company intended to *discount* prices by 10 per cent in its home-shopping catalogue.

184 Hence, it is far from clear how such announcements could lead to a generally held belief that Argos would henceforth cease to price aggressively and start to follow RRP. The consequent and largely simultaneous move to RRP for certain Hasbro products, for example Action Man and core games, is not easily accounted for by reference to these cuttings.

185 The only exception to this has been provided by Hasbro in its written representations. Hasbro quotes a commentator as stating in 'Housewares' of 1 September 1998: 'GUS hints that it may review Argos's price led marketing. During the takeover it derided Argos's recent 'the cheapest just got cheaper strategy' as folly.' This is the only press comment produced by Hasbro. Since none of the press comments submitted by Littlewoods refers to an intention by Argos to move away from its discounting strategy, the OFT does not find the existence of only one conflicting press comment persuasive.

186 The GUS take-over of Argos occurred in April 1998 and Littlewoods states that the desire to improve margins dated from before that time to the period when Stuart Rose took over as Argos's Chief Executive. This would coincide with the preparation of the Argos Autumn/Winter 1998 catalogue. However, the move to RRP is not generally seen until late 1999/early 2000. Hence, it is not clear how either of the earlier events could have sparked the change in policy that took place more than a year later.

187 The OFT notes that the statements from the Littlewoods buyers of toys and also those buyers in other categories are ambiguous about a change in Argos's policy and Littlewoods's reaction and do not credibly demonstrate that any such change was the result of the GUS take-over.

188 The Littlewoods buyers of toys indicate that they expected that Argos's announced intention after the GUS take-over to seek more margin would result in a move towards RRP (except Andrea Gornall who does not mention any change in Argos's policy). However, the buyers contradict each other as to when Argos stopped its aggressive discount policy. John McMahon states that the policy change occurred in late 1998/early 1999, and Alan Burgess says the change was visible in the A/W 1999 catalogue, for which prices would have been established in early 1999. However, according to Lesley Paisley, Peter Edmonds and Katharine Runciman, Argos changed its policy only in late 1999 or 2000. Lesley Paisley, Littlewoods Buying Manager for toys, states that the policy change was visible no earlier than in the A/W 2000 catalogue (i.e. the

catalogue that comes out in autumn 2000 for which prices would have been established in early 2000).

- 189 Both Alastair McHarrie, a buyer of electronic games and desktop technology, and Steve Martin, a buyer of telephones and photography, state only that in 2000 they heard rumours that Argos may not have been as competitive as before in order to gain margin. Ian Gunn, a buyer of various electronic equipment, says that in March 1999 he heard rumours about this on a buying trip to the Far East, but that Littlewoods only started acting upon such rumours for the A/W 2000 catalogue. Terry Overill, a buyer of kitchen electrical products, states that shortly after the GUS take-over the impression within Littlewoods and among suppliers was that Argos would focus more on margin. He seems to imply that this was interpreted to mean that Argos would move towards RRP's. However, in his statement Terry Overill only refers to a reaction to this perceived change in policy when he moved back to the buying department after an absence of 10 months in January 2000.
- 190 These four buyers of products other than toys state that [*]. Terry Overill demonstrates this with three contemporaneous e-mails that [*]. However, the e-mails do not mention that [*]. On the contrary, an e-mail of 9 August 2000 suggests that [*]. More generally, Ian Gunn refers to his scepticism about any change in Argos policy and his suspicion that it was a smokescreen put up by Argos to be able to attack Littlewoods's prices. Alastair McHarrie, Steve Martin and Ian Gunn all state that [*]. Alastair McHarrie, in particular, is uncertain as to [*].
- 191 The OFT cannot give credence to Littlewoods's assertion that the take-over by GUS led Argos to move its prices towards RRP's as Littlewoods has failed to present contemporaneous documents to show this and the statements of the Littlewoods buyers of toys contradict those of the buyers of other products regarding the timing of any change in Argos policy. In addition, despite the OFT's express request at the oral hearing, Littlewoods has not provided the OFT with any written documents confirming that there was any change in Littlewoods's pricing policy for toys following Argos's alleged policy change and the OFT has concluded that no such documents exist. The OFT finds it surprising that such an important and fundamental shift in policy by such a large company, brought about by an apparent change in the policy of its main competitor, could have left no documentary trace. Littlewoods does not have any evidence of analysis undertaken to determine whether such a shift in policy would be successful. No minutes of meetings discussing the policy have been produced. There is also no evidence of this change in policy being disseminated through the organisation. [*] It is also to be noted that within one company the reaction to a change in a competitor's policy could range from moving along

with the competitor towards RRP's for toys to aggressive pricing in other sectors. A lower margin for toys than for other products cannot be a sufficient explanation in itself without any further evidence, as margins for toys and for other products can vary considerably from low to high.

192 The OFT's position is not changed by the witness statement of Hasbro's employees. Both Neil Wilson and David Bottomley mention Argos's desire to increase margins and profitability after it had been taken over by GUS. They state that around the end of 1998 there was pressure on Hasbro from retailers to deliver more margin on its products.¹⁶¹ Neil Wilson states that Hasbro reacted by proposing a number of initiatives, including its listing initiative and its pricing initiative (see paragraph 43 above).¹⁶² David Bottomley notes that '[t]he development of the pricing initiative came at the right time insofar as Argos' business strategy was concerned. At that time Argos wanted margin injected into the sector.'¹⁶³ Also, 'Argos was sympathetic to both initiatives and was actively involved in discussions on pricing. Littlewoods followed Argos' lead, but was also involved in discussions with Hasbro about pricing.'¹⁶⁴ Ian Thomson does not mention any change in Argos's policy related to the GUS take-over. Hence, the witness statements of Hasbro's employees do not support Littlewoods's assertions; they rather suggest that Hasbro's pricing initiative was developed in response to retailers' demands for more margin on Hasbro products (on which margins tended to be relatively low) and that Littlewoods went along with Hasbro's initiative once it had received reassurance from Hasbro that Argos was prepared to go along with the pricing initiative.

193 Argos's alleged change in policy is also dealt with in response to Argos's representations (see paragraphs 284 to 287).

BUYERS' AUTHORITY TO COMMIT TO RRP's

194 Representations: Littlewoods asserts that 'none of the Littlewoods buyers in contact with Ian Thomson had the authority to set prices. These were set by Lesley Paisley after discussion with the individual buyers and then were subject to approval by the relevant Director and could even be reviewed by the Executive Management Team.' In the oral representations, Lesley Paisley suggested that up to 50 per cent of the initial prices that were set by the buyers were subject to change.

¹⁶¹ Witness statement of David Bottomley, paragraph 7 to 10; witness statement of Neil Wilson, paragraphs 6 to 9.

¹⁶² Witness statement of Neil Wilson, paragraph 9.

¹⁶³ Witness statement of David Bottomley, paragraph 10.

¹⁶⁴ Witness statement of David Bottomley, paragraph 48.

- 195 OFT's response: The OFT does not accept that it would be impossible for Littlewoods to agree to set prices at RRP because the buyers had no authority to commit to such prices.
- 196 The statements from Littlewoods employees do show that prices had to be approved by Lesley Paisley, but they contradict the evidence given by Lesley Paisley. Katharine Runciman stated that in her experience, Lesley Paisley would 'become involved in the detail of about 10% of the lines under consideration, accepting the 90% without too much discussion.' This implies that only about 10 per cent of the prices set by the buyers were likely to be changed or challenged at a later date.
- 197 Furthermore, Littlewoods accepts that it moved towards recommended retail prices at that time, so that most buyers could be fairly confident that if they agreed to go out at RRP, this would not be challenged by Lesley Paisley. Alan Cowley stated that he had no authority to set prices. However, he went on to say that he was nonetheless inclined to follow RRPs. Further contradictions are evident throughout his statement when he discusses the prices that he settled on. For example, 'If I went out at £14.99 and Argos went out at £12.99 I would have a lot of egg on my face.' This suggests a considerable amount of influence in setting the eventual price appearing in the catalogue.
- 198 Also, Lesley Paisley mentions the fact that each of the buyers has a target profit margin that is set for them by management. It is hard to see how a system of setting such targets for buyers would work if they did not have any influence in the setting of prices for the products in their area.
- 199 Finally, the OFT notes that even if the prices set by the buyers were subject to some amendment, this does not preclude the existence of the agreements. The OFT has evidence that shows that Hasbro passed on information about the evolution of prices over time, so that if a price changed from the agreed RRP, this could be communicated to the parties to the agreements. The e-mail from Neil Wilson to Ian Thomson and Mike Brighty of 25 May 2000 is an example of this type of exchange. Interactive Pikachu was confirmed at the RRP of £23.99 in the e-mail that was sent on the 18 May 2000. The follow up e-mail of 25 May 2000 from Ian Thomson stated that Argos had confirmed that Interactive Pikachu would be at £23.75 and went on to ask Neil Wilson to advise Index accordingly.

DISCUSSIONS ABOUT THE PRICING OF THE TWEENIES DOLLS

- 200 Representations: Alan Cowley recalls two instances when he had discussions with Hasbro about the prices Littlewoods were proposing to charge. One of

these is covered in the e-mail of 28 December 2000 (see paragraph 84 above). The other incident is detailed in his written statement. According to Alan Cowley, in autumn 1999, Ian Thomson asked him what price he intended to charge for the Tweenies dolls. He states that at the time Argos and Index were competing quite strongly, particularly on TV promoted products, as this was during the period when Littlewoods was still gauging the reaction of Argos to its announcement on margins. Alan Cowley goes on to say that he did not believe that Argos would go out at Hasbro's RRP of £14.99. He thought it might choose £12.99 and that was the price he was considering for Littlewoods. He remembers that Ian Thomson said that Argos would be going out at £14.99, but he suggests that he did not trust this assurance. Ian Thomson suggested that he look at the pricing of Action Man in the Argos and Index catalogues and he would see that they had been priced at the RRP. When Alan Cowley was still hesitant, Ian Thomson suggested that he talk to John McMahon, the Buying Director who had been talking to Mike McCulloch of Hasbro. When Alan Cowley approached John McMahon, Alan Cowley said that John McMahon indicated that he had discussed prices with Mike McCulloch and he recommended that Alan Cowley went along with the RRP of £14.99.

- 201 John McMahon admits that he had six monthly strategic meetings with Mike McCulloch. He goes on to say that Hasbro was concerned that Argos and Littlewoods were in a price war that was not good for either company. John McMahon says that: 'Mike made certain suggestions regarding recommended retail prices that he felt the product should be retailed at, I was always concerned that I could not trust Argos to price sensibly and on most occasions ignored the recommended price. ... Hasbro were the most organised in coming up with suggested prices, especially of the very high profile lines such as Action Man, Tweenies etc. [*].'
- 202 OFT's response: John McMahon does not explain what he means by saying that Hasbro was the most organised in coming up with suggested prices, especially in certain lines such as Action Man and Tweenies. However, the OFT notes that these lines are the same lines that are among those identified in the evidence as being subject to the price-fixing agreements. It is discussed below what inference can be drawn from Alan Cowley's statement that John McMahon recommended, after discussions with Mike McCulloch, that Alan Cowley follow the RRP for the Tweenies dolls.
- 203 Representations: Later on, John McMahon states that 'I never knew what prices Argos were selling products at until their catalogue came out.' and that 'there was never any question ... of specific pricing information from Argos being fed back to the Littlewoods team.'

- 204 OFT's response: Certain parts of this are clearly untrue in view of the e-mail of 18 May 2000. It also seems to contradict earlier evidence from Alan Cowley who says that Ian Thomson told him that Argos were going to price the Tweenies doll at £14.99 (this is the price listed in the e-mail) and suggested he check this with John McMahon. Alan Cowley states that John McMahon 'recommended that I went along with the suggestion of the £14.99 price point.' It seems very unlikely that Alan Cowley would not have told John McMahon about the assurance he had received from Ian Thomson to help him decide what to do. McMahon's statement is also contradicted by the witness statement of Ian Thomson as quoted at paragraph 168 above. Thomson also states: 'My understanding was that [in the Autumn of 1999] the agreement to stick to the Core Brand pricing was still being monitored internally in Index by their senior management whom I took to be Lesley Paisley and John McMahon.'¹⁶⁵
- 205 Representations: Alan Cowley says that this was a time when Argos and Index were competing quite strongly on price, particularly on TV promoted products. This led Alan Cowley to believe that the product should be priced at £12.99 to ensure they were not undercut by Argos. John McMahon, however, says that 'during late 1998 and early 1999 the Argos pricing was not as aggressive as previously and Littlewoods were winning on more common lines than previously.'
- 206 OFT's response: There would appear to be inconsistency in the evidence of Alan Cowley and John McMahon about their understanding of the pricing behaviour of Argos at this time in that McMahon seems to have been much more relaxed about Argos's likely pricing intentions.
- 207 Representations: John McMahon does recognise that Tweenies was a high profile product and there was a risk that Argos would choose such a line to undercut. He comments that this could be quite damaging for Littlewoods.
- 208 OFT's response: He, nevertheless, felt confident enough to advise that the Tweenies doll be priced at the recommended retail price, despite Alan Cowley having expressed his own concerns about being undercut. Alan Cowley goes on to say that John McMahon did not explain the nature of his discussion with Mike McCulloch. John McMahon says that he decided to go out at RRP because he was looking for more margin and was aware of Argos's change of margin policy. It is clear that, given the reservations expressed by Alan Cowley and his own worries about the possibility of being undercut, John McMahon was either taking a substantial risk or else he had other more compelling reasons to believe that he would not be undercut on price. The OFT considers it likely that his

¹⁶⁵ Witness statement of Ian Thomson, paragraph 88.

discussions with Mike McCulloch served to assure him that he was unlikely to be undercut.

- 209 Representations: John McMahon says that he 'would have been aware of general suggestions from Hasbro of the kind ... mentioned earlier' in his statement and that Tweenies could have been on the list of specific items that Hasbro might have been referring to.
- 210 OFT's response: This reference to general suggestions mentioned earlier seems to refer to John McMahon's comment that Mike McCulloch made certain suggestions regarding recommended retail prices that he felt the product should be retailed at. In this respect, John McMahon states that he was always concerned that he could not 'trust Argos to price sensibly and on most occasions ignored the recommended price'. The OFT has inferred that Mike McCulloch must have said something about Argos's pricing intentions when suggesting these RRP's to John McMahon, otherwise John McMahon would have had no reason to mention specifically Argos's pricing. Furthermore, John McMahon's very vague recollection of the nature of the discussions does not seem to fit with his ability to recall that the discussions involved or applied to a list of specific items that might have included the Tweenies dolls.
- 211 Representations: In his witness statement, John McMahon goes back to his point that there was never any suggestion that Hasbro had information that Argos would go out at any particular price. He says he would not trust the information even if Hasbro claimed to know.
- 212 OFT's response: The OFT notes that John McMahon had earlier in his witness statement said that many of the toy companies including Hasbro were confirming to Littlewoods that they did not think Argos was planning to cut prices as deeply as before and that this gave him extra confidence to go for higher margins.
- 213 Representations: Early on in his statement, John McMahon states that 'The instructions I gave my buyer's [sic] were to compete with Argos on pricing and try and beat Argos on price on as many lines as possible.' He moved from this policy to a decision 'in Autumn 1999 to attempt to improve the Littlewoods toy margin by going out with some of the recommended prices from Hasbro'. This was based on 'a gamble that Argos was looking for extra margin and would not price as aggressively as before.'
- 214 OFT's response: The OFT finds the timing of this sudden change of approach by John McMahon, coinciding as it does with the date that the OFT's evidence suggests was the start of the agreement to adhere to RRP's, supports rather than

undermines the OFT's case that there was an agreement to adhere to Hasbro's RRP's. The GUS take-over dates back to April 1998 and the implications of this for the pricing of Argos and Littlewoods are far from clear. The OFT is not convinced that this take-over could itself have resulted in the clear movement to RRP's on specific Hasbro products that occurred in Autumn/Winter 1999. The OFT is again struck by Littlewoods's failure to produce any contemporary documents showing a change in pricing policy arising from the GUS take-over (see further paragraphs 179 to 193 above).

INTERPRETATION OF THE E-MAIL TO LITTLEWOODS OF 18 MAY 2000

- 215 Representations: Littlewoods says that the reactions of the Littlewoods addressees to the 18 May 2000 e-mail (see paragraph 69 above) and the fact that Argos for four out of the 17 products listed went out at prices that were different to those specified in the e-mail, show that no agreement existed.
- 216 Lesley Paisley's response to this e-mail is to say that she does recall receiving the e-mail and was surprised to see that Ian Thomson even suggested that Argos was committed to these prices: 'It was inconceivable to me that Argos would have committed to Hasbro on retail prices on any product let alone all these products.' She says that she did not understand his reference to continuing to observe RRP's on Action Man and core games and she says she does not recall being asked to delete the e-mail.
- 217 OFT's response: The OFT finds it unusual that, if Lesley Paisley did not trust the contents of the e-mail nor understand the references to observing RRP's, she nevertheless appears to have failed to respond in any way to what must have seemed a very strange message, especially in view of the fact that it was also sent to most of her team. At the very least, the OFT would have expected her to have discussed the misunderstanding with her team to check whether they could shed any light on it. The absence of any evidence of a response to this e-mail either rejecting the information or seeking clarification of the contents of the e-mail is highly suspect, particularly in view of the invitation to come back to Ian Thomson with any questions that is found at the bottom of the e-mail itself. In his witness statement, as quoted at paragraph 118 above, Ian Thomson notes that, when he phoned Lesley Paisley to ask her to delete the e-mail, she expressed her surprise to him. However, Thomson attributes this surprise merely to the fact that he had sent Argos's prices to Littlewoods in writing, as he and Lesley Paisley had previously spoken about Hasbro's pricing initiative.¹⁶⁶

¹⁶⁶ See also the witness statement of David Bottomley, paragraph 34.

- 218 Katharine Runciman does not recall receiving the e-mail of 18 May, despite the fact that it purports to tell her about the pricing intentions of her closest competitor. Similarly, Phil Riley is unable to recall receiving the e-mail. His explanation for this is that it did not concern any of his products so he would probably have deleted it. However, as he was responsible for boxed games and the e-mail states quite clearly that 'Games and Action Man prices will continue to be adhered to', with 'Games' emboldened to make it stand out, the OFT finds his statement unconvincing. Alan Burgess too fails to recall the e-mail of 18 May, even though he observes in his statement that it is an unusual e-mail and admits that it looked as if either he or an assistant had ticked the e-mail presumably to check the prices against those Littlewoods were proposing to charge. The OFT also notes that he or an assistant was interested in these prices since Alan Burgess admits they were ticked. When so many of his colleagues state that they would not have trusted such information, this suggests that Alan Burgess, or perhaps an assistant, did attach some weight to them.
- 219 Finally, while Alan Cowley does remember receiving the e-mail, he has no recollection of the 'conversations' referred to therein and says that he attached no importance to the contents. The OFT is surprised that Alan Cowley has no memory of such conversations, when he gave a detailed account of one such conversation earlier in his statement, i.e. discussions about the price of the Tweenies doll. Furthermore, whilst he states that he attached no importance to the contents of the e-mail, he does admit that, after the OFT began investigating, he checked the prices on the e-mail and that the products in his control in that e-mail did go out at the prices specified.
- 220 The OFT is not convinced by the other argument raised by Littlewoods in respect of this evidence. The fact that the prices of four out of the 17 products (not including the many products included in the Action Man and games categories) were not actually applied by Argos (see further paragraph 78 above) does not constitute evidence that there were no agreements to adhere to RRP's or to fix prices. For example, it is clear with at least one of these products that subsequent conversations between the relevant buyers and their contacts at Argos and Littlewoods led to the agreed retail price for the product being changed: Interactive Pikachu was retailed by both companies at £23.75 in their Autumn/Winter 2000 catalogues. That it was Argos's intention to price this product at £23.75 was confirmed by Neil Wilson to Ian Thomson in a response to this e-mail on 25 May 2000 (see paragraph 75 above). The OFT notes that in its Autumn/Winter 2000 catalogue Littlewoods itself charged the prices as listed in the e-mail of 18 May 2000 for 15 out of the 17 products (see paragraph 77 above). The remaining two products were Interactive Pikachu, which it priced at £23.75 in accordance with Neil Wilson's e-mail to Ian Thomson, and Gardens

Galore, which Thomson's e-mail had indicated would not be listed by Argos and which Littlewoods priced at £24.99 instead of £19.99.

- 221 Furthermore, the OFT is not required to demonstrate that both parties complied with the agreements in all its aspects throughout their duration to demonstrate that any such agreements exist, as the agreements had the restriction of competition as their object (see at paragraph 128 above). This is clear in the European jurisprudence, for example in a recent judgment of the European Court of First Instance where it stated that '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 ... that it has as its object the prevention, restriction or distortion of competition' (see also at paragraph 256 below).¹⁶⁷

INTERPRETATION OF THE E-MAIL OF 28 DECEMBER 2000

- 222 Representations: Littlewoods says, based on Alan Cowley's witness statement and that of Lesley Paisley, that the e-mail of 28 December (see paragraph 84 above) was a one-off that does not provide evidence of an agreement. Alan Cowley describes the circumstances surrounding the exchange, which appears to relate to a last minute reduction in the wholesale price and hence the RRP of the product. Alan Cowley was concerned that he would not be able to reduce the price in his catalogue and refers to the dire consequences of being undercut by Argos.
- 223 OFT's response: The OFT accepts that none of the first part of the e-mail is particularly contentious. However, it is the last statement in this e-mail that the OFT is relying upon as part of its evidence of the existence of an agreement. The OFT finds it difficult to see what alternative meaning can be given to this final statement – 'I will not elaborate on the consequences if we had been unable to do so, resulting in our being undercut by Argos and other High Street outlets, especially when you had earlier been so insistent that we all went out at the same price!' (emphasis added). Alan Cowley's witness statement does not seem to provide an alternative explanation for the statement; all it endeavours to do is to play it down and explain it away by saying that he used the term 'insistent' to exaggerate the situation. Lesley Paisley attempts to further downplay Cowley's words by saying that [*]. It should be noted that her comments on this issue

¹⁶⁷ Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle etc v Commission* [2001] ECR II-02035, paragraphs 72-73. See also European Court of Justice, Case C-277/87 *Sandoz Prodotte Farmaceutici v Commission* [1990] ECR I-45, paragraph 15. Compare the *Belgian Roofing Felt Cartel* case, where the European Court of Justice held that a pricing cartel existed despite the fact that the prices fixed for new products were not observed in practice (Case C-246/86 *BELASCO v Commission* [1989] ECR 2117, paragraph 15).

come with a caveat, that her comments on the exchange are based on the explanation of them given by Cowley in his statement. It is clear from her statement that she had sight of Cowley's statement prior to the preparation of her own.

INTERPRETATION OF THE ORAL STATEMENTS

- 224 Representations: The OFT has not considered in the original rule 14 Notice the statements given by Littlewoods employees on 16 October 2001 and submitted to OFT following the Littlewoods internal investigation. These deny the existence of any agreement.
- 225 OFT's response: The OFT has fully considered the oral evidence taken from the Littlewoods employees and submitted with the written representations. This evidence is discussed in detail at various points in this Decision. It is worth stating again that where the oral evidence in this case is clearly contradictory, the OFT has chosen to place more weight on the evidence that is supported by contemporaneous written documents.
- 226 Representations: The OFT's procedures for conducting and recording the oral interviews with employees of Hasbro were unsatisfactory and as such these statements are inadmissible and should not be relied upon. A complete and exact signed record of the evidence should have been taken and made available to Littlewoods. Hasbro's employees may have said things favourable to Littlewoods's case that have not been recorded. Where oral evidence is taken and is to be relied on, then the procedures of the Police and Criminal Evidence Act 1984 ('PACE') should be complied with. Section 67(9) of PACE requires that the PACE Codes of Practice, which are to be used for the investigation of criminal offences by persons other than police officers, should have been followed since infringements of the Chapter I prohibition are to be treated as criminal offences for the purposes of Article 6 of the European Convention on Human Rights ('ECHR'). The times the interviews are recorded as lasting do not tally with the length of the note recording what was said. One would expect much longer statements. It would appear that these statements are 'partial'. Redacting sections of these statements is unacceptable. Statements given to the OFT by Littlewoods employees do not record what was said about, for example, market conditions and this material was not referred to in the original rule 14 Notice.
- 227 OFT's response: The OFT does not accept these representations. In effect, a complete and exact signed record was taken. Interviews were held and a contemporaneous note was made of the main points of evidence. This note was then given to the interviewee to read, correct and/or add to and sign as a true

and fair record of the evidence that had been given. A lawyer from Denton Wilde Sapte representing Hasbro and a legal counsel from Littlewoods was present at each interview with Hasbro employees and Littlewoods employees respectively. To adopt procedures where all interviews carried out during an investigation were recorded and a transcript then made would hamper the investigation unduly and unnecessarily, particularly since the interviewee is given a chance to correct and add to the record. Subject to a duty to act fairly, the OFT needs to adopt rules which do not unduly hamper, lengthen or frustrate the activities of those engaged in investigating.¹⁶⁸

- 228 The representation that OFT should have followed PACE procedures and Codes of Practice when holding these interviews cannot be accepted. The reference to 'offences' in PACE is clearly a reference to offences classified as criminal for the purposes of domestic law. There is no obligation upon member states to the ECHR to treat also as a criminal charge for domestic purposes all matters that fall to be classified as criminal for the purposes of the ECHR. The Court of Appeal has held that:

'It by no means follows from a conclusion that Article 6 applies that civil penalty proceedings are, for other domestic purposes, to be regarded as criminal and, therefore, subject to those provision of PACE and/or the Codes produced thereunder, which relate to the investigation of crime and the conduct of criminal proceedings *as defined by English law*.'¹⁶⁹ (emphasis in original)

The Competition Commission Appeal Tribunal has held:

'As the Court of Appeal held in *Han* ... the fact that Article 6 applies does not of itself lead to the conclusion that these proceedings must be subject to the procedures that apply to the investigation and trial of offences classified as criminal offence for the purposes of domestic law Infringements of the Chapter I and Chapter II prohibitions ... are not classified as criminal offences in domestic law'¹⁷⁰

It follows that the infringement that was under investigation in this case was not an 'offence' for the purposes of section 67(9) of PACE and therefore there was no duty for OFT to observe the provisions of PACE when conducting the investigation.

- 229 The supposed discrepancy between the time the interviews were noted as lasting and the length of the written record of the interview does not mean that the record is incomplete or 'partial'. The duration of each interview began from

¹⁶⁸ *R v MMC ex parte Elders* [1987] 1 All ER 451.

¹⁶⁹ *Han v Commissioners of Customs and Excise* [2001] 4 All ER 687, paragraph 84.

¹⁷⁰ Case No 1001/1/1/01 *Napp Pharmaceutical Holdings Limited and Subsidiaries v The Director General of Fair Trading*, 15 January 2002, [2002] CAT 1 at [101] and [105], [2001] CompAR 1.

the time the interviewees entered the interview room and ended at the time they left. Much of that time was spent doing things other than interviewing – e.g., taking refreshments and talking about general conversational matters of no relevance to the investigation. Also, a significant amount of time was spent explaining the status of the procedure to the interviewees and confirming that they were happy to give evidence on that basis. The fact that the interviews were being recorded manually in longhand, so that the interviewee could check what was written straight afterwards, also meant that time had to be allowed for the OFT official to write down the questions and answers, leading to a much slower tempo than might otherwise have been the case.

- 230 In asserting that the statements are 'partial' Littlewoods seems to ignore the fact that they include evidence that it says should be interpreted as helpful to the defence and has used to support its case. The fact that this material is present demonstrates that rather than acting 'partially' OFT has acted fairly and properly in the way in which this evidence was taken and recorded.
- 231 In redacting the statements of the Hasbro employees the OFT was having regard to his statutory responsibilities under section 55 of the Act. This provides for a general restriction on disclosing information relating to an individual or an undertaking, subject to certain gateways. The redactions to which Littlewoods refers are in respect of Hasbro's business dealings with its distributors and relate to the separate investigation by OFT which resulted in the then Director's decision of 28 November 2002. They have no relevance to the case which Littlewoods seeks to answer and therefore it would not have been proper for the OFT to reveal this material to Littlewoods. Similar redactions were made to these witness statements to remove information relating to Hasbro's dealings with Argos and Littlewoods for the purposes of including them in the OFT's file relating to this other investigation into Hasbro's dealings with its distributors.
- 232 It is for the OFT to decide the material it wishes to put to the parties in a rule 14 notice. The statements in question were included on the file for inspection by all of the parties. It is then for the parties to decide on how they make their representations to the OFT on the basis of information available to them or which has been put to them in a rule 14 notice or which is available on the OFT's file.
- 233 Representations: The OFT has relied on a highly selective treatment of the oral statements by Hasbro employees which when assessed collectively does not support the OFT's conclusions as to the position of Littlewoods.
- 234 OFT's response: The OFT accepts that it would not be satisfactory simply to select parts of the oral statements which support its case. As a general principle

the OFT relies on the body of evidence it has gathered when it is taken as a whole and in particular the statements and documents specifically referred to in Annex A. The OFT has made general observations concerning inconsistency in the witness statements at paragraphs 15, 16 and 137 above. In situations where there are clear contradictions in a statement, the OFT is inclined to place more weight on those supported by other evidence, in particular documentary evidence.

- 235 Representations: Littlewoods appears to have interpreted the evidence from Roger Aldis, Hasbro's Field Sales Manager, to mean that he was aware of an initiative, but believed it to involve Toymaster, an association of locally owned specialist toy shops.
- 236 OFT's response: The OFT finds this interpretation unconvincing, especially in the light of Roger Aldis's first few statements: Roger Aldis admits that he was aware of a 'retail pricing initiative' and that 'it involved Argos and Index plus other retailers.' He is aware that it was 'an initiative to maintain retail prices'.
- 237 Representations: Littlewoods queries the meaning of the term to 'commit' to RRP's, as used by David Bottomley in his interview with OFT officials.
- 238 OFT's response: It is the OFT's view that the meaning of the term in this context is quite clear. Given the habitual use of the term in general parlance, most people would understand it to mean that Argos and Littlewoods intended to, and said that they intended to, adhere to RRP's. This is confirmed by David Bottomley in his witness statement (see paragraph 101 above).
- 239 Representations: Littlewoods interprets David Bottomley's statement to OFT officials to mean that he assumed Argos committed to Hasbro's RRP's simply by virtue of the fact that Argos adopted those RRP's in its catalogues.
- 240 OFT's response: When the statement is read in its entirety, it is clear that this is not what he meant. OFT had asked when he had come to an agreement with Argos which could be relied upon and David Bottomley had replied that this occurred in the catalogue of A/W 99 when RRP's were adopted and that the RRP's were accepted from then on. The preceding discussion is about the agreement and how it came into effect. It also is clear from Bottomley's witness statement, for example as quoted at paragraph 101 above, that Littlewoods's interpretation of his statement to OFT officials is not correct. Also it is clearly the case with all cartels that, given the incentive to cheat, each party cannot be certain that the others will comply with the terms of the agreement until they act in the market. Hasbro therefore could not be certain that Argos would comply until it produced its catalogue.

- 241 Representations: Littlewoods suggests that as David Snow, Hasbro's National Account Executive for Argos from June 2000 to October 2001, was not asked to explain the 'pricing initiative' to which he makes reference, his statement can be interpreted to mean that it amounted to no more than discussions.
- 242 OFT's response: The OFT is not persuaded by this argument and notes that David Snow goes on to say that he was aware of an agreement on RRP's with Argos and Littlewoods.
- 243 Representations: Littlewoods argues that as David Snow says that he could never be sure that Argos or Index would follow their RRP's, this suggests that there was no commitment to Ian Thomson that they would adhere to RRP's.
- 244 OFT's response: Any price-fixing behaviour of this nature is liable to be less than perfectly stable, given the incentives to cheat and renege on the agreement. This uncertainty has not deterred others from entering into similar agreements.
- 245 Representations: Littlewoods asserts that the fact that Hasbro policed behaviour implies that RRP's were not being followed and hence that there was no agreement.
- 246 OFT's response: Littlewoods has already made it clear that RRP's were in the main followed at that time for the products concerned. Also, policing such behaviour, given the incentives to cheat referred to above, would seem sensible if agreements existed.
- 247 Representations: Littlewoods states that many of the comments from Ian Thomson's statement to OFT officials do not provide evidence of an agreement; if anything they provide evidence against the existence of an agreement. Littlewoods selects the following quotes to illustrate: 'But we did not really know if they would follow through until they published their catalogues'; in answer to the question about whether in 1998 and 1999 there was growing confidence in the arrangements: 'Yes, but I would have to check if there was total commitment to RRP's'; and: 'There was no real need to speak to accounts about RRP's as the retail toy industry was following RRP's from A/W 2000, 2001.'
- 248 OFT's response: As indicated earlier, the OFT does not find the selective quoting persuasive. Even if these quotes are accepted as presented out of context, the OFT does not see that they provide evidence against the existence of an agreement. The OFT accepts that there was a degree of uncertainty at the start about the reliability of the commitment to retail prices. As stated earlier, this is inherent in the nature of such agreements and does not cast doubt on

their existence. Similarly, the fact that Ian Thomson was unsure whether there was 'total commitment' does not imply that no agreement existed. Ian Thomson clearly states in his witness statement, for example as quoted at paragraph 115 above, that he believes there was an agreement, despite his uncertainty about the actual prices. Also, as addressed earlier, the OFT finds that the general move to RRP's in 2000 and 2001 partly results from the existence of the agreements.

- 249 Representations: Ian Thomson says that when he asked Lesley Paisley to delete the e-mail he sent to her on 18 May 2000 (see paragraph 69 above), she said she was surprised he had sent it. Littlewoods puts forward the argument that Lesley Paisley's statement suggests that she was amazed that Thomson could have been confident that Argos had committed to any prices. Lesley Paisley says she does not recall being asked to delete the e-mail, but she does express surprise at its contents.
- 250 OFT's response: The OFT notes that there are no documents that indicate a response to this e-mail and that Lesley Paisley's apparent lack of response seems implausible given the seriousness of its contents and the fact that all her team were addressees, who may have been persuaded to act upon the information (see earlier paragraph 217 above). Ian Thomson's understanding of Lesley Paisley's surprise, as described in his witness statement, is set out at paragraphs 118 and 217 above.
- 251 Representations: Littlewoods queries the meaning of the terms 'middlemen' and 'gentleman's agreement' as used in Neil Wilson's and Alpana Virani's statements to OFT officials, respectively.
- 252 OFT's response: The OFT considers that such terms are well-used in everyday speech and cannot readily see an alternative meaning for them, nor has one been suggested by Littlewoods. Also, irrespective of the exact meaning of such terms, the OFT has sufficient evidence to demonstrate that the arrangement described as a 'gentleman's agreement' amounted to an infringing agreement and/or concerted practice, as shown earlier in this Decision. Neil Wilson has clarified the term 'middlemen' in his witness statement, as quoted at paragraph 99 above.
- 253 Representations: Littlewoods suggests that Alan Cowley's poor relationship with Ian Thomson is inconsistent with the existence of an agreement.
- 254 OFT's response: The OFT does not accept Littlewoods's argument that the fact that Alan Cowley had a poor relationship with Ian Thomson is inconsistent with the existence of an agreement. There is ample evidence in the OFT's file

showing that persistent and serious problems in its distribution network had brought Hasbro's relationship with many of its retail customers to a low ebb.

APPRECIABILITY

255 Representations: The OFT must show with strong and compelling evidence that the alleged agreement did have an appreciable effect at the relevant time. The original rule 14 Notice does not say that the agreement would have such an effect, only that it might. The OFT must prove that the alleged agreement caused prices in the Argos and Littlewoods catalogues to be higher than they would have been in the absence of an agreement.

256 OFT's response: In essence these representations are all saying the same thing – that it is not sufficient to show that the agreement had as its object the restriction of competition but it must also be demonstrated that there was an actual and appreciable effect on competition. In answering these representations it is important to point out that section 2(1)(b) of the Act speaks of 'object or effect' and that, as a result of their actual or potential impact on competition, section 2(2)(a) of the Act expressly provides that the Chapter I prohibition applies to agreements which directly or indirectly fix purchase or selling prices. 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) ...'.¹⁷¹ There are also various judgments 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 (see paragraph 125 above), for example:

'... [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 ...'.¹⁷² (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 ... that it had as its object the prevention, restriction or distortion of competition within the common market (Case T-142/89 *Boel v*

¹⁷¹ See, for example, the European Commission Decision in *Pre-Insulated Pipe Cartel* ([1999] OJ L24/1, 30 January 1999).

¹⁷² Cases T-374/94 etc *European Night Services v Commission* [1998] ECR II-3141, paragraph 136.

Commission [1995] ECR II-867, paragraph 89; Case T-152/89 *ILRO v Commission* [1995] ECR II-1197, paragraph 32).¹⁷³

'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 ...'.¹⁷⁴

'... a concerted practice ... is caught by Article 81(1) EC, even in the absence of effects on the market.'¹⁷⁵

- 257 In addition, the OFT cannot accept that price-fixing agreements involving, among others, the UK's biggest toy and games supplier, the biggest retailer and another major retailer of those products did not have as their object or effect an appreciable restriction of competition, even where applied to market sectors where Hasbro's share may not have been high.

PENALTIES

- 258 The representations of Littlewoods on penalties are addressed in part V of this Decision.

D Response to the representations made by Argos on the original rule 14 Notice

THE NATURE OF THE MARKET

- 259 Representations: Argos claims that the statement in the original rule 14 Notice that the market is reliant on branding and film tie-ins is not true for all categories of toys. Hasbro is very reliant on film success but has been poor at predicting demand for toys linked to films. [*] Toy sales are highly seasonal. Argos sees its main competitors as being [*]. Littlewoods has a much smaller share of the toy market but because they operate the same retail format consumers perceive Index and Argos to be direct competitors. It is easy for high street retailers to undercut the prices of catalogue retailers.
- 260 OFT's response: The OFT does not accept all of the above representations. Even if it did, they do not go against the OFT's case that there were infringing agreements involving Argos. [*] the fact that Index and Argos use the same retail format differentiates them from other retailers and helps to explain why

¹⁷³ Cases T-202/98 etc *Tate & Lyle v Commission* [2001] ECR II-2035, paragraph 72.

¹⁷⁴ Cases T-25/95 etc *Cimenteries CBR v Commission* [2000] ECR II-491, paragraph 4862.

¹⁷⁵ Case C-199/92 *P Hüls AG v Commission* [1999] ECR I-4287, paragraph 163.

neither would be likely to commit to RRP's without some form of assurance that the other was doing likewise.

- 261 Representations: Failure to define the market and to determine whether a price-fixing agreement has as its effect or object an appreciable distortion on competition and on trade is a serious procedural irregularity. Argos refers to the judgments of the European Courts in *Völk*, *Miller*, *Erauw-Jacquery* and *European Night Services*.¹⁷⁶
- 262 OFT's response: The OFT has already dealt with the question of whether there is a legal obligation to define the market (see at paragraph 22 above) and to determine whether the agreements had an appreciable effect (see at paragraph 256 above) in this case. The European Courts have held clearly that it is not necessary either to define the market precisely or 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.
- 263 In addition, as already stated in paragraph 257 above, the OFT cannot accept that price-fixing agreements involving the UK's biggest toys and games supplier as well as the biggest retailer and another major retailer of those products did not have as their object or effect an appreciable restriction of competition, even where applied to market sectors where Hasbro's share may not have been high. The statement of Andrew Needham, an Argos toys buyer, makes clear the importance of Argos and Hasbro to one another. Argos itself argues that some Hasbro products are 'must have' items.

HASBRO SOUGHT ADHERENCE TO RRP's

- 264 Representations: Margins for Hasbro products are low. Hasbro has not been concerned that retailers make a sufficient margin. Hasbro does face the risk of some products being delisted but others are 'must have' items.
- 265 OFT's response: The OFT accepts that margins on Hasbro products have been low. However, it does not accept that Hasbro was unconcerned about this. There is ample evidence, both documentary and in statements, that Hasbro was seriously concerned about lack of retail margin. An example is in David Bottomley's witness statement where he says: '... The purpose of ... [an internal Hasbro meeting to present the 1999 trading terms] was to discuss how to increase margin. ... This meeting was the start of the process that led to Hasbro's pricing initiative/strategy' (this meeting is further discussed at

¹⁷⁶ Respectively cases 5/69 *Völk v Vervaecke* [1969] ECR 295, 19/77 *Miller International Schalplatten GmbH v Commission* [1978] ECR 131, 27/87 *Erauw-Jacquery v Hesbignonne* [1988] ECR 1919 and T-374/94 etc *European Night Services v Commission* [1998] ECR II-3141.

paragraph 45 above).¹⁷⁷ Indeed, it was this concern that in the OFT's view was the main driving force behind the Hasbro pricing initiative that led directly to the infringing agreements coming into existence. Argos's contention that Hasbro was unconcerned sits uneasily with its assertion that Hasbro faces the risk of delisting on at least some its products. There is clear linkage between the threat of delisting and low retail margins. Indeed it is the OFT's view that Hasbro was likely to have been concerned that low margins on its 'must have' products might be a contributory factor to the delisting of its other products even if the 'must have' products were not themselves subject to the threat.

- 266 Representations: Andrew Needham was not aware of any Hasbro pricing initiative: [*]. Maria Thompson, Argos's Commercial Director for toys and other products, recalls Mike McCulloch, Hasbro's Head of Sales and Marketing, wanting to ensure that all retailers went out at RRP's but dismissed this as she knew that Hasbro had no means of ensuring this. Hasbro never offered any terms or payment in return for Argos agreeing to adhere to RRP's.
- 267 OFT's response: Andrew Needham may not have recalled a Hasbro pricing initiative but it appears that Maria Thompson did, although she does not describe it in just those terms. The e-mail from Sue Porritt of Argos, the Hasbro reports of meetings with Argos and the witness statements of David Bottomley and Neil Wilson, as discussed at paragraphs 50 to 52 above, show that Argos was willing to cooperate with Hasbro's initiative, even though Maria Thompson and Sue Porritt emphasised that Argos would react if it would be undercut. The OFT accepts that at the time its initiative began, Hasbro could not ensure adherence to RRP's and this is stated explicitly in several of the statements from Hasbro employees that the OFT relies on. There was no absolute guarantee that the agreements would be adhered to by Argos and Littlewoods or that other retailers would follow suit. However, the OFT finds that this does not take away from the fact that they entered into agreements to adhere to RRP's. An element of distrust and the possibility of one of the parties failing to comply are inherent in the nature of such agreements (see earlier at paragraphs 143 and 248). The OFT finds moreover that the agreements were in fact largely adhered to. It is not part of the OFT's case that Hasbro offered special terms or payment to Argos to induce it to agree to follow RRP's and the OFT does not regard this representation as having relevance. However, the OFT takes the view that there was an inducement in the form of higher margins (even if at first it could not be guaranteed) that Hasbro did offer Argos if it entered into an agreement to adhere to RRP's.

¹⁷⁷ Witness statement of David Bottomley, paragraph 8.

268 Representations: Mike McCulloch's statement confirms that no agreement about retail pricing was reached with Argos and Index. Neil Wilson says Hasbro was not allowed to carry out sanctions if RRPs were not adhered to. David Snow says that he could not do anything if Argos did not go out at RRPs. Therefore if there was an initiative it was one that Hasbro had little prospect of implementing because of its inability to ensure retailers went out at RRPs.

269 OFT's response: The OFT does not find the selective quoting of statements by Argos persuasive. As a general principle the OFT relies on the body of evidence it has gathered when it is taken as a whole and in particular the statements and documents specifically referred to in Annex A. It is inevitable that some witnesses will have better recollection and understanding of past events than will others. Indeed, some will perhaps be inherently more truthful than others, particularly in relation to their involvement in illegal price-fixing agreements. The OFT again relies on its remarks at paragraphs 15, 16 and 137 above as to the variable nature of the witness statements in general. It is interesting to compare Mike McCulloch's evidence as quoted by Argos with a further assertion he makes in his statement that he was 'careful never to discuss retail pricing with [Argos and Index] on advice of legal dept.' and with the statement of Maria Thompson that she was told by Mike McCulloch that he could ensure that all retailers went out at RRPs. Where there are such clear contradictions in statements, this could call into question the veracity of some of the statements given in this case, and the OFT therefore gives more weight to those supported by other evidence, in particular documentary evidence. The OFT does not consider that those parts of the statements of Neil Wilson and David Snow quoted by Argos affect its case. As noted above there was never certainty that RRPs would be adhered to and it has never been the OFT's contention that Hasbro was in any position to impose sanctions on any retailer for non-compliance with its initiative. Nonetheless the OFT believes that the evidence it relies on shows that even without any guarantee or sanction the Hasbro initiative was agreed and effective.

ARGOS'S POSITION IN THE MARKET

270 Representations: When Argos entered the market its means of doing so was by seeking to offer the lowest prices on the High Street and other retailers came to view the Argos price as the one to match or beat. However, Argos is sometimes undercut and when it is it reacts. Following its acquisition by GUS in 1998 Argos [*]. Despite this it was still perceived to be the benchmark price by many retailers.

271 OFT's response: These representations are accepted with the exception of that relating to the Argos [*] which is dealt with in detail below. It is an integral part

of the OFT's case that Hasbro's initiative needed the support of Argos if it was to be effective because Argos was seen as the price leader.

- 272 Representations: It is denied that Argos would make a commitment to follow RRP's only if Index did. No-one was aware that Hasbro was rolling out an initiative to persuade retailers to keep to RRP's nor were they aware that Hasbro had discussed any such initiative with any other retailers, including Littlewoods/Index.
- 273 OFT's response: Argos relies on the statements of Maria Thompson, Argos's Commercial Director, and Andrew Needham and Vanessa Clarkson, both Argos toys buyers. These statements are contradicted by the documents and witness statements referred to in paragraphs 110 to 114 above. In addition, these statements are largely predicated on Argos's assertion that it had decided independently to move if it could towards [*]. This issue is dealt with in detail below.
- 274 Representations: Catalogue retailers cannot modify their prices as easily as other high street retailers but prices do change although they cannot be increased. [*]
- 275 OFT's response: The OFT accepts most of these representations. [*]

DISCUSSIONS BETWEEN ARGOS AND HASBRO

- 276 Representations: Andrew Needham, the buyer in charge of Action Man and core games, does not recall any discussions regarding an initiative by Hasbro on those products. The 17 February 1999 meeting (see paragraph 51 above) between Hasbro and Argos was about [*]. The conversation with Maria Thompson when Mike McCulloch suggested he could ensure all retailers went out at RRP took place after that meeting. Key Argos personnel cannot recall statements by Hasbro to the effect that other retailers would follow Argos's price leadership.
- 277 OFT's response: In so far as these representations are based on Argos employees stating that they are unable to remember things or were unaware of them, they can be given only very limited weight. The fact that the meeting on 17 February 1999 was intended by Argos to be about [*] would not have precluded discussion also of RRP's, and the e-mail from Sue Porritt of Argos indicates that a pricing strategy was in fact discussed (see paragraph 51 above). Given that Argos accepts that Mike McCulloch did make a suggestion about RRP's, it is likely that mention would have been made of Argos being price leader, which Argos accepts would have been a statement of the obvious. In addition, Andrew Needham's statement is contradicted by Neil Wilson, his counterpart at Hasbro. For example, Wilson says in his witness statement:

'... Andrew Needham was certainly aware that Hasbro was communicating with retailers with a view to increasing margins by moving towards RRP's. I know this from conversations I had with him ...'¹⁷⁸

278 Representations: The OFT's evidence does not support a bilateral commitment between Hasbro and Argos, let alone one dependent on Littlewoods. In his statement to OFT officials, Mike McCulloch states:

'Argos was not prepared to commit to selling at RRP's as it was concerned about being undercut by other retailers. ... [T]hey could not have had an agreement with Argos. Argos price how they want. ... Thomson could not possibly guarantee to Index Argos's price.'

Ian Thomson states in his statement to OFT officials:

'We were encouraged, Neil and I, to talk to our accounts and agree to accepting RRP's on Action Man and Core Games. But we did not really know if they would follow through until they published their catalogues.'

Charles Cooper states:

'I present RRP's to Argos, but there is no understanding to commit to those prices by Argos as far as I am aware.'

279 OFT's response: The OFT would again stress that it does not find selective quoting from individual statements persuasive and will again rely on its general remarks on the variable nature of witnesses' recollections. The OFT relies on the documentary evidence and the statements of Hasbro employees taken as a whole. However, it is perhaps worth analysing some of these quotations a little. The OFT has no difficulty in accepting that when Hasbro first suggested it to Argos, Argos's response was along the lines of the first quotation from Mike McCulloch. This is not inconsistent with its coming to a subsequent agreement and could well be held to suggest increased likelihood of an agreement in so far as the corollary of 'Argos was not prepared to commit to selling at RRP's as it was concerned about being undercut by other retailers' is 'Argos would be prepared to commit to selling at RRP's if it was not concerned about being undercut by other retailers'. Ian Thomson's statement to OFT officials is not at issue. It has never been part of the OFT's case as indicated above that Hasbro could guarantee that agreements to follow RRP's would be adhered to (see further paragraphs 101 to 103 above). In the case of Charles Cooper it is informative to compare his statement with his response of 4 February 2001 to an e-mail from Ian Thomson. He is asked:

'Charles

¹⁷⁸ Witness statement of Neil Wilson, paragraph 32.

Index are keen to price the Ferris Wheel at the Argos S/S price of £49.99 in their A/W 2001 catalogue.

Can you ensure that Argos will match the price and if you know of any retail price difference will you try and get them to comply.

Let me know your thoughts on the matter,

Regards, Ian'

Charles Cooper replies: 'no change planned'.

- 280 Representations: Argos's personnel deny any price-fixing arrangement. Andrew Needham's statement is relied on in that he says that he never entered into conversations with Hasbro regarding prices to be agreed with Index or any other retailers. He refers to [*].
- 281 OFT's response: The OFT does not accept this representation. The OFT is of the view that the witness statements of the Hasbro employees taken as a whole and supported by contemporaneous documents make a strong case that Hasbro's initiative was a pricing initiative, not a mere listing initiative, that necessarily involved Argos moving towards pricing at RRP's and that Hasbro believed that other retailers would be likely to follow. Argos would not be willing to do this unless it had some reassurance that RRP's would not be undercut by Index. Overall it amounts to compelling evidence that Argos agreed with Hasbro to adhere to RRP's on the understanding that Index was agreeing the same. Andrew Needham's statement refers to 'conversations with Hasbro regarding prices to be agreed with Index'. It is not part of the OFT's case that Argos agreed prices with Index through any direct contact. It is that Argos and Index both entered into agreements with Hasbro on the understanding that the other would agree to adhere to Hasbro RRP's. In addition, Andrew Needham's statement is contradicted by the witness statement of Neil Wilson, as quoted at paragraphs 87, 97 and 110 above.
- 282 Regarding what was alleged to be a listing initiative, the OFT notes that despite discovering a large number of documents during its inspection of Hasbro's files that refer to a 'pricing' initiative, it found very few that mention a 'listing' initiative. Nor has Argos provided any document that supports Andrew Needham's statement by referring to a listing initiative. It does appear from the witness statements of David Bottomley, Neil Wilson and Ian Thomson that Hasbro did in fact have a listing initiative (see paragraph 43 above). However, it is clear from these witness statements and the ample other evidence referred to above that Hasbro also operated a pricing initiative and that any listing initiative was operated concurrently with the pricing, and other, initiatives in order to try and improve retailers' margins.

283 The OFT does not find Andrew Needham's statement persuasive in this respect.

GUS TAKE-OVER OF ARGOS – IMPROVING MARGINS

284 Representations: As a result of its acquisition by GUS the decision was taken in the summer of 1998 to improve profitability and to implement a new pricing policy of [*]. [*] The change in policy had its greatest impact on Action Man and core games [*].

285 OFT's response: It is a central part of Argos's case that its observable behaviour of having moved towards RRP prices on Action Man and core games at the same time as Hasbro was putting forward its pricing initiative was not because it had agreed with Hasbro to do so but because of an independent internal initiative that happened to coincide. It would be difficult to give much credence to this in the face of such a coincidence were it not for the timing of the take-over by GUS which would not be entirely inconsistent with such a change being decided within Argos, although the move towards RRPs appears to have been some time after the takeover. However, the OFT is of the view that Argos's position is seriously undermined by its failure to produce a single piece of contemporary documentary evidence in support of its case that there was a change in policy (see also at paragraphs 135 and 136 above). Argos is a much larger company than is Hasbro in the UK and a decision on its part to move its prices [*] would be bound to have very great commercial significance for it. The OFT finds it scarcely credible that such an initiative would not have generated a very great deal of documents and internal e-mails. Not one such document has been produced by Argos either in furtherance of its case or in response to a request under section 26 of the Act that all documents relating to the pricing of Hasbro products be given to the OFT. This compares with the number of documents which were found in Hasbro's files and are now in the OFT's file that deal with Hasbro's pricing initiative. Thus, while Argos has put forward an alternative explanation for its behaviour, it has not only been unable to produce documents in support of this explanation, it has also not discharged its burden of challenging the existence of the facts based on the documents in the OFT's file. This burden was established by the European Court of First Instance where the Commission had made a finding with regard to concerted action between undertakings on the basis of documents which show that the practices were the result of concerted action:

'In those circumstances 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.¹⁷⁹

In the circumstances the OFT cannot accept these representations.

286 Even if the OFT were to accept that Argos had a unilateral change in policy at this time involving [*], this does not preclude it from also having an agreement with Hasbro and Littlewoods, which would underpin Argos's security in making such a move, and might even strengthen its motivation for such a move. This is suggested by David Bottomley, who says in his witness statement that '[t]he development of the pricing initiative [in late 1998/early 1999] came at the right time insofar as Argos' business strategy was concerned.¹⁸⁰

287 [*]

INTERPRETATION OF THE E-MAILS OF 18 MAY 2000

288 Representations: Argos was not a party to the initiative and therefore could not extend it. The statements of Andrew Needham and Vanessa Clarkson bear this out. Argos's actual prices did not all tally with those quoted in Ian Thomson's e-mail of 18 May 2000 (see paragraph 69 above). There is no documentary evidence implicating Argos to any commitment to the prices in that e-mail. The 'bite your arse' e-mail is at most Hasbro pretending to Littlewoods that Argos was committed to certain prices (see paragraph 73 above).

289 OFT's response: As has been noted before, the OFT has assessed the witness statements and the contemporary e-mails in their entirety as evidence of the arrangements which it alleges came into being involving Hasbro, Argos and Littlewoods. It is accepted that Hasbro could not guarantee that the prices it was recommending would be adhered to in practice and this is stated specifically in several of the statements upon which the OFT relies. However, it is also made clear in the statements that in practice RRP's were generally adhered to and that the more this was observed to happen the more smoothly Hasbro's initiative worked with less need for Hasbro's active involvement in facilitating the arrangements. As to the fact that Argos's prices did not all tally with those quoted by Ian Thomson, it is instructive to consider Neil Wilson's response to that e-mail of 25 May 2000 (see paragraph 75 above). He tells Ian Thomson that Argos had confirmed the price of Interactive Pikachu as £23.75 and not £23.99 and asks him to advise Index accordingly. The price of this item in the Autumn/Winter catalogues in 2000 of both Argos and Index was in fact £23.75. Further, the OFT notes that as the agreement had the restriction of competition

¹⁷⁹ Case T-306/94 *Elf Altochem v Commission* [1999] ECR II-931, paragraphs 727-728.

¹⁸⁰ Witness statement of David Bottomley, paragraph 10.

as its object, the OFT is not required to demonstrate the effects of the agreement (see paragraphs 221 and 256). Finally, it is hard to see how Mike Brighty's e-mail to Ian Thomson (see paragraph 73) could be interpreted as Hasbro pretending anything to Littlewoods. It was an internal document that was not circulated to Littlewoods. The part that says 'suggest you phone Lesley and tell her to trash?' would clearly seem to refer to Ian Thomson's e-mail to Lesley Paisley and others at Littlewoods to which Mike Brighty's e-mail was a reaction.

290 Representations: The instances referred to in the original rule 14 Notice are not evidence of monitoring by Argos. Hasbro could not enforce RRP's. The e-mails quoted (see paragraphs 81, 82, 84 and 88 above) are examples of Hasbro variously being keen for Argos to follow RRP's, of Hasbro making a mistake on a particular price, of unilaterally informing retailers of undercutting and of Argos monitoring its competitors' prices. The last example where David Snow of Hasbro reports telling Argos that Hasbro could not control prices contradicts the statement that Hasbro would try to persuade retailers to raise prices to RRP's.

291 OFT's response: As stated above, it has never been the OFT's case that Hasbro was in a position to enforce adherence to RRP's. The OFT maintains that the e-mails quoted are evidence of the sort of discussions that were going on between Hasbro, Argos and Littlewoods about prices and competitors' prices and/or likely prices. The OFT believes that this is credible background evidence as to the existence and nature of the infringing agreements it finds were in place. The OFT finds it unsurprising that David Snow made the remark quoted at the end of paragraph 88 of this Decision. The telephone call in question took place exactly one week after the OFT paid its first visit to Hasbro under the Act to investigate the alleged fixing of resale prices. The OFT can therefore give very little weight to the representation that there is a contradiction in the evidence.

THE ALLEGED OVERALL AGREEMENT

292 Representations: Before the OFT can conclude there was an agreement as alleged it must prove by strong and compelling evidence (as held in *Napp*¹⁸¹) that there was a concurrence of wills between Hasbro, Argos and Littlewoods (as held in *Bayer*¹⁸²). The European Court of First Instance has held that

'in the context of establishing the existence of a single and continuous agreement contrary to Article [81](1) E.C., the fact that the objectives of certain

¹⁸¹ Competition Commission Appeal Tribunal, Case No 1001/1/1/01 *Napp Pharmaceutical Holdings Limited and Subsidiaries v The Director General of Fair Trading*, 15 January 2002, [2002] CAT 1, [2001] CompAR 1.

¹⁸² European Court of First Instance, Case T-41-96 *Bayer v Commission* [2000] ECR II-3383.

bilateral or multilateral arrangements engaged in by the undertaking concerned coincide with those of the agreement in question is not sufficient to establish the applicant's participation in the latter. Such types of conduct can only be regarded as constituent elements of the single agreement if it is established that they formed part of an overall plan pursuing a common objective, and that the undertaking was sufficiently aware of this'.¹⁸³

Even if the existence of an agreement between Hasbro and Argos is demonstrated, the OFT has not proved that this was part of an overall plan with Littlewoods of which Argos was aware. There is no evidence to demonstrate when and with whom such an agreement was made.

- 293 As his statement makes clear, nothing was agreed between Mike McCulloch and Maria Thompson and Sue Porritt at Argos. Various other of the statements by Hasbro employees to OFT officials provide no concrete examples or contradict the proposition that such agreement existed. No corroborative evidence from Argos and little from Littlewoods has been produced to support this allegation. The statements made by Hasbro personnel to OFT officials were made following an application for leniency by Hasbro. Certain of them (specifically Ian Thomson and David Bottomley) may have believed that Hasbro was a party to some form of price-fixing arrangement with Argos and Littlewoods and thus made statements to that effect as part of Hasbro's duty to co-operate with the OFT investigation. They were mistaken in so far as their evidence was that the Argos and Index catalogue prices were at RRP's (which was not in fact the case for all the products in question).
- 294 There is no evidence that Argos and Littlewoods knowingly exchanged information through Hasbro. The series of e-mails sent around 18 May 2000 do not show direct and close involvement between Hasbro, Argos and Littlewoods. According to Andrew Needham, Ian Thomson's e-mail of 18 May 2000 (see paragraph 69 above) is based on false assumptions; he did not tell Thomson Argos's prices but Thomson may have assumed that Argos would go out at RRP's given its policy of moving towards RRP's. Vanessa Clarkson believed that Thomson was telling Littlewoods what price to go out at rather than listing Argos's pricing. There is conflict between the evidence of various Hasbro employees (in particular Ian Thomson and David Bottomley on the one hand and Mike McCulloch and Charles Cooper on the other hand).
- 295 Argos had no knowledge that its prices were being shared with other account managers in Hasbro or were being passed to Littlewoods. Evidence by Sharon Clark of GUS that she will tell Hasbro her retail prices is not evidence of an

¹⁸³ Case T-25/95 etc *Cimenteries CBR v Commission* [2000] ECR-II 491, 5 CMLR 204, page 219.

agreement with Littlewoods or a commitment by Argos to adhere to RRP. The OFT has not demonstrated that the e-mails on which it relies are supported by correspondence found at Argos's premises.

- 296 OFT's response: It is the OFT's case on the evidence that discussions between Hasbro and Argos and Hasbro and Littlewoods took place over a period of time and that there evolved an understanding (which the OFT can accept was partly influenced by a desire on the part of both Argos and Littlewoods to increase profitability on toys and games by moving towards RRP) that both Argos and Littlewoods would agree to adhere to RRP on Action Man and core games on the understanding that the other would do likewise. While there was no guarantee that this would work, in practice it did and when these prices were also largely accepted by other high street retailers, there was no incentive for either Argos or Littlewoods to break ranks. The arrangement was therefore extended to include other products on or around 18 May 2000. In the circumstances it would be difficult to point to a particular meeting or discussion as the occasion when the infringing agreements came into being. The OFT believes that the evidence in the form of oral and witness statements and e-mails as presented earlier in this Decision is strong and compelling evidence of the existence of the agreements between the parties (see in particular at paragraphs 92 to 108 above). The OFT has already shown above that the overall agreement between Hasbro, Argos and Littlewoods included two bilateral infringing agreements and/or concerted practices, contingent on each other, between Hasbro and Argos (see in particular at paragraphs 110 to 114) and between Hasbro and Littlewoods (see in particular at paragraphs 115 to 121), which formed part of a pattern of continuous conduct with a common objective.
- 297 The statements of the Hasbro employees to OFT officials were not made as part of Hasbro's duty of co-operation under leniency. They were made voluntarily by the individuals themselves, in the presence of Hasbro's legal adviser, and as the statements themselves make clear they were at liberty to say nothing and make no reply to any of the questions put to them. Hasbro did facilitate the interviews under its duty of co-operation by helping to arrange them and allowing employees who were willing to give statements the opportunity to do so. The OFT believes that the reliability or otherwise of the testimony is a matter for judgment, particularly in the context of the contemporaneous e-mails and other documents. It has already repeatedly commented on the fact that for different reasons people will have different recollections of events. Also, earlier in this part of the Decision it has responded to Argos's comments about information exchange, the e-mails of 18 May 2000 and Andrew Needham's statement. Overall, the OFT believes that there is strong and compelling evidence as to the existence of the infringing agreements alleged.

THE ORAL STATEMENTS FROM HASBRO EMPLOYEES

- 298 Representations: Argos refers to several instances in the statements by Hasbro employees to OFT officials where Argos alleges that there had, in effect, been insufficient cross-examination of the Hasbro employees on whose statements the OFT relies. Argos represents that these words and phrases might afford a different interpretation had they been subject to more forensic scrutiny at the time of the interview.
- 299 OFT's response: The OFT relies on the body of evidence taken as a whole, and has already indicated in this Decision that it gives more weight to statements of Hasbro employees that are consistent with the documentary evidence. It must be borne in mind that these were voluntary statements given by the individuals concerned who were under no obligation to answer anything at all and the OFT does not accept that it is appropriate to isolate individual words or phrases nor that it was necessary for the OFT to subject the employees to detailed cross examination. Taken as a whole the evidence relied on provides strong and compelling proof of collusion.

DURATION OF AGREEMENTS

- 300 Representations: Since the existence of the agreements is denied so is their duration. Likewise, if the agreements did not exist, they could not be extended.
- 301 OFT's response: On the question of duration, the OFT accepts that there was one incorrect statement in the original rule 14 Notice at paragraph 95. It should not have been the OFT's contention and it was not and it is not its finding that the agreements were extended in time for the publication of the Spring/Summer 2000 catalogue. The relevant catalogue is that for Autumn/Winter 2000 as was made clear subsequently in paragraph 95 of the original rule 14 Notice. The OFT fully accepts Argos's representation in this respect. In other respects since the OFT's finding is that the relevant agreements did exist and that the infringements had the duration as set out in the original rule 14 Notice, it can give no weight to this representation.

PRESUMPTION OF INNOCENCE

- 302 Representations: The OFT is wrong in law not to determine the market shares of the parties. It amounts to a presumption of illegality, not a presumption of innocence, to declare a price-fixing agreement unlawful by its very nature,

resulting in the parties being subject to fines. This approach is wrong in principle (paragraph 93 of *Napp*).¹⁸⁴

- 303 OFT's response: The OFT has already dealt above with the questions of its legal obligations in relation to market definition and whether it needs to show an effect on competition in an object case (see paragraph 262 above). The fact that an agreement may be found to breach the Chapter I prohibition by virtue of its object, whatever its effect, is not however a presumption of illegality. The OFT accepts that Argos, as are Hasbro and Littlewoods, is entitled to the presumption of innocence, and that it is for the OFT to show that an infringement of the Act by object is duly proved on the basis of strong and compelling evidence, as held by the then Competition Commission Appeal Tribunal ('CCAT') in paragraph 109 of *Napp*. The OFT considers that it has done so in this case. This representation appears to confuse the principle of the presumption of innocence with the principle that an agreement may be prohibited by virtue of its object, whatever its effect.

PENALTIES

- 304 The representations of Argos on penalties are addressed in part V of this Decision.

E Response to the representations made by Hasbro

THE SETTING AND MONITORING OF RRP's

- 305 Representations: [*] The OFT is not able to prove that Hasbro's pricing initiative involved Hasbro fixing the RRP's with Argos or Littlewoods; that the calculation or setting of Hasbro's RRP's was unlawful; or that its monitoring of the retail market was unlawful.
- 306 OFT's response: It is not and has not been part of the OFT's case that Argos and/or Littlewoods were actively involved in agreeing with Hasbro at what level RRP's would be set. Nor is it part of the OFT's case that it was Hasbro's monitoring of its pricing initiative that was itself unlawful. It was (as the OFT finds) the fact that Hasbro's pricing initiative developed into unlawful agreements between Hasbro, Argos and Littlewoods to fix the resale price of certain toys and games normally at Hasbro's recommended retail prices although for particular reasons in relation to particular products, the agreed price was less than the original recommended retail price. As stated in paragraph 43 of this

¹⁸⁴ Competition Commission Appeal Tribunal, Case No 1001/1/1/01 *Napp Pharmaceutical Holdings Limited and Subsidiaries v The Director General of Fair Trading*, 15 January 2002, [2002] CAT 1, [2001] CompAR 1.

Decision, 'The pricing initiative involved maintaining retail margins on Hasbro's toys and games range by persuading retailers to keep to recommended retail prices' These representations do not address that.

THE PRICING INITIATIVE IS DISTINCT FROM THE PRICE-FIXING AGREEMENTS

307 Representations: [*]

308 OFT's response: The OFT's case is that what may have started as a lawful pricing initiative by Hasbro led directly to the infringing agreements. There is no confusion between the two: the one led to the other. There is ample evidence, both documentary and in the statements of the Hasbro employees, that it was a vital part of the pricing initiative to persuade (rather than 'make', which the OFT accepts Hasbro was not in a position to do) retailers to move towards adhering to RRP's. There is equally persuasive evidence (see the statements of Mike McCulloch and Lesley Paisley (among others)) that it was indeed Hasbro that took the initiative in proposing a move to RRP's. The result was the unlawful agreements. Once the agreements were up and running and being seen to be effective, Hasbro could then properly be regarded as the facilitator in ensuring that the arrangements went on working (and indeed could be extended). It is difficult on the evidence to infer that this extension, as described in Ian Thomson's e-mails of 18 May 2000 (see paragraphs 67 and 69 above), was likely to have been prompted by anyone other than Hasbro. It is not the OFT's case that the setting of the RRP's was part of the unlawful arrangements; it was agreeing to adhere to them (or, on occasion, to some other price) on the understanding that the other would do so also that was unlawful, irrespective of how the prices in question were set or at what level they were pitched. It is entirely irrelevant that Hasbro could not coerce retailers into abiding by RRP's – that has never been the OFT's contention. Nor is it part of the OFT's case that monitoring the market was in itself unlawful. It is the OFT's view that the evidence of monitoring by Hasbro and the way in which it is described in statements and documents goes towards demonstrating the existence of arrangements that were unlawful.

309 [*]

310 Representations: The pricing initiative did not involve the maintenance of retail prices on the relevant products. [*]

311 OFT's response: The OFT has made clear above its views on most of these representations. The pricing initiative may not have involved RPM agreements at first but it led to such agreements. While Hasbro could not force Littlewoods and Argos to adhere to RRP's in fact they agreed to do so and in practice they

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

312 Representations: Hasbro's pricing initiative did not infringe the Act since the initiative did not involve the maintenance of RRP's. The phrase 'Dialogue opened to stabilise RRP's' in the paper prepared for the meeting with Argos in February 1999 (see paragraph 51 above) is not strong evidence of anything other than discussion of the extent to which Hasbro's RRP's were competitive prices and sensible for retailers to use. Any breach of the Chapter I prohibition occurred when Argos and Littlewoods sought reassurance on each others' pricing intentions in relation to products covered by Hasbro's pricing initiative.

313 OFT's response: The OFT does not dispute that insofar as Hasbro's pricing initiative was no more than merely recommending RRP's to Argos and Littlewoods, individually and separately, that was not unlawful. But the evidence is that any such initiative led directly to the infringing agreements.

PENALTIES

314 The representations of Hasbro on penalties are addressed in part V of this Decision.

F Response to the further representations made by Argos

315 On 10 December 2002 the OFT disclosed the representations made by Hasbro, Argos and Littlewoods to all other parties, redacted pursuant to section 56(2) and (3) of the Act. Argos and Littlewoods have made further written representations on these representations. The further representations of Argos are addressed below and the further representations of Littlewoods are addressed in part G.

DISCLOSURE ISSUES

316 Representations: Argos submits that the OFT's approach to the disclosure of the representations made by the other parties is incoherent and unlawful. It is incoherent because the OFT has made piecemeal disclosures. The OFT's final policy, that communications relating to leniency will not be disclosed, is unlawful, first, because the OFT's overriding duty is to protect the rights of defence rather than to enforce the competition rules. This principle is strengthened by Article 6 of the European Convention on Human Rights (see in a

criminal context *R v Cairns*, Times Law Reports 2002). Secondly, the issue of confidentiality is essentially directed at the cartel member's identity. As in this case it is known to Argos that Hasbro has applied for leniency, there is nothing in the public interest to redact Hasbro's submissions in response to the original rule 14 Notice. Argos submits that only the genuine business secrets of Hasbro and Littlewoods should be kept confidential *vis-à-vis* Argos.

- 317 OFT's response: The approach to disclosure adopted by the OFT did develop over time as the OFT addressed its mind to the complex issues involved and the representations made on them by Argos and Littlewoods. However, the OFT does not accept that its approach was incoherent. Whilst the OFT accepts that it must respect the rights of defence of the parties, the right of access to material in the OFT's possession is not unqualified. Section 56 of the Act sets out a number of considerations to which the OFT is obliged to have regard, which may legitimately lead to such material not being disclosed. The OFT has disclosed the representations to the parties subject to section 56(2) and (3) of the Act. Section 56(2) applies to certain representations made by Hasbro which relate to the application of the OFT's leniency programme, where it is necessary in the public interest to treat these representations as confidential in order to preserve the integrity of the leniency programme. The desirability for confidentiality does not solely concern the identity of the party which has applied for leniency, but also the OFT's reasons for granting or refusing leniency. This is in the form of a private agreement between the OFT and the applicant and as part of the duty of full co-operation that is involved, the applicant is expected to enter into a dialogue with the OFT that in other circumstances it would be likely to regard as contrary to its commercial best interests and which could in many cases lead to reprisals against it or its employees from the other parties involved. In this case Hasbro was given assurances that any representations it made would be regarded by OFT as confidential. In addition, some parts of the representations of all the parties have not been disclosed pursuant to section 56(3), as they contained confidential information the disclosure of which would, or might, in the OFT's opinion, significantly harm the legitimate business interests of the relevant party.

REPRESENTATIONS ON HASBRO'S REPRESENTATIONS

- 318 Representations: Argos notes that, in its representations to the original rule 14 Notice, Hasbro denies an infringement of the Chapter I prohibition and does not accept that the witness statements of its own officers and employees contain evidence of the alleged infringement.
- 319 OFT's response: In his decision that the Chapter I prohibition has been infringed, the OFT does not rely on any mere admission by Hasbro in its representations of

an infringement, other than the statements made voluntarily by the Hasbro employees. In addition, any denial of Hasbro is not sufficient to show that the Chapter I prohibition has not been infringed. The OFT has already responded to Hasbro's representations above (paragraphs 305 to 314 above), including any denials included in those representations. The OFT notes that Hasbro's application for leniency necessarily implies that Hasbro has admitted to a possible infringement of the Chapter I prohibition. In the OFT's view the most reasonable interpretation of the redacted version of the Hasbro representations that was given to Argos is that, while Hasbro denied infringing the Chapter I prohibition as set out by the OFT in the original rule 14 Notice, it did not deny that it had committed an infringement of some kind.

ECONOMIC POWER OF HASBRO AND ARGOS

- 320 Representations: While Argos accepts that Hasbro did not have any ability to make Argos charge Hasbro's RRP's, Hasbro is wrong in asserting in its representations that the economic power was not with Hasbro, but with the retailers and Argos in particular. Hasbro possesses considerable bargaining/economic power in respect of the many 'must have' products that it supplies. In respect of other toy products, Argos accepts that it may have a high degree of bargaining/economic power.
- 321 OFT's response: The OFT accepts that the economic power was not wholly with Argos, in particular in respect of Hasbro's 'must have' products, such as Action Man toys and Monopoly. However, Argos's position in the toy market (see paragraph 38) and the [*] share of Hasbro's sales accounted for by Argos (about [*] per cent) make it likely that even regarding these 'must have' products Argos has a significant degree of economic power.

HASBRO'S POLICY REGARDING RRP's

- 322 Representations: In its representations, Littlewoods supports Argos's submission that there is no evidence that Hasbro has ever offered any incentives to Argos to price at RRP's. This is also supported by Hasbro's representations. There is a distinction between a supplier lawfully encouraging a retailer to keep to RRP's and unlawfully offering incentives to keep to RRP's.
- 323 OFT's response: As stated in paragraph 267 above, it is not the OFT's case that Hasbro offered any direct incentives to Argos to induce it to keep to RRP's, although there clearly was an indirect incentive for Argos in the form of higher margins. This does not alter the OFT's conclusion on the basis of the evidence that Hasbro, Argos and Littlewoods entered into agreements to keep to RRP's (or, at times, another agreed price).

MARKET MOVE TOWARDS RRP's

- 324 Representations: Argos takes issue with Littlewoods's assertion that from the beginning of 2000 the toy market had naturally gravitated towards an adherence to RRP's and that all retailers were following Hasbro's RRP's. Argos accepts that there may have been more parity in the market, but claims that there were regular instances where Argos did not adhere to Hasbro's RRP's and competed head to head with [*]. Examples of such competition are contained in an annex to Argos's further representations, listing the prices charged by a number of retailers for Hasbro products in autumn/winter 2000/2001 and spring/summer 2001.
- 325 OFT's response: As set out above, the OFT is not required to demonstrate any effects of the infringement as its object was to restrict competition (see paragraphs 221 and 256 above). Hence, the OFT does not have to establish whether or not there was a move towards RRP's at the time of the infringement. The OFT has already responded above (paragraph 173 above) to Littlewoods's submission that its move to RRP's was only part of a general move of all retailers to RRP's. The OFT also notes that in its representations Argos itself has argued that it had decided to [*] after its acquisition by GUS (see paragraphs 284 to 287, although the OFT also sets out at those paragraphs reasons why it is difficult to give credence to Argos's representations in this regard).
- 326 Argos's submission that it competed head to head with [*] does not weaken the evidence of an infringement with the object of restricting competition. The OFT notes that the annex to Argos's further representations shows that there were not many instances where Argos and [*] charged different prices for Hasbro products [*]. Moreover, nearly all these price differences are very small. The OFT has already established that there were very few price differences for the products that were affected by the agreements (see Table 3 at paragraph 56 above). Also, there was always a degree of uncertainty that the parties would adhere to or continue to adhere to the agreement (see also above at paragraphs 143, 248 and 267) and there would still remain instances where Argos would need to react to [*].
- 327 Representations: In its representations, Littlewoods refers to signals made by Argos at the time of the GUS take-over regarding Argos's change in policy. Argos points out that its statements on policy were targeted at investors and were not a signal to competitors. Also, these statements referred only to a move towards higher margins across the board and did not mention toys or adherence to RRP's.

- 328 OFT's response: It is not the OFT's case that any statements made by Argos at the time of the GUS take-over were meant as a signal to competitors. Nor did Littlewoods submit any primary documents on this point, only some press cuttings which are considered at paragraphs 181 to 184. The OFT has dealt in detail with Argos's alleged change in policy above (see paragraphs 179 to 193 and 284 to 287).
- 329 Representations: Argos denies Littlewoods's claim that RRPs in practice represented both a maximum and a minimum price. Argos points out that while RRPs may often constitute maximum prices for high street retailers, home shopping catalogue retailers such as GUS are able to price above RRPs. Also, some Hasbro products are sold below RRPs.
- 330 OFT's response: The OFT has already responded to Littlewoods's claim at paragraphs 176 to 178 above. The OFT cannot see the relevance of prices charged by home shopping catalogue retailers. It has never been the OFT's case that GUS, Littlewoods's home shopping catalogue or other home shopping catalogue retailers were part of the infringement. In addition, the higher price charged by home shopping catalogue retailers may reflect the additional services they offer (for example home delivery and credit terms) compared with high street retailers.

STATEMENTS OF LITTLEWOODS EMPLOYEES

- 331 Representations: In a statement submitted by Littlewoods as part of its representations, Phil Riley, one of the Littlewoods toys buyers, states that he knew that all his competitors, such as Argos, would not go above RRPs and for most of the branded products were unlikely to go below it. Argos contends that this is an assumption which is not based on information communicated by Argos.
- 332 OFT's response: The OFT has already dealt above with the statement of Phil Riley (paragraphs 167 and 168 above). It notes that Riley received an e-mail from Hasbro assuring him that Argos would be continuing to adhere to RRP on Action Man and Games (see paragraph 69 above). Hence, the OFT cannot accept Argos's representation.
- 333 Representations: Alan Burgess, one of the Littlewoods buyers, states that suppliers' account managers would suggest to him that Argos would adhere to RRPs. However, Argos asserts that it has never agreed with Hasbro to follow RRPs.
- 334 OFT's response: The OFT has already dealt above extensively with Argos's assertion that it has not agreed to adhere to Hasbro's RRPs.

335 Representations: John McMahon, a Littlewoods Buying Director, states that during late 1998 and early 1999 Argos did not price as aggressively as previously. [*]

336 OFT's response: The OFT cannot see the relevance of this claim to the OFT's case. It is not part of its case that less aggressive pricing of Argos was a result of the GUS take-over.

G Response to the further representations made by Littlewoods

337 The further representations of Littlewoods on the representations of Hasbro and Argos (see paragraph 315 above) are addressed below.

REPRESENTATIONS ON ARGOS'S REPRESENTATIONS

338 Representations: Littlewoods refers to Argos's representations that it is easy for high-street retailers to undercut catalogue retailers. It contends that a price-fixing agreement in which only Argos and itself participated could not have been effective, because it would expose them to undercutting from nationwide toy retailers such as Woolworths and Toys 'R' Us.

339 OFT's response: The OFT notes that Littlewoods's contention does not change the evidence, as set out above, that it agreed with Argos and Hasbro to fix the prices of toys and games. However, in addition, both Littlewoods and Argos indicate in their representations that retailers perceive Argos as setting the benchmark price. Therefore, they could reasonably expect that many retailers would choose to follow the RRP's as charged by Argos and Littlewoods and make a higher margin on toys and games. This is supported by the statement of Alan Cowley, a Littlewoods toys buyer, who says that if both Argos and Littlewoods went out at RRP's then 'it was in our view also likely that the other major high street retailers such as Woolworths and Toys R Us would take the opportunity to maximise their margins by doing the same thing.' It is clear from the evidence given by Hasbro employees (see for example paragraph 53 above) that there could be no certainty that the retail market generally would follow Argos and Littlewoods prices, but that in practice that was what happened.

REPRESENTATIONS ON HASBRO'S REPRESENTATIONS

340 Representations: Littlewoods notes that, in its representations to the original rule 14 Notice, Hasbro denies an infringement of the Chapter I prohibition and agrees with Hasbro's assessment that its pricing initiative, about which Littlewoods knows no more than was set out in the original rule 14 Notice, was lawful.

- 341 OFT's response: As already stated in response to Argos's further representations above (paragraph 319 above), in its decision that the Chapter I prohibition has been infringed, the OFT does not rely on any mere admission by Hasbro of an infringement, other than the statements made by the Hasbro employees. In addition, any denial of Hasbro is not sufficient to show that the Chapter I prohibition has not been infringed. The OFT has already responded to Hasbro's representations above (paragraphs 305 to 314 above), including any denials included in those representations and Hasbro's assertions about its pricing initiative. The OFT has noted in paragraph 319 above that Hasbro's application for leniency necessarily implies that Hasbro has admitted to a possible infringement of the Chapter I prohibition. In the OFT's view the most reasonable interpretation of the redacted version of the Hasbro representations that was given to Littlewoods is that, while Hasbro denied infringing the Chapter I prohibition as set out by the OFT in the original rule 14 Notice, it did not deny that it had committed an infringement of some kind.
- 342 Representations: It is not clear how Littlewoods and Argos could have known or sought reassurance about each other's pricing intentions, as Hasbro seems to indicate they did, given that Hasbro denies involvement in an infringement and that the OFT has accepted that there was no direct contact between Littlewoods and Argos. Ian Thomson wrote in his internal e-mail of 18 May 2000 (see paragraph 67 above) that '... both Accounts ... are taking a cautious approach in case either party reneges on a price agreement.' This clearly does not refer to a particular price agreement, as then Thomson would have written '*the* price agreement'. This also shows that there was no reassurance for Littlewoods and Argos about pricing intentions.
- 343 OFT's response: The OFT has already set out in this Decision the evidence of how Littlewoods and Argos knew about each other's pricing intentions. The e-mail that Ian Thomson sent to Littlewoods on 18 May 2000, a few hours after the e-mail referred to above, is part of this evidence (see paragraph 69 above). Why Ian Thomson refers to 'a price agreement' becomes clear when a few lines later he writes that 'It goes without saying that Action Man and Games prices will be maintained as per earlier agreements.' Ian Thomson's e-mail is the beginning of the extension of the agreement on Action Man and games to the other Hasbro products listed in the e-mail and with the words 'a price agreement' he refers to this newly extended agreement. The OFT finds that Ian Thomson's remark about 'a cautious approach' merely refers to the uncertainty inherent in such agreements about the other parties' actions.
- 344 Representations: Littlewoods notes that the conclusions of the report of RBB Economics, which was submitted by Hasbro together with its representations, support its assertion that any agreement exerted no material influence on the

price of Hasbro toys. RBB Economics claims that there was no effect on interbrand competition. According to Littlewoods, such an effect could not have been achieved, because competing brands are priced independently and would have competed more successfully with Hasbro toys if the price of Hasbro toys had been artificially elevated.

- 345 OFT's response: The OFT has responded in detail to the conclusions of RBB Economics in paragraphs 382 to 385 below. It notes that Hasbro has a strong market position in some of the branded toys covered by the agreements, such as boys' toys and games and puzzles. In view of this position, it is reasonable to assume that the elevated prices of Hasbro products enabled competing manufacturers to set the price of their products higher than they would have done without the agreements.

H Response to the representations made by Argos on the supplemental rule 14 notice

SUPPLEMENTAL RULE 14 NOTICE DOES NOT COMPLY WITH CAT'S ORDER AND IS UNLAWFUL

- 346 Representations: The OFT has, contrary to the terms of the Order that was made by the CAT on 30 July 2003, taken the opportunity to treat the introduction of the three new witness statements of David Bottomley, Neil Wilson and Ian Thomson as a general remittal and has thereby acted unlawfully. The OFT's approach is contrary to the principles referred to in *AEG*¹⁸⁵ and *BASF*¹⁸⁶ cited in the interlocutory judgment of the CAT dated 30 July 2003. The Order of the CAT merely allowed the OFT to put the three witness statements to Argos for comment. It did not allow the OFT a further opportunity to improve the original Decision. Nor does it permit the OFT to adduce new documents, to amend the legal case on infringement, to add a new analysis of the prices charged by Argos and Littlewoods, to make new comments on their witness statements or to incorporate in the proposed amended decision parts of its Defence to the original Notice of Appeal.
- 347 Argos stated that it would only be responding to those parts of the supplemental rule 14 Notice that it regarded as being fairly said to be a response to the evidence of the witnesses in the three new statements.
- 348 OFT's response: In the OFT's view it would not have been proper procedurally, and indeed would have been unfair to Argos and to Littlewoods, if it had

¹⁸⁵ European Court of Justice, Case 107/82 *AEG v Commission* [1983] ECR 3151.

¹⁸⁶ European Court of First Instance, Case T-4/89 *BASF v Commission* [199] ECR II-1523.

confined itself merely to putting the witness statements to them for comment. The reasons why the OFT decided that the supplemental rule 14 Notice should be in the form of a proposed amended Decision was so that the Applicants could have the opportunity not just of commenting on the new material but of understanding precisely and in detail what the OFT was making of it and the inferences and conclusions it intended to draw, and in particular whether the new material altered in any way the OFT's conclusions as set out in the original Decision. It is difficult to see how the OFT could properly and in fairness to Argos and Littlewoods have carried out this exercise in any other way.

- 349 The OFT did not set out to try to 'improve' the original decision. However, it was inevitable that the new and additional evidence contained in the witness statements would cause it to revisit and amend the original decision where appropriate in the light of the new material, including the OFT's assessment of the infringements in terms of agreements and/or concerted practices. The OFT regards this as proper and in any case does not consider it as 'amending the legal case on infringement', as Argos puts it. It does not change the substance of the OFT's case.
- 350 As to the analysis of the prices charged by Argos and Littlewoods, it was always part of the OFT's case, from the original rule 14 Notice onwards, that the prices changed as is now indicated in Table 3 (see paragraph 56 above). The analysis in Table 3 merely restates this in a more graphic form. It was contained in the OFT's Defence.
- 351 The additional documents that are now made reference to and appended to the Decision are documents that were always on the OFT's file but whose relevance has been reappraised in the light of the new witness testimony. Some of these documents were referred to in the witness statements. Some of these documents were referred to in the OFT's Defence without objection from Argos and Littlewoods. The OFT could not ignore in its thinking the existence of the existing Notice of Appeal and the Defence thereto, which have served to clarify and define the issues in the matter.
- 352 In summary the OFT does not accept that in preparing the supplemental rule 14 Notice it has acted outwith the terms of the CAT's order. The OFT did not act unlawfully but entirely properly and has borne firmly in mind the right of the parties to understand what the OFT is making of the new material.

CLARIFICATION OF ISSUES

Gus take-over in 1998

353 Representations: The evidence of Neil Wilson and David Bottomley corroborates Argos's case that it had a unilateral change of policy in desiring to increase margins and profitability after it had been taken over by GUS. The OFT should state whether it accepts that Argos adopted this policy which would involve [*]. If it does not it should give its reasons. It should state exactly what it understands the relevant words in the witness statements: 'increase Argos profitability'; 'more profitability'; and 'to increase margins' to mean. The OFT should drop the allegation at paragraph 189 of the supplemental rule 14 Notice (which is now paragraph 192 of this Decision), which is contradicted elsewhere in the Notice, that suggests that the Hasbro pricing initiative was developed only in response to Argos's demands for more margin.

354 OFT's response: It has always been the OFT's case, from the issue of the original rule 14 Notices, that the Hasbro initiative that led to the infringements was inspired by the need to offer greater profitability on its products to retailers in general and not only to Argos. It is one thing to say that one accepts that Neil Wilson and David Bottomley were aware that following the takeover by GUS, Argos wanted to improve its profitability. It is quite another thing to say one accepts that the two witnesses were aware that Argos had taken an independent decision to move its prices [*]. The OFT is prepared to accept that the testimony of Neil Wilson and David Bottomley supports the former proposition but not the latter. The words quoted mean exactly what they would normally mean in their contexts but they do not support the weight that Argos attempts to make them carry. In any event (see in particular paragraph 286 above) the OFT has consistently made it clear that in its view, even if there had been a unilateral decision by Argos to [*], this is far from incompatible with the existence of the infringing agreements detailed in this Decision or with the timescale over which they have been found to have evolved.

17 February 1999 meeting

355 Representations: Argos admits that the meeting of 17 February 1999 (see paragraph 51 above) took place and that it is likely that [*] was discussed in the context that it would want margin support from Hasbro if its prices were undercut. It is important to know whether it is the OFT's case that Argos agreed to fix prices at this meeting. It is denied that Hasbro's 'pricing initiative', as defined by the OFT at paragraph 43 above, was discussed at this meeting. David Bottomley's statement amounts to hearsay and is not strong and compelling evidence that the 'pricing initiative' was discussed. Even if the pricing initiative was discussed, what is unlawful about this?

356 OFT's response: These representations focus on one meeting, albeit one whose circumstances give rise to evidence that the OFT relies on, among many other individual pieces of evidence. The OFT's finding of infringement does not stand or fall on what was discussed at the meeting on 17 February 1999. It stands even if there was no evidence that such a meeting ever took place. It is the OFT's case (see in particular paragraph 95 above) that Hasbro's pricing initiative, which may not in itself have been a breach of the Act, led directly to arrangements that certainly did amount to such a breach. The evidence suggests that some discussion of prices and margins took place. That may or may not have amounted to some form of agreement or concerted practice that would have infringed the Act, had it been in force in February 1999. The OFT considers that this meeting forms part of a chain of evidence which, taken together, is strong and compelling evidence of the infringements of the Act that are characterised by the OFT in this Decision.

The alleged understanding to adhere to rrps

357 Representations: Paragraph 51 of the supplemental rule 14 Notice (see paragraph 54 above) states that the new witness statements contradict the evidence of Mike McCulloch in relation to Argos's initial concerns subsequently turning into an understanding to adhere to RRP's if Littlewoods did the same. The OFT refers to paragraph 33 of David Bottomley's statement. Argos submits that none of the evidence either in the original Decision or in the new witness statements supports this important allegation. This is so important that the OFT should clarify the following:

- Is it the OFT's case that there was such an understanding at the 17 February 1999 meeting?
- If Argos and Hasbro did not have this understanding at this meeting, when does the OFT say on the present evidence that Argos gave this indication to Hasbro about Littlewoods?

358 OFT's response: The OFT has concluded that the infringing agreements and/or concerted practices were in place on 1 March 2000. It is not required to prove when precisely they first came into existence (see in particular paragraph 296 above).

I Response to the representations made by Littlewoods on the supplemental rule 14 notice

SUPPLEMENTAL RULE 14 NOTICE DOES NOT COMPLY WITH CAT'S ORDER

359 Representations: The OFT's supplemental rule 14 notice does not comply with the CAT's Order of 30 July 2003 to limit the supplemental rule 14 procedure to

the new witness statements of David Bottomley, Neil Wilson and Ian Thomson, since the OFT relies on factual allegations concerning the instigation and monitoring of the pricing arrangements that were never relied upon in the Decision, the OFT relies on documents that formed no part of the Decision, the OFT responds to many of the arguments made by Argos and Littlewoods in their Notices of Appeal, and the OFT has re-characterised the infringement.

360 OFT's response: The OFT has already responded to similar submissions made by Argos at paragraphs 348 to 352 above.

EVIDENCE OF LITTLEWOODS BUYERS CONTRADICTS EVIDENCE OF HASBRO EMPLOYEES

361 Representations: The witness statements of Littlewoods employees that were annexed to its representations on the original rule 14 notice, contradict the witness statements of David Bottomley, Neil Wilson and Ian Thomson. The pricing patterns contained in Table 3 (see paragraph 56 above) do not demonstrate any pricing arrangement, but were caused by other factors, principally the GUS takeover of Argos and the natural gravitation of the toy industry towards RRP's (see also paragraphs 172, 179 and 180 above).

362 OFT's response: The OFT notes that Littlewoods has not submitted any new evidence to refute the witness statements of David Bottomley, Neil Wilson and Ian Thomson and the documents in Annex A under D that were the subject of the supplemental rule 14 procedure, even though Littlewoods argues that these witness statements involve significant changes to the OFT's case. In its representations Littlewoods merely reiterates some of the points that were made by its witnesses prior to the preparation of the witness statements of Bottomley, Wilson and Thomson. Littlewoods's witnesses do not therefore specifically respond to these witness statements.

363 The OFT has already responded to the witness statements of John McMahon (see in particular paragraphs 200 to 214 above), Lesley Paisley (see in particular paragraphs 194 to 199, 216, 217, 222, 223, 249 and 250 above), Alan Cowley (see in particular paragraphs 197, 200 to 208, 219, 222 and 223 above), Alan Burgess (see in particular paragraphs 154 to 158, 165, 166, 169, 170 and 218 above), Phil Riley (see in particular paragraphs 167, 168 and 218 above) and Katharine Runciman (see in particular paragraph 218 above). The OFT has also already responded to Littlewoods's submissions about the GUS takeover of Argos, including the related comments of the Littlewoods witnesses (see paragraphs 179 to 193 above), and about the gravitation of retail prices towards RRP's (see paragraphs 172 to 178 above).

- 364 Representations: The witness statements of David Bottomley, Neil Wilson and Ian Thomson are unreliable, as they were drafted in June 2003, i.e. a long time after the events in question, and with the assistance of the OFT. Where there is a conflict with the witness statements of the Littlewoods employees, the latter are to be preferred.
- 365 OFT's response: Ian Thomson's witness statement was almost entirely drawn up by himself, with the aid of independent legal advice. David Bottomley was also assisted by a lawyer of his own in preparing his witness statement. Neil Wilson declined the opportunity to have his own lawyer present. The witness statements contain the witnesses' own words and the witnesses have indicated by signing their statements that they consider them to be true. The witnesses largely confirmed or clarified what they had said at their interviews with OFT officials. Those interviews had taken place five months after the end of the infringing agreements. The witness statements were prepared in May/June 2003. As noted above (see paragraphs 15, 16, 137 and 138), the statements are supported by contemporaneous documents. The OFT is satisfied that the witness statements in question are reliable and are a true account of the evidence which each of these witnesses can give to the CAT.

IV DECISION

A Agreement between Hasbro, Argos and Littlewoods

- 366 The evidence set out at part II of this Decision formed the basis of the various rule 14 Notices sent to Hasbro, Argos and Littlewoods. The OFT's assessment of the representations made in response to these rule 14 Notices is set out in part III of this Decision. Having reviewed the evidence and analysed the representations, the OFT finds that there was an agreement and/or concerted practice between Hasbro, Argos and Littlewoods to fix prices of certain Hasbro products between 1 March 2000 and some time between 15 May 2001 and 14 September 2001 which infringed the Chapter I prohibition.

B Agreement between Hasbro and Argos

- 367 On the basis of the evidence set out above, the OFT finds that there was an agreement and/or concerted practice between Hasbro and Argos to fix the prices of certain Hasbro products, which infringed the Chapter I prohibition from 1 March 2000 until some time between 15 May 2001 and 14 September 2001.

C Agreement between Hasbro and Littlewoods

368 On the basis of the evidence set out above, the OFT finds that there was an agreement and/or concerted practice between Hasbro and Littlewoods, to fix the prices of certain Hasbro products, which infringed the Chapter I prohibition from 1 March 2000 until some time between 15 May 2001 and 14 September 2001.

V ACTION

369 This part sets out the action which the OFT intends to take and its reasons for it.

D Directions

370 Section 32(1) of the Act provides that if the OFT has made a decision that an agreement infringes the Chapter I prohibition, it may give to such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end. No directions are necessary in this case as the OFT is satisfied that price-fixing between Hasbro, Argos and Littlewoods has ceased.

E Financial Penalties

371 Section 36(1) of the Act provides that, on making a decision that agreements have infringed the Chapter I prohibition, the OFT may require the undertaking which is a party to an agreement to pay the OFT a penalty in respect of the infringement. The parties to the infringing agreements are Hasbro, Argos and Littlewoods.

372 The OFT may impose a penalty on an undertaking which has infringed the Chapter I prohibition only if it 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.¹⁸⁷ The OFT is satisfied that Hasbro, Argos and Littlewoods 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 resale price-fixing amounted to a restriction of competition.

¹⁸⁷ Section 36(3) of the Act: see Competition Commission Appeal Tribunal, Case No 1001/1/1/01 *Napp Pharmaceutical Holdings Limited and Subsidiaries v The Director General of Fair Trading*, 15 January 2002, [2002] CAT 1 at [455], [2001] CompAR 1.

373 The OFT intends to impose a penalty on Hasbro, Argos and Littlewoods. There are a number of agreements identified in part IV of this Decision. The overall agreement identified is based on the existence of the two bilateral agreements, one between Hasbro and Argos and the other between Hasbro and Littlewoods. In this case the OFT has decided, since the overall agreement and the two bilateral agreements are based on the same set of facts, to impose only one penalty on each party and to base it on the overall agreement rather than impose separate penalties in respect of the separate agreements.

IMMUNITY FROM PENALTIES

374 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 part I.A).¹⁸⁸

CALCULATION OF THE PENALTIES

375 In accordance with section 38(8) of the Act, the OFT must have regard to the guidance on penalties issued under section 38(1) of the Act when setting the amount of the penalty.¹⁸⁹

Step 1 – starting point

376 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.¹⁹⁰ To be consistent with the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000,¹⁹¹ the OFT considers that the last financial year is the business year preceding the date when the infringement ended. The OFT is of the view that the agreements between Hasbro, Argos and Littlewoods ended at the earliest on 15 May 2001, when the OFT visited Hasbro's premises in Uxbridge under section 27(3) of the

¹⁸⁸ Regulation 3 of Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262).

¹⁸⁹ 'Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty', March 2000 (OFT 423).

¹⁹⁰ Paragraph 2.3 of OFT 423.

¹⁹¹ Section 36(8) of the Act and SI 2000/309.

Act (see further paragraph 388 below) and it is that date that the OFT will use in calculating the appropriate level of penalty in this case.

- 377 The actual percentage rate which is applied to the relevant turnover depends upon the nature of the infringement.¹⁹² The more serious the infringement, the higher the likely percentage rate. When making his assessment, the OFT 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.¹⁹³ 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.¹⁹⁴
- 378 The OFT 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.'¹⁹⁵
- 379 The products concerned are consumer goods sold to a mass market through an established retail environment. They are very familiar, branded toys and games, that are aimed directly at children. Parents are under pressure to accede to the growing demands of children for the latest fad or trend. The heavy promotion and advertising of many such toys means that non-branded, cheaper alternatives are not viable substitutes for many parents. This also applies to 'old favourites', toys and games with long-established brand names such as Monopoly.
- 380 Hasbro is a subsidiary of one of the two leading toy manufacturers in the world and supplies many of the leading brand names in toys and games, such as Action Man and Monopoly. These brands were among the first to be targeted in the price-fixing agreements and it is generally accepted that these 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 and games. This 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

¹⁹² Paragraph 2.4 of OFT 423.

¹⁹³ Paragraph 2.5 of OFT 423.

¹⁹⁴ Paragraph 2.6 of OFT 423. The OFT accepts the written representations of Argos on this point, stating that the OFT should take the anti-competitive effects of the agreements into consideration in determining the penalty.

¹⁹⁵ Paragraph 2.4 of OFT 423.

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 make it much more difficult.

381 In its written representations on the original rule 14 Notice, Littlewoods claims that there is no evidence of any material impact upon prices of Hasbro toys, as the market was such that retailers would in any event adhere to RRP's, and that the effect of the agreements was negligible. Also, Littlewoods claims that the alleged agreements only applied to a limited range of Hasbro products and that the agreements only concerned Index and not Littlewoods's mail order business. However, as indicated in paragraph 173 above, the OFT does not accept that retailers would have adhered to RRP's in any event. Further, the OFT has never alleged that the agreements covered Littlewoods's mail order business (nor for that matter the mail order business of GUS, Argos's parent) and the turnover of these businesses have not been taken into account in calculating the penalties. The OFT has responded below to the other representations of Littlewoods referred to in this paragraph, together with the representations of Hasbro on these issues.

382 Hasbro has submitted a report by RBB Economics ('RBB') with its written representations to the original rule 14 Notice, that claims that prices were unaffected by the 'arrangements' and actually fell, and that there was no effect on toys and games outside those directly covered by the 'arrangements'. Furthermore, it claims that there was no gain to Hasbro from the 'arrangements' as list prices (i.e. wholesale prices) also fell over the period that the 'arrangements' were in place.

383 The OFT considers that whilst RBB has demonstrated that the average retail price for many of the products targeted in the agreements actually fell over the period, it has failed to take account of what would have happened to these prices in the absence of any agreement. RBB has shown that Hasbro list prices on core games fell by an average of [*] per cent and [*] per cent to Argos and Littlewoods respectively over the period of the infringement. Hasbro's aim at the time was to increase retailer margins (see paragraph 43 above). This was an industry that had been fiercely competitive with retailers eager not to be beaten on price, particularly on key lines, such as these. There was clearly a risk for Hasbro that any attempts to increase retailer margins by reducing list prices would simply result in all the benefit being passed on to the consumer with no change in the overall margins for retailers. But the 'arrangements' were deliberately designed to have the effect that retailers did not need to discount and knew this (see paragraphs 43 to 48 above). The RBB report shows that average retail prices of core games fell by [*] and [*] per cent for Argos and Littlewoods respectively over the period. The fall in retail prices is much smaller

than the fall in list prices, enabling retailers' margins to rise quite considerably. Hence, the OFT believes that as a result of the price fixing agreements, retail prices were higher than they would otherwise have been.

- 384 RBB has claimed that because this was a vertical agreement, there was little or no effect on prices of Hasbro products other than those supplied to Argos and Littlewoods. However, it is clear that these were not simply vertical agreements and in practice had horizontal effects. Many of those interviewed stated that Argos was a price leader and most other retailers were essentially price followers (see paragraph 55 above). There is general agreement that most retailers were following Hasbro's RRP's in 2000. Hence, for the same reasons as those stated above, the OFT believes that the prices of Hasbro toys and games in other retail outlets were also higher than they would have been in the absence of the agreements.
- 385 RBB also states that the arrangements had no effect on the toys sold by other manufacturers. However, given the strong market position of Hasbro in some of the branded toys specified in the agreement, for example boys' toys and games and puzzles, it is difficult to believe that an agreement that fixed these prices at a level that was higher than they would otherwise have been, would not have had a similar effect on the competing products of other manufacturers within that market. It is reasonable to assume that if the prices of Hasbro's products were higher than they would otherwise be, then prices of competing brands could be maintained at prices that were higher than those that would have prevailed had there been no agreement.
- 386 It would be extremely difficult, if not impossible, to estimate the actual effect that such agreements have had on consumers, with far too many unknowns accurately to quantify the damage. However, the OFT believes that these agreements have raised the retail prices of many well-known toys and games for consumers to levels that were higher than they would otherwise have been. Given the nature of the products involved and the position of each of the parties involved on the relevant markets, the OFT believes that the damage to consumers from these agreements is likely to have been considerable.
- 387 Given the seriousness of the infringement both by virtue of its nature (price-fixing) and the immediacy of its impact on a major consumer market, the OFT has decided, subject to a review of the individual position of each of the three

parties, that a starting point of [between 8 and 10, inclusive]¹⁹⁶ per cent of the parties' relevant turnover is appropriate.

Step 2 – adjustment for duration

- 388 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.¹⁹⁷ The start of the agreements fixing the price of Action Man and core games pre-dates the start of the Act (see paragraph 123 above). Hence, 1 March 2000 is the appropriate starting point for these purposes. The agreements in relation to Action Man and core games are judged to have come to an end at the earliest on 15 May 2001, when the OFT visited Hasbro's premises in Uxbridge under section 27(3) of the Act, and at the latest on 14 September 2001, when Hasbro applied for leniency. Taking either date, the duration of the agreements exceeded one year, since the agreements affected Action Man and core games from the beginning. As noted in paragraph 376 above, for the purposes of calculating the penalty, the OFT has decided to take the earlier date as the date the infringement ended. This implies a potential doubling of the step 1 figure for the categories boys' toys and games and puzzles. Due to the serious nature of the infringement, the OFT does not accept Hasbro's request, made in its written representations to the original rule 14 Notice, not to take account of the period in excess of one year in setting the amount of the penalty. However, the period in excess of one year, for the purposes of calculating the penalty, lasted only for some two and a half months and did not include the period in the run up to Christmas where sales levels are particularly high. In the circumstances the OFT will not double the turnover for these categories, but will multiply it by a factor of one point two.
- 389 The extended list agreement began around May 2000, was implemented in autumn 2000 and similarly came to an end at the earliest on 15 May 2001 (see also at paragraph 123 above). The extended list agreement covered at the very least the products listed in Ian Thomson's e-mail of 18 May 2000 (see paragraph 69 above). These products fall into the categories girls' toys ('Baby All Gone'), infant and pre-school ('Tweenies All Story Time Product'), creative (the toys listed under 'Get Set' and 'Design & Draw'), plush ('Tweenies All Standard Plush' and 'Tweenies Cuddle and Squeeze Doodles') and hand-held electronic games ('Monopoly' and 'Bop It'). This implies that the turnover for these categories should not be increased. Hasbro claims that the category infant and

¹⁹⁶ The appearance of this phrase here and elsewhere in this decision signifies that the exact figure has been removed on grounds of confidentiality.

¹⁹⁷ Paragraph 2.7 of OFT 423.

pre-school was not covered in the extended list agreement, because 'Tweenies All Story Time Product' falls within the category plush. However, the OFT cannot accept this. This toy consists of two dolls, one of which has an internal voice-box, and a little story book. When one of the dolls is pressed, it reads the text of the booklet aloud. Although the dolls are soft, they are not as furry and cuddly as plush toys. The toy is intended to be used to encourage children to learn to read, as they can follow the story in the booklet along with the speaking doll. Hasbro has submitted information which shows that NPD, a market research organisation, categorises 'Tweenies All Story Time Product' as plush, along with other soft dolls that contain an internal voice-box. However, the OFT does not find this persuasive in view of the characteristics and intended use of this toy. While it is arguable that it has certain 'plush-like' characteristics, it is clearly aimed at children of pre-school age and is at least equally an activity-type toy.

- 390 In its written representations to the original rule 14 Notice, Littlewoods claims that the evidence shows that Hasbro's discussions with Littlewoods's buyers ended in early 2000. However, the OFT does not accept this claim. The e-mails of 28 December 2000, 3 April 2001 and 24 April 2001 (see paragraphs 79 to 83 above) show that these discussions were still going on during the later part of 2000 and in 2001.

Step 3 – adjustment for other factors

- 391 The penalty may be adjusted as appropriate to achieve policy objectives, particularly deterring undertakings (including non-infringing undertakings) from engaging in anti-competitive practices.¹⁹⁸ Indicated below is the OFT's decision on whether it is appropriate to adjust any penalty on these grounds.

Step 4 – adjustment for further aggravating and mitigating factors

- 392 The OFT has the power to increase the penalty where there are other aggravating factors, or decrease it where there are mitigating factors.¹⁹⁹ It is indicated below which adjustments the OFT 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

- 393 No penalty which has been fixed by the OFT may exceed 10 per cent of the turnover of the undertaking calculated in accordance with the provisions of the

¹⁹⁸ Paragraph 2.8 of OFT 423.

¹⁹⁹ Paragraph 2.10 of OFT 423.

Competition Act 1998 (Determination of Turnover for Penalties) Order 2000.²⁰⁰ The section 36(8) turnover of an undertaking is not restricted to the turnover in the relevant product market and relevant geographic market.²⁰¹ The OFT has considered below whether any penalty would exceed 10 per cent of the section 36(8) turnover.

PENALTY FOR HASBRO

Step 1 – starting point

- 394 Hasbro's turnover in the relevant product and geographic markets (i.e. UK markets for infant and pre-school, boys' toys, girls' toys, games and puzzles, creative, plush and hand-held electronic) in the financial year preceding the termination of the agreements (1 January 2000 to 31 December 2000) was £[*].²⁰²
- 395 The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 367 to 387. With specific regard to Hasbro and its role in these infringements, the OFT considers that, taking into account the very serious nature of the infringement (price-fixing) and his comments in those paragraphs regarding the nature of the products, entry conditions, damage to consumers, the effects on competitors and Hasbro's position in the supply of toys and games in the UK, a starting point of [between 8 and 10, inclusive] per cent of the relevant turnover is clearly appropriate. The starting point for Hasbro is therefore £[*].

Step 2 – adjustment for duration

- 396 As indicated above (paragraph 388), the duration of the infringements relating to Action Man and core games exceeded one year and the penalty has been calculated in step 1 on the basis that Hasbro's turnover in the categories boys' toys and games and puzzles should be multiplied by one point two. As it is not clear that the infringement relating to the other toys and games categories, for the purposes of the calculation of penalties, lasted for more than one year, the penalty based on the turnover in these categories remains unchanged. This results in a total penalty at this step of £[*].

²⁰⁰ Section 36(8) of the Act and SI 2000/309.

²⁰¹ Footnote 6 of OFT 423.

²⁰² Hasbro's turnover in the categories affected by the agreements during the period was as follows: boys' toys £[*]; games and puzzles £[*]; hand-held electronic games £[*]; girls' toys £[*]; creative £[*]; plush £[*]; infant and pre-school £[*]. While the penalty has been calculated using the non-rounded turnover figures as provided by Hasbro, in this Decision only rounded figures are mentioned.

Step 3 – adjustment for other factors

- 397 In its written representations, Hasbro suggests that as its list prices fell for the products concerned over the period concerned, there was no gain from the infringement. However, as the OFT has stated in its response to the RBB report, this ignores what might have happened in the absence of the agreement. It is clear that Hasbro was worried about declining sales on many key lines and that it was anxious to increase retail margins. Hence, there was pressure both to reduce list prices so that retail margins could increase and to bring retail prices down to increase volumes. The agreement would have helped it to achieve both of these aims simultaneously. Without the agreement, it is possible that Hasbro may have had to reduce list prices even further. The fall in list prices also disregards any changes to rebates and so actual selling prices at that time. The evidence shows that Hasbro was trying to get rid of its complex structure of rebates and hence may well have reduced the overall level of rebates at the same time as the list prices fell. Margins on core games do not seem to have fallen by as much as the average fall in list prices of core games. Hence, the OFT believes that Hasbro has gained from the agreement.
- 398 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 sales levels and margins without the agreement. Also, 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.²⁰³ However, it is reasonable to assume that any such agreements fixing the prices of so many of their products and having an effect across the entire retail sector would have implied a substantial gain for Hasbro from what might otherwise have occurred in a competitive market.
- 399 Hasbro claims that it is not necessary to deter Hasbro from further infringements of the Act because it has taken steps to terminate all offending behaviour and takes compliance with competition law very seriously. This ignores the consideration that deterrence 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.²⁰⁴

²⁰³ Competition Commission Appeal Tribunal, Case No 1001/1/1/01 *Napp Pharmaceutical Holdings Limited and Subsidiaries v The Director General of Fair Trading*, 15 January 2002, [2002] CAT 1 at [511], [2001] CompAR 1.

²⁰⁴ Paragraphs 1.8 and 2.8 of OFT 423. Also Competition Commission Appeal Tribunal, Case No 1001/1/1/01 *Napp Pharmaceutical Holdings Limited and Subsidiaries v The Director General of Fair Trading*, 15 January 2002, [2002] CAT 1 at [502], [2001] CompAR 1.

400 In this case the OFT is satisfied that a penalty figure of £[*], at this stage of the calculation, is sufficient to act as an effective deterrent both to Hasbro and others, in particular undertakings that might be considering engaging in price-fixing, and taking the factors above together has decided not to increase the amount of the penalty at this step.

Step 4 – adjustment for further aggravating and mitigating factors

401 The OFT believes that Hasbro's senior management had knowledge of, and was involved in, the agreements. In his witness statement, Neil Wilson states that 'Hasbro's senior management at director level (i.e. Mike McCulloch as well as David Bottomley and Mike Brighty, both Sales Directors) developed' Hasbro's strategy.²⁰⁵ David Bottomley, a Hasbro Sales Director, and Mike McCulloch, Hasbro's Head of Sales and Marketing, have both stated, in a witness statement and to OFT officials respectively, that they were aware of a pricing initiative, although their understanding of what this meant appears to differ. It is the OFT's view that they were fully aware of what it involved and actively encouraged its implementation. Furthermore, Mike Brighty, another Hasbro Sales Director, was clearly aware not only of the pricing initiative itself but also of its illegality when he suggested to Ian Thomson to ask Lesley Paisley of Littlewoods to delete an incriminating e-mail ('its highly illegal and it could bite you right in the arse!!!! suggest you phone Lesley and tell her to trash?', see paragraph 73 above).

402 In its written representations, Hasbro accepts that members of its management, in particular Mike McCulloch, Mike Brighty and David Bottomley were involved in the agreements. Still, Hasbro claims that the agreements did not involve a 'corporate sanctioned infringement' of the Act. However, the OFT 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 and was aware of its illegality, 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 OFT to conclude that senior management involvement is not an aggravating factor. However, the OFT 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 OFT has decided to take account of this aggravating factor by increasing the amount of the penalty by 10 per cent.

²⁰⁵ Witness statement of Neil Wilson, paragraph 9. See also paragraph 126 of Ian Thomson's witness statement.

- 403 The OFT has considered the evidence regarding who should be considered to have been an instigator or the instigator of the infringing agreements. As noted in paragraph 296 above, it is the OFT's view that discussions between Hasbro and Argos and Hasbro and Littlewoods took place over a period of time and that there evolved an understanding (which the OFT can accept was partly influenced by a desire on the part of both Argos and Littlewoods to increase profitability on toys and games by moving towards RRP's) that both Argos and Littlewoods would agree to adhere to RRP's on Action Man and core games on the understanding that the other would do likewise. In the circumstances the OFT accepts it would be difficult to point to a particular meeting or discussion as the occasion when the infringing price-fixing agreements came into being. However, on any reading of the evidence the OFT believes that it is sufficiently persuasive for it to find that Hasbro acted as an instigator of the infringements. Therefore the OFT has decided to increase the amount of the penalty by 10 per cent.
- 404 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 OFT 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.
- 405 However, the OFT is also aware of the remedial action taken by Hasbro's parent company, Hasbro Inc, following its discovery of the infringement. It has taken severe disciplinary action against the employees concerned and has stepped up compliance measures in its UK subsidiary by organising a specific competition law training programme for its senior management and sales staff and training in competition law for new staff. The OFT considers that in the light of these mitigating factors it is appropriate to reduce the amount of the penalty by 10 per cent.
- 406 The OFT is normally minded to give a reduction in a penalty when a party has co-operated with its investigation. However, as Hasbro benefits from the leniency programme and as a condition of being granted leniency Hasbro agreed to co-operate fully with the OFT, the OFT does not consider that there should be an additional reduction in the penalties under this head to reflect general co-operation.
- 407 The OFT believes that Hasbro committed the infringement intentionally. Hasbro's actions were intended to maintain the recommended resale prices of its products and Hasbro cannot have been unaware that this was likely to result in a

restriction of competition. As Hasbro did not commit the infringement merely negligently, this cannot be a mitigating factor.

- 408 As a result, the total percentage added to the penalty for aggravating circumstances is 20 per cent. The total percentage deducted for mitigating circumstances is 10 per cent. The penalty for Hasbro is therefore determined at £15.59 million.

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

- 409 For the purposes of section 36(8) of the Act, the turnover of Hasbro amounts to (i) its UK turnover in the business year preceding the date when the infringement ended, and (ii) for the period that the infringement lasted longer than one year, the amount of its UK turnover in the business year preceding the business year identified under (i) which bears the same proportion to this turnover as the period by which the length of the infringement exceeded 12 months bears to 12 months.²⁰⁶ As the infringement ended at the earliest on 15 May 2001, the business year identified under (i) is the year from 1 January 2000 to 31 December 2000. Hasbro's total UK turnover in this year amounted to £[*]. To this turnover must be added a proportion of the turnover in the business year identified under (ii), i.e. the year from 1 January 1999 to 31 December 1999. Hasbro's total turnover in this year was £[*]. As the infringement lasted at least 2.5 months longer than 12 months, the relevant proportion of this turnover amounts to at least £[*].

- 410 Hence, Hasbro's turnover for the purposes of section 36(8) of the Act amounts to at least £[*]. As the penalty does not exceed 10 per cent of this amount, there are no further adjustments to the penalty.

Leniency

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

PENALTY FOR ARGOS

Step 1 – starting point

- 412 Argos's turnover in the relevant product and geographic markets (i.e. UK markets for boys' toys, games and puzzles, girls' toys, infant and pre-school,

²⁰⁶ Article 3 of the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309).

plush, creative and hand-held electronic) in the financial year preceding the termination of the agreements (the 52 week period ended 24 March 2001) was £[*].²⁰⁷

- 413 The OFT has made an analysis of the seriousness of this infringement at paragraphs 376 to 387 above. With specific regard to Argos, the OFT takes into account the very serious nature of the infringement (price-fixing) and its comments in those paragraphs regarding the nature of the products, entry conditions, damage to consumers and the effects on competitors. In addition Argos was the largest toy retailer in the UK with 17.6 per cent of the retail supply of traditional toys and games in 2000 (see paragraph 38).
- 414 Argos is generally considered to be the price leader in the retail toy market, with other toy retailers to a large extent following Argos's prices. This made Argos's co-operation with Hasbro's attempt at maintaining recommended resale prices essential for its success. It was expected that other retailers would follow Argos's lead. Argos was aware of this position. It must therefore also have been aware of the wider consequences for the retail toy market of its maintaining Hasbro's recommended resale prices. This is especially the case as Argos sought assurances from Hasbro as to the co-operation of its main competitor in the catalogue business, Littlewoods, before it would enter into any agreement.
- 415 Taking all the above factors into consideration, the OFT has decided that a starting point of [between 8 and 10, inclusive] per cent of the relevant turnover is also clearly appropriate for Argos. The starting point for Argos is therefore £[*].

Step 2 – adjustment for duration

- 416 As indicated above (paragraph 388), the duration of the infringement relating to Action Man and core games exceeded one year and the penalty has been calculated in step 1 on the basis that Argos's turnover in the categories boys' toys and games and puzzles should be multiplied by one point two. As it is not clear that the infringement relating to the other toys and games categories lasted for more than one year, the penalty based on the turnover in these categories remains unchanged. This results in a total penalty for Argos at this step of £[*].

²⁰⁷ Argos's turnover in the categories affected by the agreement was as follows: boys' toys £[*]; girls' toys £[*]; plush £[*]; games and puzzles £[*]; creative £[*]; hand-held electronic games £[*]; infant and pre-school £[*]. While the penalty has been calculated using the non-rounded turnover figures as provided by Argos, in this Decision only rounded figures are mentioned.

Step 3 – adjustment for other factors

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

Step 4 – adjustment for further aggravating and mitigating factors

- 419 The OFT finds that Hasbro was an instigator of the infringing agreements. While there is some evidence that Argos was an instigator, there is no clear evidence against Argos in this respect and therefore it is not appropriate to make an adjustment to the penalty for Argos in respect of this aggravating factor.
- 420 In recognition of Argos's full co-operation with the investigation the OFT has reduced the amount of the penalty by 10 per cent.
- 421 As a result, there are no increases of the penalty for aggravating factors and the total percentage deducted from the penalty for mitigating circumstances is 10 per cent. The penalty for Argos is therefore determined at £17.28 million.

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

- 422 For the purposes of section 36(8) of the Act, 10 per cent of Argos's turnover (see paragraph 2) exceeds the level of the penalty by a very wide margin and the OFT does not consider it necessary to do the detailed calculations carried out for Hasbro at step 5. There are therefore no further adjustments to the penalty.

PENALTY FOR LITTLEWOODS

Step 1 – starting point

- 423 Littlewoods's turnover²⁰⁸ in the relevant product and geographic markets (i.e. UK markets for boys' toys, games and puzzles, girls' toys, infant and pre-school, plush, creative and hand-held electronic) in the financial year preceding the termination of the agreements (the financial year ended 30 April 2001) was £[*].²⁰⁹
- 424 The OFT has set out its views generally about the seriousness of this infringement at paragraphs 376 to 387. With specific regard to Littlewoods, the OFT takes into account the very serious nature of the infringement (price-fixing) and its comments in those paragraphs regarding the nature of the products, entry conditions, damage to consumers and the effects on competitors. Although the position of Littlewoods in the retail toy sector is less important than the position of Argos, Littlewoods's share of the retail supply of traditional toys and games is significant. Littlewoods is a substantial and well known retailer in its own right.
- 425 Despite Littlewoods's lower market share in the retail toy sector compared with Argos, Littlewoods is seen as Argos's main competitor in the high street catalogue sector. This is caused by the similarity of their outlet channel, the ease with which consumers can compare their prices because these are included in their catalogues, and their price-match guarantees. This means that Argos would not have taken part in the infringing agreements without the participation of Littlewoods. In the OFT's view Littlewoods would have been well aware that its participation in the infringing agreements was essential in order to bring Argos and its much larger market share within the scope of the infringement. It would also have known that other retailers would have been likely to follow Argos's prices since Argos is the acknowledged price leader in the market. Littlewoods's lower market share is not, therefore, a factor that should lead the OFT to find that its participation in the agreements should be viewed less seriously than that of Argos. Market share in any event is only one of the factors taken into account in assessing the seriousness of an infringement at step 1 and the OFT is in no

²⁰⁸ In its written representations to the original rule 14 Notice Littlewoods states that the agreements only applied to Index and not to Littlewoods's mail order business. The OFT accepts this and has never alleged otherwise. Hence, this turnover does not include Littlewoods's mail order business.

²⁰⁹ Littlewoods's turnover in the categories affected by the agreement was as follows: boys' toys £[*]; girls' toys £[*]; plush £[*]; games and puzzles £[*]; creative £[*]; hand-held electronic games £[*]; infant and pre-school £[*]. While the penalty has been calculated using the non-rounded turnover figures as provided by Littlewoods, in this Decision only rounded figures are mentioned.

doubt that, in the light of all the relevant factors as far as Littlewoods is concerned, this was a very serious infringement.

- 426 In view of the seriousness of the infringement as shown above the OFT has decided that a starting point of [between 8 and 10, inclusive] per cent of the relevant turnover is also clearly appropriate for Littlewoods. The starting point for Littlewoods is therefore £[*].

Step 2 – adjustment for duration

- 427 As indicated above (paragraph 388), the duration of the infringement relating to Action Man and core games exceeded one year and the penalty has been calculated in step 1 on the basis that Littlewoods's turnover in boys' toys and games should be multiplied by one point two. As it is not clear that the infringement relating to the other toys and games categories lasted for more than one year, the penalty based on the turnover in these categories remains unchanged. This results in a total penalty for Littlewoods of £[*] at this step.

Step 3 – adjustment for other factors

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

Step 4 – adjustment for further aggravating and mitigating factors

- 430 In its written representations, Littlewoods claims that if there was an infringement it was not an instigator of the infringement. Also, Littlewoods claims that only its lowest level employees were involved and any infringement was in no way condoned by its more senior management. The OFT accepts these arguments and therefore does not consider these aspects as aggravating factors.

431 In its representations, Littlewoods also claims that it has co-operated with the OFT by making its employees available for interviews by the OFT and by providing the OFT voluntarily with explanations and additional documents over and above those found during the OFT's on-site investigation at Littlewoods's headquarters. The OFT accepts this and in recognition of this co-operation with the investigation the OFT has reduced the amount of the penalty by 10 per cent.

432 As a result, there are no increases of the penalty for aggravating factors and the total percentage deducted from the penalty for mitigating circumstances is 10 per cent. The penalty for Littlewoods is therefore determined at £5.37 million.

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

433 For the purposes of section 36(8) of the Act, 10 per cent of Littlewoods's turnover (see paragraph 3) exceeds the level of the penalty by a very wide margin and the OFT does not consider it necessary to do the detailed calculations carried out for Hasbro at step 5. There are therefore no further adjustments to the penalty.

PAYMENT OF PENALTY

434 The OFT requires Argos to pay it a penalty of £17.28 million ([*] per cent of its relevant turnover for the 52 week period ended 24 March 2001) and Littlewoods to pay him a penalty of £5.37 million ([*] per cent of its relevant turnover for the financial year ended 30 April 2001). The penalties must be paid within three months of the date of this Decision.

435 If any party 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 OFT can commence proceedings to recover the required amount as a civil debt.

Vincent Smith

Director, Competition Enforcement Division

ANNEX A

List of statements and documents relied on by the OFT as evidence of the infringement

A. Notes of interviews of the following persons (obtained by the OFT prior to the issue of the original Rule 14 Notices):

1. David Bottomley, a Hasbro Sales Director
2. Mike McCulloch, Hasbro's Head of Sales and Marketing
3. Ian Thomson, Hasbro's Business Account Manager for Littlewoods
4. Neil Wilson, Hasbro's Business Account Manager for Argos
5. Charles Cooper, Hasbro's Business Account Manager for Argos (Neil Wilson's successor)
6. Roger Aldis, Hasbro's Field Sales Manager
7. Carol Evans, Hasbro's Category Development Director for boys' toys and pre-school brands
8. Alastair Richards, Hasbro's managing director
9. David Snow, Hasbro's National Account Executive for Argos
10. Alpana Virani, a Hasbro Brand Manager
11. Alan Burgess, Littlewoods's buyer of boys' toys, electronics and construction toys
12. Alan Cowley, Littlewoods's buyer of pre-school and musical toys
13. Lesley Paisley, Littlewoods's Buying Manager for toys

B. Witness statements of the following persons:

1. David Bottomley, a Hasbro Sales Director, dated 17 June 2003
2. Ian Shotbolt Thomson, Hasbro's Business Account Manager for Littlewoods, dated 12 June 2003
3. Neil Wilson, Hasbro's Business Account Manager for Argos, dated 13 June 2003

C. Documents:

1. Paper prepared by Hasbro for its meeting with Argos on 17 February 1999
2. E-mail from Charles Cooper to Jonathan Ward of Hasbro of 15 April 2000
3. E-mail from Ian Thomson and Neil Wilson to other Hasbro employees of 18 May 2000 (sent at 11.56 am)
4. E-mail from Ian Thomson to various Littlewoods toys buyers of 18 May 2000 (sent at 1.23 pm)

5. E-mail from Mike Brighty, a Hasbro Sales Director, to Ian Thomson of 19 May 2000
6. E-mail from Neil Wilson to Ian Thomson and Mike Brighty of 25 May 2000
7. E-mail from Ian Thomson to Henry Foulds, a Hasbro Brand Manager, of 30 November 2000
8. E-mail from Alan Cowley to Ian Thomson of 28 December 2000
9. E-mail from David Snow to Charles Cooper of 23 February 2001
10. E-mail from Ian Thomson to Charles Cooper of 3 April 2001 and the reply from Charles Cooper to Ian Thomson of 4 April 2001
11. E-mail from Charles Cooper to David Bottomley of 24 April 2001
12. E-mail from David Snow to Charles Cooper of 22 May 2001
13. Report produced by Littlewoods for the OFT, 'Investigation into the Market for Toys: Points of General Clarification for the Office of Fair Trading' (21 December 2001)

D. Documents supporting the witness statements:

1. Hasbro presentation headed '1999 Trading Terms. A package for continued success. J Evans/ M Brighty. 23rd October 1998'
2. Letter of 18 March 1999 from Alistair Richards of Hasbro to Terry Duddy of Argos
3. E-mail of 19 February 1999 from Sue Porritt of Argos to Merchandise Toy Teams
4. Hasbro contact report of meeting between Neil Wilson of Hasbro and Sue Porritt of Argos on 29 March 1999
5. Summary of prices for Hasbro products affected by the agreement/concerted practice as set out in the Argos and Littlewoods catalogues from S/S 1998 to S/S 2001
6. Hasbro presentation headed 'Trading Strategy 2000'
7. Hasbro contact report of meeting between Neil Wilson and Mike Brighty of Hasbro and Sue Porritt of Argos on 9 December 1999
8. E-mail of 4 May 2000 from Ian Thomson of Hasbro to Karen Sobers of Littlewoods
9. E-mail of 18 May 2000 from Ian Thomson to a number of Littlewoods employees, printed by Alan Burgess and ticked by hand
10. E-mail of 30 November 2000 from David Bottomley of Hasbro to Ian Thomson of Hasbro
11. E-mail of 28 December 2000 from Alan Cowley to Ian Thomson, printed by Alan Cowley and with a hand-written note

ANNEX B

List of statements and documents submitted by Hasbro, Argos and Littlewoods as part of their representations on the original Rule 14 Notices

A. Statements of the following persons, submitted by Hasbro:

1. Statement of Emma Wilson, a Hasbro legal counsel (with attached documents)

B. Documents submitted by Hasbro:

1. Guide to Corporate Conduct of Hasbro Inc of 1996
2. Hasbro's intranet competition compliance programme, print-out of 20 February 2002
3. Hasbro's competition compliance training, slides of Denton Wilde Sapte and case studies

C. Statements of the following persons, submitted by Argos:

1. Vanessa Clarkson, Argos's buyer of girls' toys, girls' plush toys and creative toys
2. Andrew Needham, Argos's buyer of boys' toys, games and construction toys (with attached documents)
3. Sarah Silverwood, Argos's Trading Manager for toys and nursery products
4. Maria Thompson, Argos's Trading Director for toys and other products and subsequently Argos's Commercial Director (with attached documents)
5. Jacqueline Wray, Argos's Merchandise Assistant for boys' toys and games (with attached document)

D. Documents submitted by Argos:

1. List of Argos's margins on Hasbro toys and games for catalogues Spring/Summer 1999 to Autumn/Winter 2000
2. List of Argos's profits and losses made on Hasbro toys and games in 2000
3. Memorandum from Maria Thompson on margin contributions of 28 May 1999
4. Advertisements of various retailers comparing their prices with Argos's prices of several products
5. List of changes in Argos's prices of Hasbro toys and games during the Autumn/Winter 2000 catalogue
6. List of various flyers sent out by Argos in 2000 and 2001

7. List of prices of Hasbro toys and games of Argos and its competitors for catalogues Spring/Summer 1999 to Autumn/Winter 2000, dated June 2002

E. Statements of the following persons, submitted by Littlewoods:

1. Alan Burgess, Littlewoods's buyer of boys' toys, electronics and construction toys
2. Alan Cowley, Littlewoods's buyer of pre-school and musical toys (with attached documents)
3. Peter Edmonds, Littlewoods's Buying Director for toys and other products (as successor of John McMahon)
4. Andrea Gornall, Littlewoods's buyer of boxed games, junior sports and outdoor sports and subsequently buyer of girls' and creative toys (as successor of Katharine Runciman)
5. Ian Gunn, Littlewoods's buyer of various electronic equipment
6. Steve Martin, Littlewoods's buyer of telephones and photography
7. Alastair McHarrie, Littlewoods's buyer of electronic games and desktop technology
8. C. John McMahon, Littlewoods's Buying Director for toys and other products
9. Terry Overill, Littlewoods's buyer of kitchen electrical products (with attached documents)
10. Lesley Paisley, Littlewoods's Buying Manager for toys (with attached documents)
11. Phil Riley, Littlewoods's buyer of boxed games, junior sports, outdoor and character bicycles (as successor of Andrea Gornall) (with attached documents)
12. Katharine Runciman, Littlewoods's buyer of girls' toys and creative toys

F. Documents submitted by Littlewoods:

1. Copies of press articles on the take-over of Argos by GUS, April 1998