

# Decision of the Competition and Markets Authority

Supply of Rangers FC-branded clothing  
Case 50930

27 September 2022

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# 1. Introduction and next steps

- 1.1 By this decision (the '**Decision**'), the Competition and Markets Authority ('**CMA**') has concluded that the persons listed below (each a '**Party**', together the '**Parties**') have infringed the prohibition in section 2(1) (the '**Chapter I prohibition**') of the Competition Act 1998 (the '**Act**'):
- (a) Elite Sports Group Limited<sup>1</sup> and its parent company Elite Corporation Limited<sup>2</sup> (together, '**Elite**');
  - (b) JD Sports Fashion Plc ('**JD Sports**');<sup>3</sup> and
  - (c) The Rangers Football Club Limited ('**TRFC**')<sup>4</sup> and its parent company Rangers International Football Club Plc<sup>5</sup> (together, '**Rangers**').
- 1.2 The CMA finds that between 26 September 2018 and at least 8 July 2019 Elite and JD Sports were parties to a single and continuous infringement (the '**Single and Continuous Infringement**') to fix retail prices for Rangers-branded clothing products in the UK. The CMA also finds that Rangers participated in the Single and Continuous Infringement, but only insofar as it related to fixing the retail price at which Elite and JD Sports would sell the Rangers 2018 / 2019 season adult short sleeved 'home' replica shirt ('**RFC H18 shirt**') at £60 between 26 September 2018 and at least 15 November 2018. The Single and Continuous Infringement, as well as each of the agreements and/or concerted practices which constitute it, had as its object the prevention, restriction or distortion of competition.
- 1.3 Rangers-branded clothing products, including Rangers replica shirts, are important products for Rangers football fans. Elite and JD Sports accounted for the vast majority of retail sales of Rangers-branded clothing products during the period of the relevant conduct.
- 1.4 The CMA opened an investigation under section 25 of the Act on 15 December 2020.<sup>6</sup> Notices requiring the production of documents and information under section 26 of the Act were sent to each of the Parties on launch. During the course of the investigation the CMA also interviewed a number of witnesses, both on a

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<sup>1</sup> Elite Sports Group Limited (previously known as LBJ Sports Apparel Ltd, until its name was changed to Elite Sports Group Limited on 24 August 2021) is a limited liability company registered in England and Wales, with Company Number 07111486.

<sup>2</sup> Elite Corporation Limited is a limited liability company registered in England and Wales, with Company Number 07111804.

<sup>3</sup> JD Sports Fashion Plc is a public limited company registered in England and Wales, with Company Number 01888425.

<sup>4</sup> The Rangers Football Club Limited is a limited liability company registered in Scotland, with Company Number SC425159.

<sup>5</sup> Rangers International Football Club Plc is a public limited company registered in Scotland, with Company Number SC437060.

<sup>6</sup> The case originally also involved two other parties: Hummel A/S and Greaves Sports Limited. However the investigation into their activities was closed on administrative priority grounds in December 2021 and May 2022 respectively.

voluntary basis and using its compulsory powers. Information and documents were also provided by Elite and JD Sports without recourse to the CMA's formal powers, as part of their obligation to cooperate under leniency. JD Sports approached the CMA for leniency under the CMA's leniency policy<sup>7</sup> on 18 December 2020 and was granted Type B leniency on 1 June 2022.<sup>8</sup> Elite approached the CMA for leniency on 2 February 2021 and was granted Type C leniency on 31 May 2022.

- 1.5 On 7 June 2022, the CMA issued a statement of objections<sup>9</sup> and a draft penalty statement<sup>10</sup> to the Parties.
- 1.6 On 6 September 2022, the CMA decided to settle the case with each of the Parties, after each of the Parties:<sup>11</sup>
- (a) made a clear and unequivocal admission that it had infringed the Chapter I prohibition in the terms set out in the statement of objections;<sup>12</sup>
  - (b) confirmed that it had ceased the infringing behaviour and committed that it would refrain from engaging again in the same or similar behaviour;
  - (c) accepted that a maximum penalty would be imposed;
  - (d) agreed to cooperate in expediting the process for concluding the CMA's investigation; and
  - (e) agreed not to challenge or appeal against the Decision to the Competition Appeal Tribunal ('**CAT**').
- 1.7 By this Decision the CMA is imposing financial penalties under section 36 of the Act.

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<sup>7</sup> *Applications for leniency and no-action in cartel cases* (OFT1495, adopted by the CMA Board).

<sup>8</sup> [3<]

<sup>9</sup> In accordance with section 31 of the Act and Rules 5 and 6 of The Competition Act 1998 (Competition and Market Authority's Rules) Order 2014, SI 2014/458.

<sup>10</sup> In accordance with section 36(6) of the Act.

<sup>11</sup> CMA8, *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases*, 31 January 2022, paragraphs 14.7 and 14.8.

<sup>12</sup> Including the minor amendments to the statement of objections made by the CMA on 16 August 2022 to reflect limited representations made as part of the settlement process, as per CMA8, paragraphs 14.14 and 14.15.

## 2. Parties and relevant market

### Parties

#### Elite

- 2.1 Elite supplies technical kits and sports merchandising to professional clubs. It offers retail management, white label leisurewear<sup>13</sup> and directly supplies the retail sector as well as operating its own retail channels in the UK.
- 2.2 On 30 March 2018, Elite was appointed by TRFC as exclusive worldwide supplier of official and replica kit for Rangers,<sup>14</sup> and on 11 September 2018 TRFC licensed Elite to deal with the sale of Rangers-branded products.<sup>15</sup> Accordingly, during the period of the Single and Continuous Infringement, Elite manufactured and supplied Rangers-branded products on a retail basis to the public, and on a wholesale basis to retailers.
- 2.3 During the period of the Single and Continuous Infringement Elite sold Rangers-branded products, which it did initially via the online store Gers Online and subsequently also through bricks-and-mortar stores in Glasgow and Belfast, and was seen as Rangers' retail partner.<sup>16</sup>
- 2.4 The CMA considers that Elite's involvement in the Single and Continuous Infringement took place primarily through the following individuals:

- (a) [Director A] (Elite), [§<]; and
- (b) [Employee] (Elite), [§<].

#### JD Sports

- 2.5 JD Sports retails branded sports and casual wear and footwear, both through its network of retail stores and online. During the period of the Single and Continuous

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<sup>13</sup> White label describes a particular type of product where the brand name and logo has been removed from the product and the branding of the purchaser of the product is used instead.

<sup>14</sup> The agreement was effective from 1 June 2018 to the end of the 2020/2021 Scottish Football Premier League and European/Europe League seasons (LLL000001893, Rangers' response dated 1 February 2021 to the CMA's s.26 notice dated 15 December 2020, question 6(a), page 5).

<sup>15</sup> Elite was licensed to do so via two agreements, a non-exclusive rights agreement, which was effective from 15 September 2018, and a retail units agreement, which took the form of a subsidiary letter to the non-exclusive rights agreement. The non-exclusive rights agreement was meant to be in place until the end of the 2019/2020 football season. However on 24 October 2018, TRFC was enjoined from continuing to perform the non-exclusive rights agreement (and though the injunction did not apply to the retail units agreement, TRFC treated it as such). Notwithstanding this, according to Rangers Elite continued to exercise its rights and sold Rangers-branded products at a retail and wholesale level for the 2018/2019 and 2019/2020 football seasons (LLL000001893, Rangers' response dated 1 February 2021 to the CMA's s.26 notice dated 15 December 2020, question 6(a), page 5).

<sup>16</sup> LLL000001855, Elite's response dated 11 January 2021 to the CMA's s.26 notice dated 15 December 2020, question 6, page 3; LLL000001893, Rangers' response dated 1 February 2021 to the CMA's s.26 notice dated 15 December 2020, question 6(a), page 6; transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, pages 24, 39 and 40; transcript of interview with [Director A] (Rangers) held on 30 July 2021, LLL000016775, page 34.

Infringement, JD Sports retailed Rangers-branded clothing products supplied on a wholesale basis by Elite. During that period, JD Sports had an arrangement with Elite to purchase a minimum value of Rangers-branded clothing products in return for being the exclusive high street retailer of Rangers products, with the exception of certain independent retailers such as Greaves Sports, and of Elite.<sup>17</sup>

2.6 The CMA considers that JD Sports' involvement in the Single and Continuous Infringement took place primarily through the following individuals:

- (a) [Employee A] (JD Sports), [redacted];
- (b) [Employee B] (JD Sports), [redacted];
- (c) [Employee C] (JD Sports), [redacted]; and
- (d) [Employee D] (JD Sports), [redacted].

## Rangers

2.7 TRFC is the registered owner of all trademarks owned by the Rangers International Football Club Plc group and is the main operating vehicle for Rangers Football Club, a football club in the Scottish Professional Football League. TRFC licenses third parties to use those trademarks and other intellectual property required for the manufacture and sale of Rangers-branded products.

2.8 During the period of the Single and Continuous Infringement, Rangers did not manufacture, supply, distribute or retail Rangers-branded products itself, instead appointing third parties to perform these roles.<sup>18</sup> As set out at paragraph 2.2, in March 2018, TRFC appointed Elite as exclusive worldwide supplier of official and replica kit, and in September 2018, it licensed Elite to deal with the sale of Rangers-branded products.

2.9 The CMA considers that Rangers' involvement in the Single and Continuous Infringement took place primarily through the following individuals:

- (a) [Director A] (Rangers), [redacted]; and
- (b) [Director B] (Rangers), [redacted].<sup>19</sup>

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<sup>17</sup> LLL000000102.

<sup>18</sup> LLL000001891, Rangers' response dated 22 December 2020 to the CMA's s.26 notice dated 15 December 2020, question 1, page 2; LLL000001893, Rangers' response dated 1 February 2021 to the CMA's s.26 notice dated 15 December 2020, question 7(b), page 9; and LLL000016688, Rangers' letter to the CMA dated 1 March 2022 and Rangers' response to the CMA's s.26 notice dated 4 February 2022.

<sup>19</sup> [Director B] (Rangers) carried out this role on a [redacted] and no longer works at Rangers (LLL000001891, Rangers' response dated 22 December 2020 to the CMA's s.26 notice dated 15 December 2020, question 2, page 3). The CMA was told that [Director B] (Rangers) [redacted] (transcript of interview with [Director B] (Rangers) held on 4 November 2021, LLL000016787, pages 8 and 9).

## Relevant market

### Introduction

2.10 The CMA has formed a view of the relevant market in order to calculate the Parties' 'relevant turnover' in the markets affected by the Single and Continuous Infringement, for the purposes of establishing the level of the financial penalties that the CMA has decided to impose.<sup>20</sup>

### Relevant product market

2.11 The process of defining the relevant market starts with the focal product or products that are the subject of the investigation. In this case, the focal products of the Single and Continuous Infringement are:

- (a) Rangers replica shirts (and specifically the RFC H18 shirt); and
- (b) the range of Rangers-branded clothing products sold by JD Sports and Elite. That includes Rangers replica kit<sup>21</sup> and other Rangers-branded clothing products.

2.12 To define the relevant markets, the CMA has considered the following questions:

- (a) whether any of the relevant markets should include merchandise associated with other football clubs or with national teams;
- (b) whether Rangers replica shirts are part of a wider market for Rangers replica kit;
- (c) whether Rangers replica kit is part of a wider market for Rangers-branded products; and
- (d) whether other Rangers-branded clothing products are part of a wider market with non-clothing merchandise.

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<sup>20</sup> CMA73, *Guidance as to the appropriate amount of a penalty*, 16 December 2021 ('Penalty Guidance'), paragraphs 2.1 and 2.10 to 2.13. When assessing the relevant market for these purposes, it is not necessary to carry out a formal analysis: the relevant market may properly be assessed on a broad view of the particular trade affected by the infringement in question. *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, paragraphs 169 to 173 and 189; *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, paragraphs 176 to 178. See also judgment of 6 July 2000, *Volkswagen AG v Commission* T-62/98, EU:T:2000:180, paragraph 230 and judgment of 12 January 1993, *SPO and Others v Commission* T-29/92, EU:T:1995:34, paragraph 74, on the circumstances in which market definition is required.

<sup>21</sup> These are authentic reproductions of the short- and long-sleeved shirt, shorts and socks (home, away, third, goalkeeper and special edition) in adult, junior and infant sizes to which Rangers' trademark is applied and which are worn by Rangers' team players when competing in football tournaments.

***Whether any of the relevant markets should include merchandise associated with other football clubs or with national teams***

- 2.13 The CMA's view is that other clubs' merchandise is not part of the same market as Rangers merchandise because demand side substitution between the replica kit of different teams is virtually non-existent. As noted by the Office of Fair Trading ('OFT') in *Price-fixing of Replica Football Kit*,<sup>22</sup> those supporters who are sufficiently committed to Rangers to purchase Rangers merchandise will not consider other clubs' merchandise to be a suitable substitute. As regards supply-side substitution, manufacturers are generally exclusively licensed by a football club to manufacture all replica kit items, thus precluding other manufacturers from supplying replica kit for that club.
- 2.14 The OFT also considered whether the replica kit of national teams might be substitutable. However, it concluded that purchases of the national team replica kit would typically be an additional purchase rather than a substitute for the kits of their own clubs. For the same reasons, the CMA's view is that the branded products of national teams do not form part of the same product market as Rangers-branded clothing products.

***Whether Rangers replica shirts are part of a wider market for Rangers replica kit***

- 2.15 The CMA has considered whether Rangers replica shirts are part of a wider market for Rangers replica kit. This question arises, in particular, because Rangers' involvement in the Single and Continuous Infringement related only to the fixing of the retail price for a particular Rangers replica shirt.
- 2.16 In *Price-fixing of Replica Football Kit*, the OFT found that all but one of the agreements covered by the decision had as their object the price-fixing of replica shirts (one of the agreements extended to certain licensed merchandise). Nevertheless, the OFT decided that the most appropriate market definition in that case was a club's replica kit, and that the relevant product market was not narrower than that. This was on the basis that sales of replica shirts were the most important item of replica kit and drove sales of replica shorts and socks, and that a replica kit is designed and marketed at launch as a single product, each item having the visible purpose of supporting a particular club or team. The CMA understands that these key facts remain true today. Further, the OFT observed that manufacturers are normally licensed to manufacture and distribute all items of the kit together under an exclusive licence. The CMA notes that Elite's license covered all items of the kit as well as all other Rangers-branded products. In light of all of this, the CMA considers that Rangers replica shirts are part of a wider market for Rangers replica kit.

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<sup>22</sup> *Price-fixing of Replica Football Kit*, OFT decision No CA98/06/2003, 1 August 2003. This was upheld by the Court of Appeal in *JJB Sports PLC v OFT* [2006] EWCA Civ 1318, paragraph 189.



### ***Whether Rangers replica kit is part of a wider market for Rangers-branded products***

- 2.17 The CMA's view is that Rangers replica kit is not part of the same market as other Rangers-branded products. When the OFT considered this in 2003, it took the view that other licensed merchandise, including clothing and non-clothing, is unlikely to be substitutable with replica kit even when it is a similar item of clothing. The OFT set out a range of characteristics that set replica kit apart, including that it is more or less identical to the kit worn by the team when competing in tournaments; it is seen as a prime means of showing support; a significant number of consumers replace their replica kit when the new season's replica kit is released; and it commands a significantly higher price than other similar items of clothing.
- 2.18 The CMA understands that these points still apply today and so the CMA's view is that Rangers replica kit does not form part of a wider product market for Rangers-branded products.

### ***Whether other Rangers-branded clothing products are part of a wider market with non-clothing merchandise***

- 2.19 The CMA's view is that other Rangers-branded clothing products are not part of a wider market with non-clothing Rangers merchandise. While different types of Rangers merchandise are substitutes in terms of demonstrating support for Rangers, non-clothing items are likely to be less substitutable with clothing in terms of other attributes. Further, while Elite retailed some non-clothing merchandise during the period of the Single and Continuous Infringement, JD Sports did not do so. The CMA has therefore decided not to include non-clothing merchandise in the relevant product market for the Single and Continuous Infringement.

### ***Market for the grant of Rangers intellectual property licenses***

- 2.20 The CMA's view is that there is a further product market that is potentially relevant for the purpose of determining the level of any penalty on Rangers in this case, namely the market for the granting of intellectual property licences for the manufacture, distribution and/or retail of Rangers replica kit. This is because, during the period of the Single and Continuous Infringement, Rangers was not active in the relevant markets (as it was not involved in the retail sale of Rangers-branded clothing products itself), and this is the same approach taken by the OFT in *Price-fixing of Replica Football Kit*.
- 2.21 The right to use relevant intellectual property is an essential input for the manufacture and supply of Rangers-branded products. The product market for the granting of intellectual property licences for use of the Rangers replica kit is not part of the same product market as the replica kit itself. However, the market for intellectual property licences is relevant when considering the agreement and/or concerted practice in which Rangers was involved. The value of Rangers intellectual property licences is affected by downstream markets for the related

Rangers-branded products. This creates an interest for Rangers, as licensor, in the downstream markets for Rangers-branded products.

- 2.22 The only licensor involved in this case is Rangers and it only licenses Rangers-branded products. Therefore, for the purpose of calculating penalties, the CMA does not need to decide whether the relevant market includes any other club's intellectual property.
- 2.23 The affected product in the agreement and/or concerted practice in which Rangers was involved is Rangers replica shirts. As above, the CMA has considered whether, in this case, the relevant market for that agreement and/or concerted practice should be wider than Rangers replica shirts and should also include the other products that comprise Rangers replica kit (shorts and socks).
- 2.24 In *Price-fixing of Replica Football Kit*, the OFT found that, for intellectual property licences, all replica kit products are contained in the same relevant market. This was on the basis that each product comprising a replica kit is not the subject of separate licensing arrangements or distribution and marketing. Further, the OFT found that, although it might be possible for each product to be manufactured or sold by different undertakings, in practice this does not happen and the value of licences for replica kit would be very much lower if licences were not granted exclusively to one manufacturer for all replica kit products. The CMA understands that these key facts remain true today. For example, Rangers had appointed Elite as the exclusive manufacturer during the period of the Single and Continuous Infringement. Based on this, the CMA's view is that the appropriate relevant product market for the purpose of determining any penalty in respect of Rangers' involvement in the Single and Continuous Infringement is the supply of intellectual property rights for Rangers replica kit.

### **Relevant geographic market**

- 2.25 As regards both the markets for Rangers replica kit and for other Rangers-branded clothing, the CMA considers that the relevant geographical markets are at least UK-wide. As the OFT found in *Price-fixing of Replica Football Kit*, major clubs have supporters located across the UK who purchase replica shirts and other club-branded clothing. Rangers is a major club, whose branded products are also available for delivery throughout the UK via the internet.
- 2.26 As regards the market for the supply of intellectual property rights for Rangers replica kit, given that intellectual property licences for the manufacture or sale of Rangers replica kit cover at least the UK, the CMA's view is that the geographic market is at least UK-wide.

## **Conclusion on the relevant market**

2.27 For the reasons set out above, the CMA has found that for the purposes of determining the level of any penalty in this case for Elite and JD Sports, the relevant product markets are the retail supply of:

- (a) Rangers replica kit in the UK; and
- (b) other Rangers-branded clothing products in the UK.

2.28 For Rangers, the market for the purpose of the calculation of any penalty is the supply of intellectual property rights for Rangers replica kit in the UK.

## 3. The law

3.1 This Chapter sets out the key legal principles, including references to relevant case law and primary and secondary legislation, applied in this Decision.<sup>23</sup>

### Chapter I prohibition

3.2 The CMA's findings are made by reference to the Chapter I prohibition,<sup>24</sup> which prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK.<sup>25</sup>

### Legal principles for establishing the Chapter I prohibition

#### Undertakings

3.3 For the purposes of the Chapter I prohibition, the term 'undertaking' covers '*every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.*'<sup>26</sup> An entity is engaged in 'economic activity' where it conducts any activity '*of an industrial or commercial nature by offering goods and services on the market.*'<sup>27</sup> The concept covers an economic unit, even if in law that unit consists of several natural or legal persons.<sup>28</sup>

#### Coordination between undertakings

#### Agreements

3.4 The Chapter I prohibition is intended to catch a wide range of agreements.<sup>29</sup> The key question is whether there has been '*a concurrence of wills between at least two parties, the form in which it is manifested being unimportant, so long as it constitutes the faithful expression of the parties' intention.*'<sup>30</sup> Courts have also

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<sup>23</sup> Following the UK's exit from the EU, the UK no longer has jurisdiction to apply Article 101 TFEU. However, EU case law applying Article 101 TFEU remains relevant pursuant to section 60A of the Act.

<sup>24</sup> Section 2(1) of the Act.

<sup>25</sup> References to the UK are to the whole or part of the UK: section 2(7) of the Act.

<sup>26</sup> Judgment of 23 April 1991, *Klaus Höfner and Fritz Elser v Macrotron GmbH* C-41/90, EU:C:1991:161, paragraph 21.

<sup>27</sup> Judgment of 16 June 1987, *Commission v Italian Republic* C-118/85, EU:C:1987:283, paragraph 7.

<sup>28</sup> Judgment of 10 September 2009, *Akzo Nobel NV and Others v Commission* C-97/08 P, EU:C:2009:536, paragraph 55 and the case law cited; *Sainsbury's v Mastercard* [2016] CAT 11 at 352-357 and 363.

<sup>29</sup> Judgment of 15 July 1970, *ACF Chemiefarma v Commission* C-41/69, EU:C:1970:71, paragraphs 106 to 114; judgment of 26 October 2000, *Bayer AG v Commission* T-41/96, EU:T:2000:242, paragraph 71; judgment of 8 July 1999, *Commission v Anic Partecipazioni* C-49/92 P, EU:C:1999:356, paragraph 81; *Argos Limited and Littlewoods Limited v OFT* [2004] CAT 24, paragraph 658.

<sup>30</sup> Judgment of 27 September 2006, *Dresdner Bank v Commission* cases T-44/02 etc, EU:T:2006:271, paragraph 55, citing judgment of 26 October 2000, *Bayer AG v Commission* T-41/96, EU:T:2000:242, paragraph 69 (upheld on appeal in *BAI and Commission v Bayer*, joined cases C-2/01 P and C-3/01 P, EU:C:2004:2, paragraphs 96 and 97) and judgment of 17 December 1991, *Hercules Chemicals v Commission* T-7/89, EU:T:1991:75, paragraph 256.

described the concept of an agreement as a 'common understanding' between the parties.<sup>31</sup>

- 3.5 While it is essential to show the existence of a joint intention to act on the market in a specific way in accordance with the terms of the agreement, it is not necessary to establish a joint intention to pursue an anti-competitive aim.<sup>32</sup>

### **Concerted practices**

- 3.6 A concerted practice is '*a form of coordination between undertakings which without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.*'<sup>33</sup>

- 3.7 Each economic operator must determine independently the policy it intends to adopt on the market.<sup>34</sup> This principle precludes any direct or indirect contact between undertakings the object or effect of which is to create conditions of competition which do not correspond to the normal conditions of the market in question.<sup>35</sup>

- 3.8 It follows that a concerted practice '*implies, besides undertakings concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two.*'<sup>36</sup> However, that does not necessarily mean that the conduct should produce the concrete effect of restricting, preventing or distorting competition.<sup>37</sup>

- 3.9 Where an undertaking participating in a concerted practice remains active on the market, there is a presumption that it will take account of information exchanged with its competitors when determining its own conduct on the market.<sup>38</sup> For the presumption to be rebutted, the parties concerned must adduce evidence of this.<sup>39</sup>

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<sup>31</sup> For example, in its judgment in *Hitachi*, the EU General Court held that '*the Commission was right to find that the common understanding constituted an agreement between undertakings within the meaning of Article [101](1).*' Judgment of 12 July 2011, *Hitachi v Commission* T-112/07, EU:T:2011:342, paragraph 272.

<sup>32</sup> Judgment of 27 September 2006, *GlaxoSmithKline Services Unlimited v Commission* T-168/01, EU:T:2006:265, paragraph 77 (upheld on appeal in *GlaxoSmithKline Services Unlimited v Commission* joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610).

<sup>33</sup> Judgment of 14 July 1971, *ICI v Commission* C-48/69, EU:C:1972:70, paragraph 64.

<sup>34</sup> Judgment of 16 December 1975, *Suiker Unie and Others v Commission* joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, EU:C:1975:174, paragraph 173.

<sup>35</sup> Judgment of 14 July 1981, *Züchner v Bayerische Vereinsbank* C-172/80, EU:C:1981:178, paragraph 14; judgment of 16 December 1975, *Suiker Unie and Others v Commission* joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-74, EU:C:1972:70, paragraph 174; judgment of 8 July 1999, *Commission v Anic Partecipazioni* C-49/92 P, EU:C:1999:356, paragraph 117; *Balmoral Tanks Limited v Competition and Markets Authority* [2017], CAT 23, paragraph 41.

<sup>36</sup> Judgments of 8 July 1999, *Commission v Anic Partecipazioni* C-49/92P EU:C:1999:356, paragraph 118; and *Hüls AG v Commission* C-199/92 P, ECR I-4287, paragraph 161. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(ix)].

<sup>37</sup> Judgment of 8 July 1999, *Commission v Anic Partecipazioni* C-49/92P EU:C:1999:356, paragraph 124. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(xi)].

<sup>38</sup> Judgment of 8 July 1999, *Commission v Anic Partecipazioni* C-49/92P, EU:C:1999:356, paragraph 121. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, paragraph 206(x).

<sup>39</sup> Judgment of 19 March 2015, *Dole Food Co. v Commission (Bananas)* C-286/13 P, EU:C:2015:184, paragraph 127.

The presumption can be rebutted, for example, if an undertaking attending a meeting can demonstrate that it at least ended its participation in the meeting as soon as the anti-competitive nature of the gathering became apparent<sup>40</sup> and publicly distanced itself from what was discussed in order not to give the impression to the other participants that it subscribed to the aim of the meeting and would act in conformity with it.<sup>41</sup>

### **Agreements and/or concerted practices**

3.10 The concepts of agreement and concerted practice are fluid and may overlap; they are distinguishable from each other only by their intensity and the forms in which they manifest themselves.<sup>42</sup> It is therefore not necessary to distinguish between agreements and concerted practices, or to characterise conduct as exclusively an agreement or a concerted practice.<sup>43</sup>

### **Object of preventing, restricting or distorting competition**

3.11 Agreements and concerted practices that have the object of preventing, restricting or distorting competition are those forms of coordination between undertakings that can be regarded, by their very nature, as being harmful to the proper functioning of competition.<sup>44</sup> They include agreements and concerted practices that contain obvious restrictions of competition such as price-fixing, market sharing or the control of outlets.<sup>45</sup>

3.12 The 'essential legal criterion' for a finding of anti-competitive object is that the coordination between undertakings '*reveals in itself a sufficient degree of harm to competition*' such that there is no need to examine its effects.<sup>46</sup>

3.13 It is settled law that infringements taking the form of those described in the paragraph below infringe the Chapter I prohibition by object. As also set out further below, subjective intentions are not a necessary factor for a finding that the object

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<sup>40</sup> Judgment of 20 March 2002, *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft and Others v Commission* T-9/99, EU:T:2002:70, paragraph 223.

<sup>41</sup> Judgment of 6 April 1995, *Tréfileurope Sales v Commission* T-141/89, ECR II-791, paragraph 85; judgment of 17 December 1991, *Hercules Chemicals v Commission* T-7/89, EU:T:1991:75, paragraph 232 and judgment of 10 March 1992, *Solvay v Commission* T-12/89, ECR 11-907, paragraphs 98-100.

<sup>42</sup> Judgment of 4 June 2009, *T-Mobile Netherlands* C-8/08, EU:C:2009:343, paragraph 23; judgment of 8 July 1999, *Commission v Anic Partecipazioni* C-49/92P, EU:C:1999:356, paragraph 131 and *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, [206(ii)].

<sup>43</sup> *Argos Ltd and Littlewoods Ltd v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, paragraphs 21 and 22. See also, judgment of 8 July 1999, *Commission v Anic Partecipazioni SpA* C-49/92 P, EU:C:1999:356, paragraphs 81, 131 and 132.

<sup>44</sup> Judgment of 11 September 2014, *Groupement des cartes bancaires v Commission* C-67/13 P, EU:C:2014:2204, paragraph 50; judgment of 14 March 2013, *Allianz Hungária Biztosító and Others v Gazdasági Versenyhivatal* C-32/11, EU:C:2013:160, paragraph 35 and the case law cited.

<sup>45</sup> Judgment of 15 September 1998, *European Night Services v Commission* T-374/94, EU:T:1998:198, paragraph 136.

<sup>46</sup> Judgment of 11 September 2014, *Groupement des cartes bancaires v Commission* C-67/13 P, EU:C:2014:2204, paragraphs 49 and 57; judgment of 20 January 2016, *Toshiba v Commission ('Power Transformers')* C-373/14P, EU:C:2015:427, paragraph 26.

of the conduct was anti-competitive. Nor is it a relevant factor whether or not the arrangement was implemented.

### **Price fixing and the exchange of commercially sensitive information**

- 3.14 The Chapter I prohibition applies, among other things, to agreements or concerted practices which '*directly or indirectly fix purchase or selling prices or any other trading conditions.*'<sup>47</sup> Price-fixing agreements are, by their very nature, restrictive of competition.<sup>48</sup> An agreement not to undercut a competitor's price has been found to constitute a restriction of competition by object.<sup>49</sup>
- 3.15 Information exchange that reduces or removes the degree of uncertainty as to the operation of the market may amount to an infringement on a standalone basis.<sup>50</sup> However, in the case of cartels,<sup>51</sup> infringing exchanges of information may also occur to reinforce, facilitate or cause the operation of the cartel, particularly by exchanging confidential and commercially sensitive information. For example, price fixing is often achieved through the sharing of sensitive price information in order to align prices between competitors or to check compliance with an agreement to fix prices. The concerted practice of competitors sharing between themselves commercially sensitive information about future pricing intentions has been found to constitute a restriction of competition by object.<sup>52</sup>

### **Subjective intentions**

- 3.16 The object of an agreement or concerted practice is to be identified primarily from an examination of objective factors, such as the content of its provisions, its objectives, and the legal and economic context of which it forms part.<sup>53</sup>
- 3.17 The object of an agreement or concerted practice is not assessed by reference to the parties' subjective intentions when they enter into it.<sup>54</sup> Anti-competitive subjective intentions on the part of the parties can be taken into account in the

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<sup>47</sup> Section 2(2)(a) of the Act.

<sup>48</sup> Judgment of 30 January 1985, *BNIC v Clair* C-123/83, EU:C:1985:33, paragraph 22.

<sup>49</sup> Judgment of 11 September 2014, *Groupement des Cartes Bancaires v European Commission* C-67/13 P, BNP Paribas (intervening) and ors (intervening), ECLI:EU:C:2014:2204.

<sup>50</sup> Judgment of 19 March 2015, *Dole Food v Commission* C-286/13 P, EU:C:2015:184, paragraph 121; the UK CAT in *Balmoral Tanks v CMA* [2017] CAT 23, paragraphs 41-50.

<sup>51</sup> For purposes of leniency, cartels are defined as agreements and/or concerted practices which infringe the Chapter I prohibition and involve price-fixing (including resale price maintenance), bid-rigging (collusive tendering), the establishment of output restrictions or quotas and/or market sharing or market-dividing. See the CMA's guidance *Applications for leniency and no-action in cartel cases* (OFT1495, adopted by the CMA Board), paragraph 2.2.

<sup>52</sup> Judgment of 19 March 2015, *Dole Food v Commission* C-286/13 P, EU:C:2015:184, paragraphs 129-134.

<sup>53</sup> Judgment of 14 March 2013, *Allianz Hungária Biztosító and Others* C-32/11, EU:C:2013:160, paragraph 36; judgment of 11 September 2014, *Groupement des cartes bancaires v Commission* C-67/13 P, EU:C:2014:2204, paragraph 53.

<sup>54</sup> Judgment of 28 March 1984, *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission*, joined cases 29/83 and 30/83, EU:C:1984:130, paragraphs 25 and 26.

assessment, but they are not a necessary factor for a finding that the object of the conduct was anti-competitive.<sup>55</sup>

## Implementation

3.18 Parties cannot avoid liability for an infringement by arguing that they played a limited part in setting up an agreement or concerted practice; that they were not (or were not always) fully committed to the agreement or concerted practice; that the agreement or concerted practice was never implemented or put into effect by them; or that they ‘cheated’ on the agreement or concerted practice.<sup>56</sup>

## Participation in a Chapter I infringement

3.19 The Chapter I prohibition is not limited in its application to undertakings operating on the market affected by the infringement, or in neighbouring markets, or in markets upstream or downstream of that affected by the infringement.<sup>57</sup> It is clear from case law that an infringing agreement or concerted practice does not only arise if there is a ‘*mutual restriction of freedom of action on one and the same market on which all the parties are present*’; indeed only the commercial conduct of one of the parties needs to be affected by the terms of the arrangements in question.<sup>58</sup> The participation of an undertaking in an agreement or concerted practice, and/or as part of a broader ‘single and continuous infringement,’ may therefore infringe the Chapter I prohibition regardless of the markets in which it operates, provided it contributes to restricting competition in a given market.<sup>59</sup>

3.20 An undertaking will be considered to have participated in an infringement and will be liable for the various elements comprising the infringement where ‘*the undertaking concerned intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same*

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<sup>55</sup> Judgment of 14 March 2013, *Allianz Hungária Biztosító and Others* C-32/11, EU:C:2013:160, paragraph 37 and judgment of 11 September 2014, *Groupement des cartes bancaires v Commission* C-67/13 P, EU:C:2014:2204, paragraph 54.

<sup>56</sup> Judgment of 14 March 2013, *Dole v Commission* T-588/08, EU:T:2013:130, paragraph 484; judgment of 1 February 1978, *Miller v Commission* C-19/77, ECR, EU:C:1978:19, paragraph 7; judgment of 21 February 1984, *Hasselblad v Commission* C-86/82, ECR, EU:C:1984:65, paragraph 46; judgment of 15 March 2000, *Cimenteries CBR v Commission* T-25/95 ECR, EU:T:2000:77 (‘Cimenteries’), paragraphs 1389 and 2557 (this judgment was upheld on liability by the CJEU in *Aalborg Portland and Others v Commission*, joined cases C-204/00 P etc., EU:C:2004:6); judgment of 8 July 1999, *Commission v Anic Partecipazioni* C-49/92 P, EU:C:1999:356, paragraphs 79 and 80; judgment of 11 January 1990, *Sandoz v Commission* C-277/87, EU:C:1990:6, paragraph 3.

<sup>57</sup> Judgment of 22 October 2015, *AC-Treuhand AG v Commission* C-194/14 P, EU:C:2015:717, paragraph 34.

<sup>58</sup> Judgment of 22 October 2015, *AC-Treuhand AG v Commission* C-194/14 P, EU:C:2015:717, paragraphs 34-35 and the case law cited in that judgment; judgment of 10 November 2017, *ICAP v Commission* T-180/15, ECLI:EU:T:2017:795, paragraph 103.

<sup>59</sup> Judgment of 22 October 2015, *AC-Treuhand AG v Commission* C-194/14 P, EU:C:2015:717, paragraph 35.



*objectives or that it could reasonably have foreseen it and that it was prepared to take the risk.*<sup>60</sup>

- 3.21 Further, an undertaking will be considered to have participated in an infringement even if it has played a passive role. The courts have held, for example, that an undertaking being present in meetings at which anti-competitive agreements were concluded, without that undertaking clearly opposing them, is indicative of collusion capable of rendering the undertaking liable, since a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, encourages the continuation of the infringement and compromises its discovery.<sup>61</sup>
- 3.22 An undertaking active on a market different from that affected by the cartel can be liable for all or part of a cartel, whether such involvement is described as a facilitator<sup>62</sup> or as a direct participant (which is a question of fact in each case). Factors that may be relevant to the assessment of whether or not an undertaking is a direct participant include whether an undertaking took a direct and leading role in a cartel.<sup>63</sup> An undertaking is also more likely to be characterised as a direct participant in a cartel where it has a direct and immediate interest in the successful execution of an anti-competitive agreement.<sup>64</sup>

### Single and continuous infringement

- 3.23 A single and continuous infringement of the Chapter I prohibition refers to a pattern of conduct involving a series of agreements and/or concerted practices entered into over a period of time where the practices at issue are interlinked in that they pursue a common anti-competitive objective. This can be the result of *'a series of acts or from continuous conduct, even if one or more aspects of that series of acts*

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<sup>60</sup> Judgment of 22 October 2015, *AC-Treuhand AG v Commission* C-194/14 P, EU:C:2015:717, paragraph 30 and the case law cited in that judgment. Judgment of 10 November 2017, *ICAP v Commission* T-180/15, ECLI:EU:T:2017:795, paragraph 100. On awareness, in judgment of 16 September 2013, *Masco v Commission* T-378/10, EU:T:2013:469, paragraph 70, the General Court confirmed that liability may be attributed to an undertaking for an infringement covering, in part, products that it did not manufacture. Such liability was attributable if it was aware of all the unlawful conduct planned or put into effect by the other participants in the cartel in pursuit of the same objectives.

<sup>61</sup> Judgment of 22 October 2015, *AC-Treuhand AG v Commission* C-194/14 P, EU:C:2015:717, paragraph 31 and the case law cited in that judgment, including judgment of 28 June 2005, *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 142 and 143 and the case law cited.

<sup>62</sup> A recent example of which is the role played by Spire Healthcare Limited, a private hospital operator, in a cartel for services provided by independent consultant ophthalmologists. See CMA decision in Case 50782-1, *Privately funded ophthalmology services*, dated 1 July 2020. Other recent examples include: judgment of 10 November 2017, *ICAP v Commission* T-180/15, ECLI:EU:T:2017:795; Dyball Associates Limited in Ofgem's decision dated 21/7/19 in respect of a market-sharing cartel for domestic energy customers.

<sup>63</sup> Judgment of 8 September 2009, *Deltafina v Commission* T-29/05, EU:T:2010:355 in which the General Court confirmed the European Commission's finding that Deltafina, which was not itself active in the Spanish raw tobacco processing market in which a cartel took place (but was active in the market immediately downstream from that on which the cartel took place), was a participant in the cartel because of its *'direct and leading role which [was not] confined to the role of external coordinator and/or facilitator'*, see paragraphs 51, 110 and 112.

<sup>64</sup> Opinion of Advocate General Bobek, judgement of 2 April 2020, *Budapest Bank and Others* C-228/18, EU:C:2019:678, paragraphs 100 to 102. This was an Article 267 TFEU reference for a preliminary ruling from the Hungarian Court.

*or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of that provision. Accordingly, if the different actions form part of an “overall plan”, because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.*<sup>65</sup>

3.24 The pattern of conduct may also vary and adapt to new circumstances, sub-agreements or inner circles of closer cooperation may be established, and new implementing mechanisms developed. Some participants may drop out, others may join in, and not every undertaking may necessarily be involved in every aspect of the infringing arrangement.<sup>66</sup>

3.25 Three conditions need to be satisfied in order that an undertaking’s liability for a single and continuous infringement is established.<sup>67</sup> This will happen where:

3.25.1 the agreements and/or concerted practices shared an overall plan pursuing a common objective or objectives

What might otherwise appear to be separate agreements and/or concerted practices must have an ‘identical’ purpose or object so that they form ‘*part of a series of efforts made by the undertakings in question in pursuit of a single economic aim.*’<sup>68</sup> Several factors are relevant to assessing whether there is an overall plan pursuing a common objective (or objectives).<sup>69</sup> These include the identity (or diversity) of the goods or services concerned, albeit a single and continuous infringement is not necessarily limited to a single product or to substitutable products only.<sup>70</sup>

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<sup>65</sup> Judgment of 6 December 2012, *Commission v Verhuizingen Coppens NV* C-441/11 P, EU:C:2012:778, paragraph 41.

<sup>66</sup> Judgment of 20 March 2002, *LR af 1998 v Commission* T-23/99, EU:T:2002:75, paragraphs 106-109; judgment of 11 July 1989, *Belasco and others v Commission* C-246/86, EU:C:1989:301, paragraphs 10 to 16; Commission Decision of 21 October 1998, *Pre-Insulated Pipe Cartel*, Case IV/35.691/E-4, paragraphs 129 to 134; judgment of 22 October 2015, *AC-Treuhand AG v Commission* C-194/14 P, EU:C:2015:717, paragraph 132.

<sup>67</sup> Judgment of 8 July 1999, *Commission v Anic Partecipazioni* C-49/92 P, EU:C:1999:356, paragraph 8.

<sup>68</sup> Judgment of 8 July 1999, *Commission v Anic Partecipazioni* C-49/92 P, EU:C:1999:356, paragraph 197.

<sup>69</sup> Such factors include the extent to which the separate agreements and/or concerted practices involve identical: objectives (or diversity) of the practices at issue; goods or services concerned; participating undertakings; detailed rules for implementation of the plan; natural persons; geographical scope of the practices at issue. For example, judgment of 12 December 2012, *Almamet v Commission* (‘Calcium carbide and magnesium based reagents for the steel and gas industries’) T-410/09, EU:T:2012:676, paragraph 174 and the case law cited.

<sup>70</sup> Judgment of 12 December 2012, *Almamet v Commission* (‘Calcium carbide and magnesium based reagents for the steel and gas industries’) T-410/09, EU:T:2012:676, paragraphs 171–175; *Bathroom Fittings and Fixtures*: judgment of 16 September 2013, *Masco Corp v Commission* T-378/10, EU:T:2013:469; COMP/39181, Commission Decision of 1 October 2008, *Candle Waxes*, paragraphs 287–296, upheld on appeal Case T-566/08 *Total Raffinage Marketing v Commission* (‘Candle Waxes’) EU:T:2013:423, paragraphs 270–273 (appeal on other grounds mostly dismissed, Case C-634/13P EU:C:2015:614).

The common objective must go beyond a general reference to the distortion of competition in the market<sup>71</sup> but the conduct may nonetheless encompass a variety of different practices.<sup>72</sup>

It is not necessary to demonstrate that the 'series of efforts' were also complementary in nature.<sup>73</sup> However, an absence of complementarity can call into question the existence of an overall plan pursuing a common objective.<sup>74</sup>

The continuity of a practice throughout time is another feature of a single and continuous infringement. However, in the context of an overall plan, the courts have confirmed that the fact that there are certain gaps in the sequence of events established does not mean that the infringement cannot be regarded as uninterrupted. The question of whether or not a gap is long enough to constitute an interruption of the infringement cannot be examined in the abstract and should be assessed in the context of the functioning of the cartel in question.<sup>75</sup>

### 3.25.2 through its own conduct, each undertaking intended to contribute to the common objective(s) pursued by all the participants

An undertaking's intention to contribute to the overall objective pursued can be inferred from its participation in at least one element of the relevant conduct.<sup>76</sup> Its intention to contribute to the overall objective must not be

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<sup>71</sup> Judgment of 12 December 2007, *BASF AG and UCB SA v Commission* T-101/05 and T-111/05, EU:T:2007:380, paragraph 180. By way of example, in judgment of 11 July 2013, *Team Relocations NV v Commission* C-444/11 P, EU:C:2013:464 the common objective was to establish and maintain a high price level for the provision of international removal services in Belgium and to share this market.

<sup>72</sup> Judgment of 24 March 2011, *Aalberts Industries v Commission* T-385/06, EU:T:2011:114, paragraph 105, the Commission found a single and continuous infringement in the copper fittings market which consisted in fixing prices, agreeing on price lists, agreeing on discounts and rebates, agreeing on implementation mechanisms for introducing price increases, allocating national markets, allocating customers and exchanging other commercial information and also in participating in regular meetings and in maintaining other contacts intended to facilitate the infringement. The Commission concluded, however, that '*since the objective of the anti-competitive practices remained the same, namely collusion on prices in relation to fittings, the fact that certain characteristics or the intensity of those practices changed is not conclusive.*'

<sup>73</sup> Judgment of 5 December 2013, *Siemens AG v Commission* C-239/11, EU:C:2013:866, paragraphs 247-248.

<sup>74</sup> Judgment of 12 December 2012, *Almamet vs Commission* T-410/09, ECLI:EU:T:2012:676, paragraph 154; judgment of 6 February 2014, *AC Treuhand v Commission* T-27/10, EU:T:2014:59, paragraph 241; judgment of 12 December 2007, *BASF and UCB v Commission* T-101/05, EU:T:2007:380, paragraphs 179-181; and judgment of 5 December 2013, *Siemens AG v Commission* C-239/11, EU:C:2013:866, paragraph 248.

<sup>75</sup> Judgment of 2 February 2012, *Denki Kagaku v Commission* T-83/08, ECLI:EU:T:2012:48, paragraphs 223-224. In this case, '*The cartel extended over a number of years and, accordingly, a gap of nine months between the various manifestations of that cartel, during which the applicants did not distance themselves from it, is immaterial.*' By contrast, in judgment of 17 May 2013, *Trelleborg Industrie SAS v Commission*, T-147/09, ECLI:EU:T:2013:259 an 18-month period in the course of the cartel, for which there was no evidence of anti-competitive contacts between the undertakings, was regarded as breaking the continuity of the overall plan, paragraph 68. In *Alloy Surcharge*, a single meeting was regarded as the basis of a four-year overall plan, in view of the fact that the reference values fixed at this single meeting were used throughout that four-year period in the calculation of the alloy surcharge (Judgment of 14 July 2005, *ThyssenKrupp Stainless GmbH and ThyssenKrupp Acciai speciali Terni SpA v Commission* C-65/02 P and C-73/02 P, EU:C:2005:454, paragraph 39).

<sup>76</sup> In judgment of 15 March 2000, *Cimenteries CBR v Commission* T-25/95 ECR, EU:T:2011:286, paragraph 4123, a single and continuous infringement was found to exist on the ground that '*[e]ach party whose participation in the*

confused with its individual motivations for behaving as it did which are not relevant to the assessment of this second condition.<sup>77</sup> An undertaking's conduct need not be identical to that of other participants in the single and continuous infringement for it to be found to have intended to contribute to the achievement of the common objectives.<sup>78</sup> A change in the number or identity of the participating undertakings does not necessarily rule out that the infringement is continuing.<sup>79</sup>

3.25.3 each undertaking was aware of the offending conduct (planned or put into effect) of the other participants in pursuit of the same objective(s) or each undertaking could reasonably have foreseen it and was prepared to take the risk that it would occur<sup>80</sup>

It is not necessary for an undertaking to be aware of the full detail of all the participants' activities to be held liable for the entire single and continuous infringement, so long as it had sufficient awareness of the overall plan and intended to contribute to it.<sup>81</sup>

3.26 The courts have held that this approach is consistent with the principle of personal responsibility for infringements and that it neither neglects the individual analysis of evidence against an undertaking nor breaches the rights of defence of the undertakings involved.<sup>82</sup>

### ***Liability for a single and continuous infringement***

3.27 The finding of the existence of a single and continuous infringement is separate from the question of whether liability for the infringement as a whole is imputable to an undertaking.<sup>83</sup>

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*Cembureau agreement is established contributed, at its own level, to the pursuit of the common objective by participating in one of more of the implementing measures referred to in the contested decision.'*

<sup>77</sup> In judgment of 10 November 2017, *Icap Plc v European Commission* T-180/15, EU:T:2017:795, Icap argued that it did not intend to contribute to the common objective pursued by the other banks, it merely had the intention of satisfying the wishes of a sole trader. However, the Court held that Icap's argument was based on a '*confusion between the motives of Icap, which may indeed have consisted in the desire to satisfy the requests of a trader, and the knowledge that its conduct had the objective of facilitating the manipulation of rates...*', paragraph 181.

<sup>78</sup> In judgment of 10 November 2017, *Icap Plc v European Commission* T-180/15, EU:T:2017:795, the applicants argued that Icap did not intend to contribute to the common objectives pursued by the other banks. However, the Court held that there was a high degree of complementarity between the conduct of the banks concerned and that of Icap and it necessarily followed that Icap intended to contribute to the achievement of the common objectives pursued by those banks, paragraph 180.

<sup>79</sup> Commission Decision of 21 October 1998, *Pre-insulated Pipes Cartel*, Case IV/35.691, paragraph 134: '*Members may join or leave the cartel from time to time without it having to be treated as a new agreement with each change in participation.*'

<sup>80</sup> Judgment of 16 June 2011, *Team Relocations NV v Commission* T-204/08, EU:T:2011:286, paragraphs 32 to 37; judgment of 8 July 1999, *Commission v Anic Partecipazioni* C-49/92 P, EU:C:1999:356, paragraph 87.

<sup>81</sup> Judgment of 14 December 2006, *Raiffeisen Zentralbank Osterreich v Commission* T-259/02, EU:T:2006:396, paragraph 193.

<sup>82</sup> Judgment of 8 July 1999, *Commission v Anic Partecipazioni* C-49/92 P, EU:C:1999:356, paragraphs 83 to 85 and 203.

<sup>83</sup> Judgment of 26 September 2018, *Infineon Technologies AG v Commission* C-99/17 P, EU:C:2018:773, paragraphs 171 to 177.

- 3.28 Each participating undertaking in a single and continuous infringement may bear personal responsibility not only for its own conduct, but also for the conduct of other participants to the single and continuous infringement.<sup>84</sup> Indeed, *'the mere fact that each undertaking takes part in the infringement in ways particular to it does not suffice to exclude its responsibility for the entire infringement, including conduct put into effect by other participating undertakings but sharing the same anti-competitive object or effect.'*<sup>85</sup> The liability of an undertaking for a single and continuous infringement is not therefore limited by the fact that it did not take part in all aspects of it, or that it played only a minor role in those aspects in which it did take part.<sup>86</sup>
- 3.29 However, an undertaking participating in one or more aspects of a single and continuous infringement is not automatically held liable for the infringement as a whole. Whether an undertaking should have liability beyond its own conduct depends on whether it meets all three limbs of the test described above. The second and third limbs relating respectively to the intention to contribute, through its own conduct, to the common objective and the awareness of the offending conduct of the other participants have particular relevance.<sup>87</sup> In *Fresh Del Monte*,<sup>88</sup> the court referred to the need for evidence of 'subjective intent' which required the authority to establish that these two limbs were met.<sup>89</sup> Thus, where, for example, an undertaking lacks awareness of the offending conduct of the other participants, it is liable only for that conduct for which it has awareness or which it could reasonably have foreseen and was prepared to take the risk that it would occur.<sup>90</sup>

### **Appreciable restriction of competition**

- 3.30 An agreement or concerted practice will not infringe the Chapter I prohibition if its impact on competition is not appreciable.<sup>91</sup> An agreement that has an anti-

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<sup>84</sup> Judgment of 8 July 1999, *Commission v Anic Partecipazioni SpA* C-49/92 P, EU:C:1999:356, paragraph 83.

<sup>85</sup> Judgment of 8 July 1999, *Commission v Anic Partecipazioni* C-49/92 P, EU:C:1999:356, paragraph 80. See also judgment of 22 October 2015, *AC-Treuhand AG v Commission* C-194/14 P, EU:C:2015:717, paragraphs 30 and 34 to 35.

<sup>86</sup> Judgment of 22 October 2015, *AC-Treuhand AG v Commission* C-194/14 P, EU:C:2015:717, paragraph 132.

<sup>87</sup> Judgment of 24 September 2019, *HSBC Holdings plc v Commission* T-105/17, EU:T:2019:675, paragraphs 199- 200. See also judgment of 26 September 2018, *Infineon Technologies AG v Commission* C-99/17 P, EU:C:2018:773, paragraphs 172-173.

<sup>88</sup> Judgment of 14 March 2013, *Fresh Del Monte Produce v Commission* T-587/08, EU:T:2013:129.

<sup>89</sup> Judgment of 14 March 2013, *Fresh Del Monte Produce v Commission* T-587/08, EU:T:2013:129, paragraphs 637–639.

<sup>90</sup> Judgment of 14 March 2013, *Fresh Del Monte Produce v Commission* T-587/08, EU:T:2013:129, paragraph 639. This was a case involving bilateral exchanges of banana quotation prices between Dole/Chiquita and, separately, between Dole/Fresh Del Monte. Chiquita was held liable for the whole single and continuous infringement, including that involving Dole/Fresh Del Monte, which exchanges it did not participate in, because it was aware of, or at least should have reasonably foreseen the pricing communications between Dole/Fresh Del Monte.

<sup>91</sup> Judgment of 9 July 1969, *Franz Völk v S.P.R.L. Ets J. Vervaecke* C-5/69, EU:C:1969:35. See also *North Midland Construction plc v OFT* [2011] CAT 14, paragraphs 45 and 52 and judgment of 13 December 2012, *Expedia Inc. v Autorité de la concurrence and Others* C-226/11, EU:C:2012:795, paragraph 16.

competitive object constitutes an appreciable restriction on competition by its nature and independently of any concrete effect that it may have.<sup>92</sup>

### **Effect on trade within the UK**

3.31 The CAT has held that this is a purely jurisdictional test to demarcate the boundary line between the application of EU competition law and national competition law, and that there is no requirement that the effect on trade within the UK should be appreciable.<sup>93</sup>

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<sup>92</sup> Judgment of 13 December 2012, *Expedia Inc. v Autorité de la concurrence and Others* C-226/11, EU:C:2012:795, paragraph 37; and European Commission Notice on agreements of minor importance [2014] OJ C291/01, paragraphs 2 and 3. In accordance with section 60A(2) of the Act, this principle applies mutatis mutandis in respect of the Chapter I prohibition. See also *Carewatch Care Services Limited v Focus Caring Services Limited and Others* [2014] EWHC 2313 (Ch), paragraph 148.

<sup>93</sup> *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11, paragraphs 459 and 460 and the case law cited. The CAT considered this point also in *North Midland Construction plc v OFT* [2011] CAT 14, paragraphs 48 to 51 and 62 but considered that it was 'not necessary [...] to reach a conclusion.'

## 4. Conduct and legal assessment

### Introduction

4.1 This Chapter sets out the CMA's assessment that the Chapter I prohibition has been infringed.

### Undertakings

4.2 The CMA concludes that, during the period of the Single and Continuous Infringement, Elite, JD Sports and Rangers were engaged in economic activity and therefore each constituted an undertaking for the purposes of the Chapter I prohibition.<sup>94</sup>

4.3 Chapter 5 sets out the CMA's decision as regards the entities that it has held jointly and severally liable for the Single and Continuous Infringement. To the extent that these entities were not themselves directly involved in the Single and Continuous Infringement, the CMA has concluded that they exercised decisive influence over a company that was directly involved in the Single and Continuous Infringement. The CMA considers that these entities form part of the undertakings with which they share liability.

### Standard of proof and evidence

4.4 The CMA has assessed the evidence in this case by reference to the civil standard of proof, namely whether it is sufficient to establish, on the balance of probabilities, that an infringement occurred.<sup>95</sup> The CMA has considered the totality of the evidence in its possession in the round, taking all the relevant factors into proper consideration, and finds that the evidence is sufficient to establish, on the balance of probabilities, that the Single and Continuous Infringement occurred.

4.5 The CAT has acknowledged that the activities of those participating in infringements of competition law are often, by their nature, secret or clandestine.<sup>96</sup> The CAT has also acknowledged that, consequently, evidence explicitly showing unlawful conduct '*will normally be only fragmentary or sparse, so that it is often necessary to reconstitute certain details by deduction.*'<sup>97</sup> Competition authorities

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<sup>94</sup> Elite and JD Sports were involved in the supply of sportswear, including Rangers-branded clothing. TRFC is the registered owner of all trademarks owned by the Rangers International Football Club Plc group and licenses third parties to use those trademarks and other intellectual property required for the manufacture, marketing and sale of Rangers-branded products.

<sup>95</sup> *Tesco Stores Limited and Others v OFT* [2012] CAT 31, paragraph 88.

<sup>96</sup> For example the CAT in *Claymore Dairies* stated that '*Chapter I cases will often concern cartels that are in some way hidden or secret; there may be little or no documentary evidence; what evidence there may be may be quite fragmentary; the evidence may be wholly circumstantial or it may depend entirely on an informant.*' *Claymore Dairies Limited v OFT*, [2003] CAT 18, paragraph 3.

<sup>97</sup> *Durkan Holdings Limited and Others v Office of Fair Trading* [2011] CAT 6, paragraph 96, relying on judgment of 7 January 2004, *Aalborg Portland and Others v Commission* C-204/00 P, EU:C:2004:6, paragraphs 56 to 57.

are therefore entitled to infer the existence of an anti-competitive agreement or concerted practice from fragmentary evidence.

- 4.6 The CMA has given particular weight to contemporaneous documentary evidence in this Decision. However, it has also taken into account information from individuals directly involved in the Single and Continuous Infringement. The CMA acknowledges that witness and interview evidence is subjective in nature and may to some extent be inconsistent. It has therefore considered carefully the credibility and reliability of the evidence provided by each witness. Further to this assessment, the CMA has relied on witness and interview evidence in this Decision only to the extent that the CMA considers it to be sufficiently clear, internally consistent, and corroborated by other witness evidence or contemporaneous documentary evidence.

## **Conduct giving rise to the single and continuous infringement**

### **Summary of findings of fact**

- 4.7 On the basis of the documentary evidence and contextualised by the witness evidence, the CMA finds that:
- 4.7.1 On 26 September 2018, Rangers became concerned by the fact that JD Sports was undercutting the price on Gers Online for the RFC H18 shirt (paragraphs 4.14 to 4.21) and there is evidence that this concern was held at board level (paragraphs 4.20, 4.38 and 4.51). Rangers dealt with this concern by seeking and receiving comfort from Elite that it would sort the problem (paragraphs 4.22 to 4.28). On 26 September 2018, following discussions between Elite and Rangers, they reached a common understanding that Elite would contact JD Sports to discuss JD Sports resolving the price discrepancy (in circumstances where the only action that JD Sports was in a position to – and indeed subsequently did – take to resolve Rangers’ concerns over the pricing discrepancy was to raise its prices) (paragraphs 4.23 to 4.28).
- 4.7.2 Following its discussions with Rangers, on 26 September 2018, Elite contacted JD Sports and the two agreed that JD Sports would increase the price of the RFC H18 shirt from £55 to £60 once the stock JD Sports held at the time had run out (paragraphs 4.29 to 4.32).
- 4.7.3 On 26 September 2018, having become concerned that JD Sports would not in fact increase the price as agreed, Elite contacted Rangers to seek its assistance in achieving that desired outcome, thus making Rangers aware (to the extent that Rangers was not already aware) that Elite had asked JD Sports to increase its price, and further evidencing that



discussions had previously taken place between Rangers and Elite about Elite asking JD Sports to raise its price (paragraphs 4.33 to 4.35).

- 4.7.4 Later on the same day, Elite reported back to Rangers that JD Sports had confirmed it would increase the price of the RFC H18 shirt to £60, to which Rangers responded with approval (paragraphs 4.36 to 4.41).
- 4.7.5 On 28 September 2018, Elite contacted JD Sports again regarding the price for replica shirts, telling JD Sports that Rangers had been putting pressure on Elite and wanted the price discrepancy to be rectified. In response, JD Sports reassured Elite that its prices would be moving up, thus further evidencing the existence of a common understanding between them that JD Sports would align its price for the RFC H18 shirt with Elite's at £60 (even if the price change would come into effect later than Elite initially expected) (paragraphs 4.42 to 4.44).
- 4.7.6 A discussion that took place at a Rangers board meeting on 5 October 2018 about the price discrepancy at launch and an email from Rangers to Elite on 16 October 2018 inquiring whether JD Sports was selling Rangers replica shirts for £60, further evidence that Rangers was aware that Elite had discussed with JD Sports the matter of JD Sports increasing its retail price, and that the outcome that Rangers expected to see was JD Sports selling the RFC H18 shirt for £60 (paragraphs 4.51 to 4.54).
- 4.7.7 On 15 November 2018, in response to questioning from Elite, JD Sports reassured Elite that it would immediately adjust upwards the price it was charging for the RFC H18 shirt at its Glasgow airport store, in line with the price that had been agreed between them (paragraphs 4.55 to 4.59).
- 4.7.8 Between 26 and 28 September 2018, Elite and JD Sports also disclosed to each other the prices they would be charging for other Rangers-branded clothing products, thereby reducing uncertainty as to their future pricing intentions, and reassured each other that they would be adjusting their respective retail prices for the Rangers-branded clothing products they both sold to be aligned with each other (paragraphs 4.45 to 4.50).
- 4.7.9 In February 2019, Elite disclosed to JD Sports its pricing intentions (discounts) for the remainder of the football season, and JD Sports took account of this information when determining its own prices (paragraphs 4.60 to 4.65).
- 4.7.10 On a number of occasions during March 2019, Elite and JD Sports informed each other of their own future pricing intentions (namely the timing and level of discounts to be applied to Rangers-branded clothing products) and in response each time, the other party acknowledged receipt of the information and/or expressed agreement with each

disclosure of its competitor's future pricing plans. According to contemporaneous documentary evidence, JD Sports' aim through those exchanges of future pricing information was for both businesses to align prices and maximise profits and sales (paragraphs 4.66 to 4.72).

- 4.7.11 Between 4 and 8 July 2019, Elite and JD Sports explicitly confirmed to each other that they would align their retail prices for Rangers-branded clothing products for the 2019/2020 season. JD Sports' stated objective, according to contemporaneous evidence, was for the two retailers to avoid eroding their margins through price competition (paragraphs 4.73 to 4.79).

## **Price fixing during the initial sales period (pre-discounting period)**

### ***Price of Rangers replica shirts at launch***

#### **Background**

- 4.8 The CMA was told that, following a boycott of Rangers' products by fans that began in around 2014<sup>98</sup> which resulted in pent up demand,<sup>99</sup> Rangers had been seeking to return retail operations and the revenue generated from sales to a more 'normal' level. This process was known internally within Rangers as 'normalising the club' and was of great importance to Rangers. Creating a more effective retail operation was part of that 'normalisation' process.<sup>100</sup>
- 4.9 Rangers' concerns with establishing itself as a high-quality sporting brand were reflected in its invitation to tender for a retail partnership,<sup>101</sup> which required, as a condition for appointment, that Rangers should be consulted in relation to the successful applicant's determination of its retail prices:

*'the successful applicant must consult with Rangers on the pricing of products and the timing of promotional activities and other sales initiatives (including flash sales and combined discounts across Rangers Products and other Rangers offers). The successful applicant must market Rangers Products at prices that are consistent with establishing Rangers Products as a high quality-sporting brand. There shall be no deep discounting of Rangers Products without Rangers' prior approval [...]'<sup>102</sup>*

- 4.10 In Elite's response to this invitation to tender dated 31 May 2018, Elite confirmed in writing that it would comply with these conditions for appointment. The invitation to tender resulted in Rangers and Elite entering into a non-exclusive rights agreement

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<sup>98</sup> Transcript of interview with [Director A] (Rangers) held on 30 July 2021, LLL000016775, page 11.

<sup>99</sup> Transcript of interview with [Director A] (Rangers) held on 30 July 2021, LLL000016775, pages 15 and 51; transcript of interview with [Director B] (Rangers) held on 4 November 2021, LLL000016787, page 39.

<sup>100</sup> Transcript of interview with [Director A] (Rangers) held on 30 July 2021, LLL000016775, page 46.

<sup>101</sup> LLL000002047.

<sup>102</sup> LLL000002047, page 8.

on 11 September 2018.<sup>103</sup> The conditions for appointment referred to at paragraph 4.9 were not included in the non-exclusive rights agreement between Rangers and Elite.<sup>104</sup> As regards prices, Elite agreed to *'market Rangers products at prices that are consistent with establishing Rangers products as a high quality-sporting brand.'*<sup>105</sup>

### **Pre-launch contacts between Elite and JD Sports about pricing**

- 4.11 As set out in paragraph 2.5 above, Elite had an arrangement to supply JD Sports with Rangers-branded clothing products for the 2018/2019 football season. As part of that arrangement, on 5 May 2018, Elite provided JD Sports with a list of RRP's for Rangers-branded clothing products for the forthcoming 2018/2019 football season.<sup>106</sup> In this price list, the RRP for the RFC H18 shirt was indicated as £55.
- 4.12 At some point after the price list was sent by Elite to JD Sports, but before the Rangers-branded clothing products were made available to purchase at JD Sports or in the Rangers-branded stores operated by Elite, Elite decided to launch the RFC H18 shirt at a price of £60 instead of £55 (*'we were going to be at £60 with the revised retail prices,'*<sup>107</sup> *'that was our own retail price'*).<sup>108</sup> According to [Director B] (Rangers) and [Director A] (Elite), that change in the intended price was discussed with Rangers before being implemented.<sup>109</sup>
- 4.13 Elite did not communicate any change in price to JD Sports before JD Sports started selling Rangers replica kit.<sup>110</sup> According to [Director A] (Elite), this was a serious mistake on Elite's part (*'when we increased it to £60 for our own stores, [3<] when we didn't go back to JD and communicate that we were going to be at £60 with the revised retail prices'*),<sup>111</sup> as Elite should have communicated to JD Sports that the RFC H18 shirt would be launched at a retail price of £60 on Gers Online, rather than £55.<sup>112</sup> According to [Director A] (Elite), Elite *'should have gone back to JD Sports and communicated the fact that if they wanted to, there was another £5 of retail ticket for them.'*<sup>113</sup>

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<sup>103</sup> LLL000000062.

<sup>104</sup> LLL000016688, Rangers' letter to the CMA dated 1 March 2022 and Rangers' response to the CMA's s.26 notice dated 4 February 2022.

<sup>105</sup> LLL000000062, paragraph 4.

<sup>106</sup> LLL000000107 and LLL000000108. The CMA was told that, at launch, when customer anticipation and demand are at their highest, replica kit is typically priced at recommended retail prices ('RRP'). Depending on demand fluctuations, discounts tend to be introduced later in the football season to try to increase demand (LLL000000054, JD Sports' response dated 18 January 2021 to the CMA's s.26 notice dated 15 December 2020, question 7, pages 3 and 4).

<sup>107</sup> Transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, page 72.

<sup>108</sup> Transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, page 73.

<sup>109</sup> Transcript of interview with [Director B] (Rangers) held on 4 November 2021, LLL000016787, pages 28 to 30; transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, pages 74 and 75.

<sup>110</sup> LLL000000125.

<sup>111</sup> Transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, page 72.

<sup>112</sup> Transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, page 115.

<sup>113</sup> Transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, page 73.

## Internal discussions within Rangers regarding the price of the replica shirt

4.14 On 26 September 2018, JD Sports started selling the RFC H18 shirt in store and online and noted that this product was being retailed by Elite on Gers Online at £60, that is, at a price £5 higher than the RRP that had been provided by Elite and the price at which JD Sports was selling the shirt.<sup>114</sup> On that date, [Employee A] (JD Sports) sent an email to [Employee E] ([§<], JD Sports) saying:

*'Rangers also put theirs up to £60 but we were given RRP of £55 and they never informed us so have left price as is – think changing now would get us terrible press.'*<sup>115</sup>

4.15 During the course of that day, Rangers began to receive negative attention from Rangers fans due to the fact that the replica shirt was available to purchase at JD Sports cheaper than on Gers Online,<sup>116</sup> which was seen as Rangers' retail partner.<sup>117</sup> The story was also picked up by the [§<], which reached out to Rangers for comment regarding an article that it was about to publish, which would refer to the fact that fans had expressed frustration about JD Sports' customers being able to *'buy the adult top for £55 with free delivery, while those who ordered from the Gers Store Online paid £60 plus £4.95 postage.'*<sup>118</sup>

4.16 In interview, [Director A] (Rangers) explained that Rangers had received a very large number of complaints about the fact that Gers Online was selling the replica shirt at a price higher than JD Sports. He stated:

*'[Rangers] got an avalanche of complaints from fans not long after the strips<sup>119</sup> had gone on sale because JD had been given a supply of strips, and they were - I think they were at 55 quid and we were at 60, and they were – so, fans who, at that time, could only buy online, they were paying 60 plus whatever postage was going to be. And we got a lot of fans saying, "Wait a minute, what's happened here?" you know, "You're ripping us off". [...] We were - reacting to supporter criticism but we didn't know where the, the things had been priced. And, obviously, they're entitled to price at what they want to price it, so – but we didn't have any warning of it.'*<sup>120</sup>

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<sup>114</sup> The CMA considers that all the discussions described in this section relating to whether the price of Rangers replica shirts should be £55 or £60 refer to the Rangers 2018/2019 season adult short sleeved 'home' replica shirt (the RFC H18 shirt), which was the only Rangers replica shirt available for purchase from JD Sports on 26 September 2018 (see transcript of interview with [Employee A] (JD Sports) held on 3 August 2021, LLL000016786, pages 27 and 28). Any references to 'replica shirts' should therefore be taken as references to the RFC H18 shirt.

<sup>115</sup> LLL000000125.

<sup>116</sup> LLL000016127.

<sup>117</sup> See paragraph 2.3.

<sup>118</sup> LLL000002149.

<sup>119</sup> 'Strip' is a term commonly used to refer to a football replica shirt.

<sup>120</sup> Transcript of interview with [Director A] (Rangers) held on 30 July 2021, LLL000016775, page 47.

*'My initial thought was the reaction of the fans to that. How will the fans react to that and how?... Because this was us coming into a new era for retail and the fans were looking forward to, you know, an uncontroversial post [Individual] (Third Party) kind of era of retail. And almost not quite day one but early on in the process, the fans were going saying, "What's going on here?" So it was exacerbated by the fact Elite were having issues with their website and also with delivery. [§<] .'<sup>121</sup>*

- 4.17 In relation to the nature of Rangers' concerns at that time, in a letter to the CMA, Rangers said that it was concerned about Elite's performance issues in general, not pricing, and that Rangers was motivated by its desire to improve its relationship with fans. According to Rangers, the price at which JD Sports was selling the replica shirt was simply an aggravating factor.<sup>122</sup> A similar point was made by [Director A] (Rangers), who said in interview that the fact that JD Sports was selling Rangers replica shirts at £5 cheaper than Elite was not '*an issue at all.*'<sup>123</sup>
- 4.18 However, these assertions are inconsistent both with the remainder of [Director A]'s (Rangers) witness evidence and with the contemporaneous documentary evidence that demonstrates that Rangers - including [Director A] (Rangers) – was concerned about JD Sports undercutting Elite, and that it took steps to put an end to it.
- 4.19 After receiving news about the fans' discontent, [Director A] (Rangers) asked [Director B] (Rangers) to contact Elite to discuss the issue of the £5 differential between JD Sports' and Elite's retail prices. [Director A] (Rangers) did this by forwarding to [Director B] (Rangers) an email that he had received from [Individual] (Rangers)<sup>124</sup> on that same day (26 September 2018) pointing out that the replica shirt was being sold £5 cheaper by JD Sports (*'the strips going on sale today at JD for £5 cheaper than they were on the club announced website on Friday is not going down particularly well...Most people who ordered on Friday don't have their strips yet so I think that is making it worse'*).<sup>125</sup> [Director A]'s (Rangers) email to [Director B] (Rangers), which was also sent to [Employee A] ([§<], Rangers) and to [Employee C] ([§<], Rangers), read:

*'See below. I've had an email from a fan saying that he has cancelled his order with Elite and is ordering one from JD*

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<sup>121</sup> Transcript of interview with [Director A] (Rangers) held on 30 July 2021, LLL000016775, pages 49 and 50.

<sup>122</sup> LLL000016688, Rangers' letter to the CMA dated 1 March 2022 and Rangers' response to the CMA's s.26 notice dated 4 February 2022.

<sup>123</sup> Transcript of interview with [Director A] (Rangers) held on 30 July 2021, LLL000016775, page 57.

<sup>124</sup> [Director A] (Rangers) described [Individual] (Rangers) [§<] (transcript of interview with [Director A] (Rangers) held on 30 July 2021, LLL000016775, page 54).

<sup>125</sup> LLL000016127.

*Can you speak to [Director A,(Elite)] and get his thoughts and give me a ring please.*<sup>126</sup>

- 4.20 When asked in interview about his conversation with [Director A] (Rangers), [Director B] (Rangers) said: '[Director A (Rangers)] said, *"but that's a big problem to Rangers"*. [...] *'I can't remember exactly, but it was just, "You need to fix it" and something - "You need to speak to and see what they -" or not "fix" but "You need to speak to [Director A (Elite)] and see what they can do."*'<sup>127</sup> He also said he understood that the Rangers' board considered that the replica shirt *'shouldn't be cheaper in other places.*'<sup>128</sup>
- 4.21 [Director B] (Rangers) told the CMA he was aware about competition law and that Rangers was not able to dictate prices to other retailers.<sup>129</sup> Indeed, this is reflected in certain contemporaneous documents and in statements made to the CMA, which indicate that Rangers and relevant individuals within it were (or became) aware that under competition law retailers should be free to set their own prices.<sup>130</sup> Despite this awareness, however, the CMA considers that the evidence set out in the paragraphs below shows that Rangers asked Elite to fix the problem, and that there was an understanding between the two that Elite would contact JD Sports and ensure that both retailers set their prices at the same level, namely £60.

### **Rangers contacts Elite**

- 4.22 Following the instruction from [Director A] (Rangers) to contact Elite, on the same day (26 September 2018), [Director B] (Rangers) forwarded the internal Rangers correspondence described at paragraph 4.19 to [Director A] (Elite), thus relaying to him the concerns expressed within Rangers about the price differential between JD Sports and Elite.<sup>131</sup>
- 4.23 According to [Director B] (Rangers) he subsequently spoke to [Director A] (Elite), and the two agreed that Elite would contact JD Sports to see what could be done about the price discrepancy. In interview, [Director B] (Rangers) stated in relation to his conversation with [Director A] (Elite):

*'CMA: What was the conversation you had with [Director A] (Elite)*

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<sup>126</sup> LLL000016127.

<sup>127</sup> Transcript of interview with [Director B] (Rangers) held on 4 November 2021, LLL000016787, page 45.

<sup>128</sup> Transcript of interview with [Director B] (Rangers) held on 4 November 2021, LLL000016787, page 53.

<sup>129</sup> Transcript of interview with [Director B] (Rangers) held on 4 November 2021, LLL000016787, page 45.

<sup>130</sup> For example, an email from [Employee A] (Rangers) to [Director A] (Rangers) on 26 September 2018 stating *'...ultimately we cannot tell our retail partners what price to sell strips [replica shirts] at, that is for their commercial judgment'* (LLL000002149). See also LLL000016688, Rangers' letter to the CMA dated 1 March 2022 and Rangers' response to the CMA's s.26 notice dated 4 February 2022; transcript of interview with [Director A] (Rangers) held on 30 July 2021, LLL000016775, pages 50 and 57.

<sup>131</sup> LLL000016127.

[Director B] (Rangers): *I can't remember it. It was along the lines of, "We've got a problem with the board. They're kicking my ass here. What can be done about it?" And I'm pretty sure we had the thing, "Well, I don't think we can do anything about it because it's not down to us", but that was it.*

CMA: *What did [Director A (Elite)] say to you?*

[Director B] (Rangers): *I think he said he'll see what he could do; he'll speak to the [§<]. I can't remember what the [§<]'s name -- he'll speak to someone at JD and see what can happen, if anything.*<sup>132</sup>

- 4.24 [Director A] (Elite) also recalls having a telephone conversation with [Director B] (Rangers). According to [Director A] (Elite), [Director B] (Rangers) explained that the Rangers board was very concerned about the price differential, and that Elite should sort out the problem otherwise Rangers would contact [Director A] (JD Sports) directly to solve it. In interview, [Director A] (Elite) stated:

[Director A] (Elite): [Director B (Rangers)] *called me to say that they'd had a board meeting and what the hell was going on, in probably slightly stronger words than that, to be honest with you. [...]*

CMA: [...] *And what was [Director B (Rangers)]'s response?*

[Director A] (Elite): *Just get it sorted or either he or [Director A (Rangers)] will go to [Director A] [JD Sports' [§<]] to get it sorted. [...]*

*So in hindsight, having taken advice, and the, the sharing of information at that point, I totally appreciate now, my response I should have shut it down straightaway, so ... ultimately JD can price whatever they want. It's an unfortunate -- it is, it is what it is but ... you need to -- you have to stop from approaching about retail prices, and I'm not going to even have the conversation with JD about their prices. In hindsight, that's what I should have done.*<sup>133</sup>

- 4.25 Other than evidence from [Director A] (Elite) (which includes his witness evidence described in the preceding paragraph as well as his account in the contemporaneous email described in paragraph 4.42), the CMA has not seen corroborating evidence that [Director A] (Rangers) threatened to contact [Director A] (JD Sports) directly. Nor has the CMA seen evidence that [Director A] (Rangers) had a personal or business relationship with [Director A] (JD Sports). However, it is not necessary for the purposes of establishing the infringement for the CMA to

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<sup>132</sup> Transcript of interview with [Director B] (Rangers) held on 4 November 2021, LLL000016787, pages 48 and 49. The CMA gives weight to [Director B]’s (Rangers) witness account on this point, despite the fact that he states not fully recalling the conversation with [Director A] (Elite), because the account he gives of that conversation is consistent with [Director A]’s (Elite) account and with the documentary record of what took place subsequently.

<sup>133</sup> Transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, pages 115 and 116.

reach a conclusion as to whether or not [Director A] (Rangers) threatened to contact [Director A] (JD Sports).

- 4.26 In interview, [Director A] (Elite) said he understood that Rangers was concerned about the price difference between Elite and JD Sports. He said that in the telephone calls he had with [Director B] (Rangers) and with [Director A] (Rangers) on 26 September 2018 they both stated that the issue of the price difference had been discussed at a Rangers board meeting, and that their message – which was given in *'fairly aggressive tones'* - was *'how [...] can one of our retail partners [...] be pricing replica products different to the official store?'*<sup>134</sup>
- 4.27 [Director A] (Elite) told the CMA that he had a conversation with [Director A] (Rangers) on that same day and along the same lines as the conversation with [Director B] (Rangers) described at paragraph 4.24.<sup>135</sup> [Director B] (Rangers) also stated in interview that he believed that [Director A] (Elite) and [Director A] (Rangers) had spoken directly about this matter.<sup>136</sup> However, [Director A] (Rangers) was not aware of having had any communications with [Director A] (Elite) on 26 September 2018.<sup>137</sup> In the circumstances, the CMA has not made a finding as to whether or not any such conversation between [Director A] (Elite) and [Director A] (Rangers) took place.
- 4.28 Speaking about the operational issues affecting the launch of the kit broadly, [Director A] (Elite) said that Rangers made it clear to Elite that it considered those issues to be very serious and that, following these conversations, *'the feeling I got from the guys was that the world is caving in'* and that Elite feared that its contract with Rangers was potentially in jeopardy.<sup>138</sup>

### **Elite contacts JD Sports**

- 4.29 [Director A] (Elite) said that, after speaking to [Director B] (Rangers) and to [Director A] (Rangers), he called [Employee A] (JD Sports) immediately *'because I had the world raining down on me from Rangers, so it was pretty important to try and get some idea of what was going to happen.'*<sup>139</sup>
- 4.30 In interview, [Employee A] (JD Sports) stated that JD Sports had on this occasion received pressure from Elite to amend the price for the replica shirt, and that this was a one-off (that is, not a regular occurrence).<sup>140</sup>

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<sup>134</sup> Transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, pages 113 and 114.

<sup>135</sup> Transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, pages 116 and 117.

<sup>136</sup> Transcript of interview with [Director B] (Rangers) held on 4 November 2021, LLL000016787, page 46.

<sup>137</sup> Transcript of interview with [Director A] (Rangers) held on 30 July 2021, LLL000016775, page 60.

<sup>138</sup> Transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, pages 115 to 118.

<sup>139</sup> Transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, pages 135 and 136.

<sup>140</sup> Transcript of interview with [Employee A] (JD Sports) held on 3 August 2021, LLL000016786, page 66.



4.31 In interview, [Director A] (Elite) said that the call with [Employee A] (JD Sports) was *'about where they [JD Sports] were on their retail prices, and [...] there's the £5 difference, the whole of Glasgow's going mad.'*<sup>141</sup> [Director A] (Elite) recalled this conversation as follows:

*'To the best of my memory, as I can remember it was along the lines of, "look, we've made a pretty major clerical error with our recommended retail prices we suggested to you. We changed the price, our recom -- we changed our pricing subsequent to you placing your orders and you obviously can see there's a variance in the prices. So I would recommend -- I would like to recommend that you adopt our revised recommended prices." In effect.*

*But I do want to make it -- it wasn't along the lines of, "[Employee A] (JD Sports), put your prices up or I'm not supplying you. You have to put your prices up." It was trying to almost kind of say "Look, you know, we can get another £5 of revenue out of this per shirt, so ..." of which he was receptive to.'*<sup>142</sup>

4.32 According to [Director A] (Elite), [Employee A] (JD Sports) agreed to increase JD Sports' price for the RFC H18 shirt in the next few days (once the stock it held at the time had run out and it received a second allocation of replica shirts) and recognised the opportunity for JD Sports to increase its margins. He stated: *'[Employee A (JD Sports)] was very much of the opinion that "actually I wouldn't have a problem with that at all. Actually it makes sense. I can get some more margin out of the deal.'*<sup>143</sup>

### **Elite seeks assistance from Rangers**

4.33 After his initial contact with [Employee A] (JD Sports) about the £5 price differential, [Director A] (Elite) became concerned that [Employee A] (JD Sports) may not have the authority to take action and increase the price as agreed. [Director A] (Elite) sent a text message to [Director B] (Rangers) on 26 September 2018 at 13:08 referring to a discussion he had with JD Sports about JD Sports increasing the price for the replica shirt and seeking to enlist Rangers' help in ensuring that JD Sports did indeed increase its price. The text message stated:

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<sup>141</sup> Transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, page 133.

<sup>142</sup> Transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, page 136.

<sup>143</sup> Transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, page 133 to 137. [Employee A] (JD Sports) could not recall any conversations with [Director A] (Elite) around this time but noted in interview that *'clearly there was one'* on the basis of contemporaneous documents (transcript of interview with [Employee A] (JD Sports) held on 3 August 2021, LLL000016786, pages 32 and 40).

*'Need a favour. I think [Director A] (JD Sports)] is the only one who can make the call on upping their RRP.<sup>144</sup> [Redacted] [Employee A (JD Sports)] is shitting himself with doing it. I don't want to go over his head, but if it comes from Rangers it will look more official.'*<sup>145</sup>

- 4.34 The CMA considers that this text message further evidences that there had been previous discussions between Rangers and Elite and Elite asking JD Sports to raise its price.
- 4.35 In interview when asked about this text message, [Director B] (Rangers) said he could not recall exactly what [Director A] (Elite) told him about his conversation with JD Sports, but he stated, *'I don't know how he's asked the question. I'm assuming he has asked the question, given the response he's had from the [Redacted], but I don't know what that question was.'*<sup>146</sup> The CMA however considers that it is clear from the context and wording of the text message that [Director A] (Elite) told [Director B] (Rangers) that he had spoken to [Redacted] of Rangers products at JD Sports and had asked JD Sports to increase its retail price. Later on that day at 15:29, [Director A] (Elite) sent [Director A] (JD Sports) a text message stating *'Hi [Director A] (JD Sports), can you call me when convenient please sir.'*<sup>147</sup> It is unclear however whether [Director A] (JD Sports) replied and whether the two individuals spoke on that day.

### **Elite reports back to Rangers**

- 4.36 Following his discussions with JD Sports, at 18:12 on 26 September 2018 [Director A] (Elite) sent an email to [Director B] (Rangers) informing him that JD Sports had confirmed it would increase the price of the replica shirt to £60 and sending his apologies to the Rangers board of directors. [Director A]'s (Elite) email read:

*'Just had another chat to JD Sports. Unsurprisingly sales of Rangers Replica have been excellent today, they think they will be sold out by tomorrow mid-day. [...] For all future drops (17 Oct Onwards) they are happy to revert to our RRP's and put price up by £5.00. Please pass my apologies onto the board, the price change should have been communicated to JD.'*<sup>148</sup>

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<sup>144</sup> The CMA notes from its review of the evidence that the term 'RRP' is sometimes also used to refer to retail prices. This document for example refers to JD Sports 'upping their RRP' but it clearly refers to JD Sports' own retail prices rather than to retail prices *recommended* by JD Sports.

<sup>145</sup> LLL000009328. Although the text message is showing as being sent by '[Individual] (Elite)', [Director A] (Elite) confirmed in interview that the number listed there was his (transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, pages 131 and 132).

<sup>146</sup> Transcript of interview with [Director B] (Rangers) held on 4 November 2021, LLL000016787, pages 51 and 52.

<sup>147</sup> LLL000009292.

<sup>148</sup> LLL000002158.

4.37 [Director B] (Rangers) replied at 18:19 expressing his approval that the matter had been resolved, stating:

*'That's brilliant. Thanks for sorting so quickly.'*<sup>149</sup>

4.38 When asked about this email in interview, [Director B] (Rangers) said that he was referring to the fact that the issue the Rangers board had with JD Sports' prices being lower had been solved, as JD Sports would be changing its price so that it would be aligned with Elite's. He stated: *'it would be the issue that the board had, that the prices were cheaper, and it looks like JD are going back to the price that Rangers [NB: Elite] were selling at. So, their issue has been sorted.'*<sup>150</sup>

4.39 [Director A] (Elite) responded to [Director B]'s (Rangers) email of 18:19 saying that he had also spoken to [Director A] (Rangers). The email read: *'Just had a chat to [Director A (Rangers)] too, so he is in the picture and seemed comfortable. He was with your mate, [redacted] ...'*<sup>151</sup>

4.40 At 18:13, [Director B] (Rangers) forwarded [Director A]'s (Elite) email of 18:12 (referred to in paragraph 4.36) to [Director A] (Rangers).<sup>152</sup>

4.41 [Director A] (Rangers) replied stating: *'Thanks [Director B (Rangers)]. at least it's only been on a relatively small number of jerseys.'*<sup>153</sup> In his reply he copied other members of the Rangers' board and senior management, [Director D] (Rangers), as well as [Employee A] (Rangers), and [Employee C] (Rangers).

### **Elite follows up again with JD Sports**

4.42 Two days later, on 28 September 2018, Elite contacted JD Sports again regarding the price for replica shirts. According to [Director A] (Elite), this is because the replica shirts were still on sale on JD Sports' website (at £55) and this was *'still creating heat,'* by which he said he meant that *'social media [was] still being a frenzy.'*<sup>154</sup> The email chain between [Director A] (Elite) and [Employee A] (JD Sports) refers to Elite having been put under pressure by Rangers about replica shirt prices, which results in [Employee A] (JD Sports) providing further re-

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<sup>149</sup> LLL000002158.

<sup>150</sup> Transcript of interview with [Director B] (Rangers) held on 4 November 2021, LLL000016787, page 55. When asked whether it was the board that had the issue, [Director B] (Rangers) replied *'Yeah, or [Director A] (Rangers) Whether you want to call him [redacted] – its probably best saying [redacted] because I'm not having that conversation with the board as such. And [redacted] sits on the board, so...'* (transcript of interview with [Director B] (Rangers) held on 4 November 2021, LLL000016787, page 56).

<sup>151</sup> LLL000002158. [Director A] (Elite) told the CMA in interview that in this email '[redacted]' was a reference to [Director A] (Rangers) (transcript of interview with [Director A] (Elite) held on 28 July 2021, pages 152 and 153).

<sup>152</sup> LLL000002157.

<sup>153</sup> LLL000002157. Although the email chain shows that this email followed [Director B]'s (Rangers) email at 18:13, the time stamp is showing 17:24, which the CMA considers is likely to be due to email recipients being in different time zones.

<sup>154</sup> Transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, page 158.

assurance to [Director A] (Elite) that JD Sports' prices would be moving up. The email reads:

[Director A] (Elite) to [Employee A] (JD Sports): '[...] Need a call about the replicas too at some point, I've been roasted by Rangers [redacted],<sup>155</sup> he's going to phone [Director A] (JD Sports)...trying to manage the situation.'

[Employee A] (JD Sports) to [Director A] (Elite): 'Prices changing next week if that helps!'

[Director A] (Elite) to [Employee A] (JD Sports): 'OK mate, will be a big help. 340 cancelled orders yesterday.'

[Employee A] (JD Sports) to [Director A] (Elite) : 'We'll have no stock after today hence easier to adjust price Monday and then be aligned for stock refresh next month!'

[Director A] (Elite) to [Employee A] (JD Sports): 'Great, it's just that yesterday it was on pre-sale, so was hurting, sure it will be sorted once things move.'<sup>156</sup>

- 4.43 In interview, [Employee A] (JD Sports) explained that he understood from this email exchange that [Director A] (Elite) had been 'approached by [redacted] to ask why there was a price discrepancy between what the Rangers club were selling the shirt at and what JD were.'<sup>157</sup> [Employee A] (JD Sports) also explained that by 'easier to adjust price Monday and then be aligned for stock refresh' he meant that JD Sports' price would become aligned with Elite's 'RRP.'<sup>158</sup>
- 4.44 When asked in interview about whether anyone from Rangers had any contact with JD Sports about the 'communication mix up' between Elite and JD Sports (see paragraph 4.51), [Director A] (Rangers) stated: 'not that I'm aware of. It [Rangers] wouldn't have gone to retail. That's why we had Elite. Elite was there to do that for us.'<sup>159</sup> [Director A]'s (Rangers) statement indicates that Rangers did not feel the need to contact JD Sports directly, as Elite was responsible for the matter.

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<sup>155</sup> In interview, [Director A] (Elite) explained that in this email '[redacted]' was a reference to [Director A] (Rangers). He could not recall whether by 'roasting' he had been referring to the calls he had with Rangers on 26 September 2018, or to additional calls with Rangers (transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, pages 159 and 160).

<sup>156</sup> LLL000000197.

<sup>157</sup> Transcript of interview with [Employee A] (JD Sports) held on 3 August 2021, LLL000016786, pages 40 to 42.

<sup>158</sup> Transcript of interview with [Employee A] (JD Sports) held on 3 August 2021, LLL000016786, page 45.

<sup>159</sup> Transcript of interview with [Director A] (Rangers) held on 30 July 2021, LLL000016775, pages 73 and 74.

## ***Contacts between Elite and JD Sports in September 2018 regarding other Rangers-branded clothing products***

- 4.45 Between 26 and 28 September 2018, while the discussions about the £5 price differential for the RFC H18 shirt were taking place, Elite and JD Sports were also in contact with one another about the retail prices they would each be charging for other Rangers-branded clothing products.
- 4.46 On 26 September 2018 at 13:45, [Director A] (Elite) sent to [Employee A] (JD Sports) a list containing prices labelled as 'RRPs' for the Rangers-branded 2018/2019 training range. His cover email stated: *'Following on from our call, please see our Training Range RRP's.'*<sup>160</sup> Upon receipt, [Employee A] (JD Sports) told [Director A] (Elite) that JD Sports would change its prices immediately (*'Cheers on it - we'll change right away!'*)<sup>161</sup>
- 4.47 In interview, [Director A] (Elite) explained that RRP's were being discussed at this point because there had been issues with Elite's price list, namely that it was not consistent with the prices being charged by Elite on Gers Online (*'the recommended price was over or above what, what we actually on the Gers Store at, and they were seeing some unders as well. So it was literally all over the place'*).<sup>162</sup> In relation to [Employee A]'s (JD Sports) reply to him, [Director A] (Elite) explained that he understood that to mean that JD Sports *'would be adjusting their prices to fall in line with the recommended prices.'*<sup>163</sup>
- 4.48 Further, having spotted a discrepancy regarding the RRP for training pants that Elite had sent through,<sup>164</sup> on 28 September 2018 [Employee D] (JD Sports) sent a list of all of its Rangers-branded clothing products to [Director A] (Elite) seeking to confirm Elite's RRP's.<sup>165</sup> [Employee D] (JD Sports) was acting under the instructions of [Employee B] (JD Sports), who had requested him to ask Elite for their own sale prices: *'(...) Rangers SPs [sale price] – please send a list of all our rangers buys and current SP to [Director A] [(Elite)], ask him to verify their SPs.(...)'*<sup>166</sup>
- 4.49 Following Elite's confirmation of the price list sent by JD Sports,<sup>167</sup> JD Sports queried the accuracy of the information by referring not only to the two sets of 'RRP' price lists sent by Elite, but also to the retail prices charged at Gers Online. JD Sports' email read: *'After looking through the list, you emailed [Employee A (JD*

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<sup>160</sup> LLL000002601.

<sup>161</sup> LLL000002601.

<sup>162</sup> Transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767 page 142.

<sup>163</sup> Transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767 page 143.

<sup>164</sup> LLL000002603.

<sup>165</sup> LLL000000132 with attachment at LLL000000133.

<sup>166</sup> LLL000002602.

<sup>167</sup> LLL000003215 with attachment at LLL000003216.

Sports)] earlier this week saying the training pant was £35/30, however the attached says £40/£35. Also this style is on Gers Online for £30?<sup>168</sup>

- 4.50 In response to JD Sports' query, [Director A] (Elite) clarified which were the correct figures and stated that Elite would amend the price on Gers Online (*'It is £35 adults and £30 kids, we will tweak Gersonline'*).<sup>169</sup>

#### **Rangers board meeting on 5 October 2018 (replica shirt)**

- 4.51 Rangers' concerns about the discrepancy in prices for the replica shirt between Elite and JD Sports were mentioned in the minutes of a Rangers International Football Club plc board meeting on 5 October 2018:

*[...] There had been some teething issues with Elite's performance and we had been assured these would be addressed. An error had been made with JD and the price at which they put strips on sale. We had been told this was the result of a communication mix up between Elite and JD and would not occur again.*<sup>170</sup>

- 4.52 In interview, [Director A] (Rangers) stated that in this extract *'there's obviously a reference to the price there and part of the noise that was coming from the fans was they were at a different price.'*<sup>171</sup>

#### **Contacts between Elite and Rangers on 16 October 2018 (replica shirt)**

- 4.53 On 16 October 2018, [Director A] (Rangers) asked [Director A] (Elite) whether JD Sports was selling the replica shirt at £60. [Director A] (Elite) replied:

*'I have recommended to them [JD Sports] that they revert to the £60 price point, which I am confident they will. As always this is only a recommended price, but they can see there is £5 more margin for them if they do this.'*<sup>172</sup>

- 4.54 In interview, when asked about why he was at that point checking JD Sports' price, [Director A] (Rangers) explained:

*'I was conscious that that was one of the issues that the supporters had raised. So it was still something I wanted to know where they were, just a*

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<sup>168</sup> LLL000003257.

<sup>169</sup> LLL000003257.

<sup>170</sup> LLL000002173.

<sup>171</sup> Transcript of interview with [Director A] (Rangers) held on 30 July 2021, LLL000016775, page 73.

<sup>172</sup> LLL000002162. The CMA notes that [Director A] (Elite) described to Rangers his request to JD Sports as a 'recommendation' (albeit that he also said he was confident JD Sports would follow such a recommendation). However even if it is true that Elite positioned its discussion with JD Sports as a 'recommendation' (which the CMA does not accept), the steps that Elite took afterwards (for example enlisting Rangers' help) show that the aim of [Director A]'s (Elite) actions was to achieve price alignment.

*knowledge thing so if I was speaking to supporters I would then know what was actually happening, where the retailers were selling at.*<sup>173</sup>

### **Contacts between Elite and JD Sports on 15 November 2018 (replica shirt)**

- 4.55 On or around 15 November 2018, [Director A] (Elite) received an email from [Director B] ([§<], Elite) which demonstrates Elite responding with concern about a report that JD Sports was selling the replica shirt at a cheaper price than agreed between them. The email, which had the subject line *'Big concern JD Airport'* and contained a photo of the price tag of a shirt showing a price of £49.50 discounted from £55<sup>174</sup> at the JD Sports store at Glasgow airport, read, *'They have discounted again your views.'*<sup>175</sup>
- 4.56 On 15 November 2018 [Director A] (Elite) forwarded this email to [Employee A] (JD Sports), with the cover message *'Is this just at the airport store?'*<sup>176</sup>
- 4.57 Elite's email triggered an immediate reaction from JD Sports, who reassured Elite that the price would be increased overnight: *'looks like they haven't repriced to £60 and then knocking the tax off. Will amend these overnight!'*<sup>177</sup> According to [Director A] (Elite), he understood this to mean that JD Sports would amend the pricing by subtracting the VAT from £60 (that is, taking the price to £54).<sup>178</sup>
- 4.58 A few minutes later [Employee A] (JD Sports) sent [Director A] (Elite) another email saying *'tell [Director B (Elite)] not to panic... just a glitch in one store. Apologies!'*<sup>179</sup>
- 4.59 JD Sports changed the price of the replica shirt sold at the JD Sports store at Glasgow airport to £54 on 15 November 2018.<sup>180</sup>

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<sup>173</sup> Transcript of interview with [Director A] (Rangers), held on 30 July 2021, LLL000016775, page 78.

<sup>174</sup> [Employee A] (JD Sports) explained that at Glasgow airport JD Sports applies a price of 10 per cent off RRP (transcript of interview with [Employee A] (JD Sports) held on 3 August 2021, LLL000016786, page 62). A 10 per cent discount on a price of £55 equals £49.50.

<sup>175</sup> LLL000002609. The date of [Director B]'s (Elite) email is unclear. In interview, [Director A] (Elite) said that he thought that [Director B] (Elite) was *'implying that, again, there's a price discrepancy'* (transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, page 189).

<sup>176</sup> LLL000002609.

<sup>177</sup> LLL000002609.

<sup>178</sup> Transcript of interview with [Director A] (Elite), held on 28 July 2021, LLL000016767, page 191.

<sup>179</sup> LLL000002610.

<sup>180</sup> LLL000016805.

## Contacts between Elite and JD Sports during the discounting period for the 2018/2019 season

### Contacts in February 2019

4.60 On or around 13 February 2019, JD Sports became aware that Elite was selling certain Rangers-branded clothing products at a 30 per cent discount. In an internal JD Sports email exchange on that date, JD Sports staff noted:

*'Just to make you aware that the rangers store and the official website is offering 30% off the home and away tops. Not sure if we have any scope to match or review our prices as this will hurt strong sales seen from these shirts.'*<sup>181</sup>

4.61 In an email that invites Elite to keep JD Sports informed of upcoming changes in retail price, [Employee A] (JD Sports) forwarded the above email to [Director A] (Elite) on the same date, with the note:

*'Might be worth us sharing info like this as it helps keep the relationship sweet internally! How long is the promo planned for?'*<sup>182</sup>

4.62 [Employee A] (JD Sports) explained in interview that finding out that Elite was discounting was *'a bit of a kick in the teeth.'*<sup>183</sup>

4.63 [Employee A] (JD Sports) said that JD Sports had been seeking some clarity as to when Elite was planning to discount because this would have a negative impact on JD Sports' sales.<sup>184</sup> He explained that, if the discount was going to be permanent (as opposed to a shorter, say, four-day weekend discount), JD Sports would reconsider its stock position and sales position.<sup>185</sup>

4.64 [Director A] (Elite) replied on the following day, providing information to [Employee A] (JD Sports) about Elite's future pricing plans, saying to [Employee A] (JD Sports) that he was *'on my list to call'* and stating that *'due to our stock levels, we think this discount will be to end of the season, but as always will depend on demand.'*<sup>186</sup>

4.65 [Employee A] (JD Sports) then relayed the information that Elite's changes would be permanent to his colleagues at JD Sports.<sup>187</sup> According to [Employee A] (JD Sports), following this email chain, JD Sports made the decision to reduce its retail

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<sup>181</sup> LLL000004397.

<sup>182</sup> LLL000004397.

<sup>183</sup> Transcript of interview with [Employee A] (JD Sports) held on 3 August 2021, LLL000016786, page 71.

<sup>184</sup> Transcript of interview with [Employee A] (JD Sports) held on 3 August 2021, LLL000016786, pages 71 and 72.

<sup>185</sup> Transcript of interview with [Employee A] (JD Sports) held on 3 August 2021, LLL000016786, page 72.

<sup>186</sup> LLL000004397.

<sup>187</sup> LLL000002615. In his email, [Employee A] (JD Sports) stated that 'Hummel' had provided this information. However in interview he clarified that this referred to Elite – see transcript of interview with [Employee A] (JD Sports) held on 3 August 2021, LLL000016786, page 76.



prices on the basis that it knew that Elite's discount would be permanent (that is, until the end of the football season).<sup>188</sup> JD Sports' sales data for Rangers-branded clothing products shows that JD Sports reduced some of the prices of the 2018/2019 season Rangers-branded clothing products on 20 February 2019.<sup>189</sup>

### **Contacts in March 2019**

4.66 On 5 March 2019, Elite and JD Sports were in contact again in relation to discounts to Rangers-branded clothing products.

4.67 At 13:14, [Employee B] (JD Sports) told [Employee F] (JD Sports) that 'Rangers' (which the CMA takes to be a reference to Elite) would be keeping JD Sports informed of its discounting plans. [Employee B]'s (JD Sports) email read: *[the] plan [is] to reduce to ½ price at Easter (but if Rangers go earlier we follow, they are keeping us informed of their plans).*<sup>190</sup>

4.68 At 14:40, in the context of a negotiation between them regarding the purchase of more stock, [Employee B] (JD Sports) sent an email to [Director A] (Elite) informing him of JD Sports' forthcoming discounting plans, asking whether they were consistent with Elite's pricing intentions and requesting that the two parties should keep each other informed about their prices so as to allow for price alignment to maximise profits. The email read:

*[Director A (Elite)] – We are planning to take the lines to 50% off during May ½ term (w/c 19 May) obviously it might change depending how many we can shift at 30% up until then.*

*Does this fit with your plans? Please let's keep in the loop on pricing so we are aligned and both parties can maximise GPV [gross profit value] + ensure sell thru.*<sup>191</sup>

4.69 Witness evidence from Elite and from another individual at JD Sports is that they understood that email to mean that both businesses should remain aligned on prices. [Employee A] (JD Sports) explained in interview that he believed [Employee B] (JD Sports) was asking [Director A] (Elite) to *'confirm that they [JD Sports] are aligned with Rangers retail.*<sup>192</sup> Similarly, [Director A] (Elite) in interview said that he understood that [Employee B] (JD Sports) was seeking confirmation that the proposed discounts would fall in line with Elite's retail pricing plans and they would keep each other informed about prices: *'[Employee B (JD Sports)] was looking for*

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<sup>188</sup> Transcript of interview with [Employee A] (JD Sports) held on 3 August 2021, LLL000016786, pages 75 to 77.

<sup>189</sup> LLL000000128, see for example pages 1302 and 1303.

<sup>190</sup> LLL000000148.

<sup>191</sup> LLL000000149.

<sup>192</sup> Transcript of interview with [Employee A] (JD Sports) held on 3 August 2021, LLL000016786, page 83.

*my commitment that we would be in the loop on pricing [...] that it would fall in line with our plans around the Gers Store.*<sup>193</sup>

4.70 [Director A] (Elite) replied by email saying *'this is all agreed, look forward to receipt of official POs.*<sup>194</sup>

4.71 According to [Director A] (Elite) his reply *'this is all agreed'* was not intended to be a response to JD Sports' discounting plans.<sup>195</sup> He said that he was only *'pushing really hard on the negotiation'* [about wholesale sales to JD Sports] and he was *'trying to avoid any discussion around strategy on retail pricing.'*<sup>196</sup> However, even if [Director A]'s (Elite) recollection of his intentions is accurate, the CMA considers that [Director A]'s (Elite) response would have been understood by JD Sports as an agreement with JD Sports' discounting plans as set out in [Employee B]'s (JD Sports) email, as well as with the proposal that they keep each other informed of future price intentions in order for their prices to be aligned and for both parties to maximise profits.

4.72 JD Sports and Elite subsequently kept each other informed of their pricing intentions:

4.72.1 On the following day (6 March 2019), [Employee B] (JD Sports) told [Director A] (Elite) that the half price discount was now planned for Easter rather than May. In response, [Director A] (Elite) acknowledged and agreed with JD Sports' future pricing plans, confirming that it was *'OK to go 50% at Easter for now...'*<sup>197</sup> In an internal Elite email on the same day, [Director A] (Elite) stated *'[JD Sports] have agreed to match our RRP's.'*<sup>198</sup>

4.72.2 On 12 March 2019, [Director A] (Elite) informed [Employee A] (JD Sports) via text message of Elite's plans to discount all replica kit products at 50 per cent that week (that is, more than a month before Easter):<sup>199</sup> *'we are going to go to 50% discount this week on all replicas, just a FYI.'* [Employee A] (JD Sports) acknowledged and/or agreed with Elite's future pricing plans by responding with a 'thumbs up' emoji.<sup>200</sup>

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<sup>193</sup> Transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, pages 209 and 210.

<sup>194</sup> LLL000000154.

<sup>195</sup> Transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, page 212 and 213.

<sup>196</sup> Transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, page 210.

<sup>197</sup> LLL0000016140. See also transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, pages 217 and 218.

<sup>198</sup> LLL000016658.

<sup>199</sup> In 2019, Easter Sunday was on 21 April.

<sup>200</sup> LLL000000157. See also transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, pages 219 and 220.

4.72.3 Later that day, [Employee A] (JD Sports) shared the details of Elite's discounting plans for that week with JD Sports staff and took this information into account when making JD Sports' own plans:

*'Rangers are going HALF PRICE this week in their shops and on-line. We haven't enough stock to match them plus we have loads of other good stuff happening this week. We are landing our stock this week to get the Rangers promo on next week so can you let the guys up North know that we know (about Rangers pricing etc etc) and we'll have some great offers for them next week.'*<sup>201</sup>

4.72.4 On 13 March 2019, [Employee A] (JD Sports) told [Director A] (Elite) via text message that JD Sports was in fact planning to reduce its prices the following week: *'FYI we'll reduce prices next week as we need the deliveries in to us first?'* [Director A] (Elite) acknowledged and agreed JD Sports future pricing plans by responding with a 'thumbs up' emoji.<sup>202</sup>

#### **Contacts between Elite and JD Sports regarding the 2019/2020 season**

4.73 Between 4 and 8 July 2019, Elite and JD Sports were in contact with one another in relation to the retail prices for 2019/2020 season Rangers-branded clothing products.

4.74 On 4 July 2019, in an email chain titled 'Rangers RRP Pricing', [Employee C] (JD Sports) asked [Employee] (Elite) and [Director A] (Elite) to confirm 'RRP prices' for certain items of Rangers-branded clothing products and referred to the prices available at Gers Online. His email read:

*'I am currently setting our pricing and upon looking at thegersonline.com I have noticed we would be considerably cheaper on certain styles*

*Have the RRP prices been increased since our orders were signed off? [...]*

*If the RRP's have been increased could you please share the new prices as we of course would not like to go to market cheaper than yourselves?'*<sup>203</sup>

4.75 Later that day, [Employee] (Elite) confirmed the prices to [Employee C] (JD Sports) and asked whether JD Sports was *'ok to match.'*<sup>204</sup>

4.76 On the same day, JD Sports replied:

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<sup>201</sup> LLL000016813.

<sup>202</sup> LLL000000158. See also transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, pages 220 and 221.

<sup>203</sup> LLL000005713.

<sup>204</sup> LLL000005713.

*'Absolutely fine to match the below prices.*

*To confirm there are no others which have changed price aside from the below?*

*If you see any of the new lines appear on our website cheaper than yourselves please let me know and I will get it amended immediately*<sup>205</sup>

- 4.77 On the next day (5 July 2019) [Employee] (Elite) sent an email to JD Sports identifying discrepancies between the intended prices indicated by JD Sports, setting out Elite's prices, and asking whether JD Sports agreed to align its retail prices with the prices provided by Elite. Her email read:

*'I put our RRP's in the last column. Looks like there are differences.*

*'Hope you are ok to keep RRP's [(which the CMA understands to refer to JD Sports' retail prices)] the same as ours.*<sup>206</sup>

- 4.78 On the same day, [Employee A] (JD Sports) confirmed that JD Sports would follow Elite's price list:

*'Thanks [Employee (Elite)] and yes absolutely – no point taking money off each other!'*

- 4.79 On 8 July 2019, [Employee C] (JD Sports) confirmed to Elite that JD Sports had amended its prices in accordance with Elite's price list. In reply, Elite thanked JD Sports for amending its prices (*'Thanks a lot for updating the RRP's'* – which the CMA understands to be a reference to JD Sports' retail prices).<sup>207</sup>

## **Legal assessment**

- 4.80 On the basis of the evidence above, and having regard to the legal principles set out in Chapter 3, the CMA makes the following findings, leading to the conclusion that the Parties have breached the Chapter I prohibition.

## **Agreement and concerted practice**

- 4.81 The CMA finds that, between 26 September 2018 and at least 8 July 2019, Elite and JD Sports were parties to a Single and Continuous Infringement to fix retail prices for Rangers-branded clothing products in the UK. The CMA also finds that Rangers participated in the Single and Continuous Infringement, but only insofar as it related to fixing the retail price at which Elite and JD Sports would sell the RFC H18 shirt at £60 between 26 September 2018 and at least 15 November 2018.

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<sup>205</sup> LLL000005713.

<sup>206</sup> LLL000005713.

<sup>207</sup> LLL000005713.

4.82 In particular, the CMA finds that:

- 4.82.1 On or around 26 September 2018, Elite, JD Sports and Rangers reached an agreement that JD Sports would increase the price for the RFC H18 shirt in order to align it with Elite's retail price (£60). Despite the fact that JD Sports and Rangers did not communicate directly about JD Sports' prices, the CMA considers there was a concurrence of wills between Elite, JD Sports and Rangers for the following reasons:
- (a) The contact between Elite and JD Sports to discuss and ultimately agree JD Sports' price increase was initiated at Rangers' request, following a discussion between Elite and Rangers in which they agreed that Elite would take action to address the price discrepancy 'problem' by contacting JD Sports. This stemmed from the fact that Rangers was very concerned about the fact that JD Sports was selling the replica shirt more cheaply than Elite (which was seen as Rangers' retail partner) (paragraphs 4.14 to 4.28; 4.33 to 4.35; 4.38 and 4.51).
  - (b) There was a common understanding between Elite and Rangers that the price differential should be sorted by JD increasing its price (which was the only action that JD Sports was in a position to take to resolve Rangers' concerns) (paragraphs 4.22 to 4.28; and 4.33 to 4.41).
  - (c) Following the discussions between Elite and Rangers, Rangers understood that the action that Elite would take to sort the price discrepancy problem would be to ask JD Sports to raise its price for the replica shirt to match Elite's price. At the very least, given the shared understanding between Elite and Rangers about the nature of the problem that Rangers wanted to see sorted, and given the discussions that had taken place between Elite and Rangers, it was reasonably foreseeable to Rangers that that would be the action that Elite would take, and Rangers approved of that action, whether explicitly or tacitly (paragraphs 4.22 to 4.29; and 4.33 to 4.35).
  - (d) Rangers took no steps to distance itself publicly from that course of action or to report it to the CMA, even after Elite told Rangers that it had asked JD Sports to increase its retail price, and subsequently that it had reached an agreement with JD Sports. To the contrary, when Elite reported that it had asked JD Sports to increase its prices, and subsequently that JD Sports had agreed to such request, Rangers expressed satisfaction with the course of action taken and with the fact that the matter had been resolved (paragraphs 4.36 to 4.41).

- (e) Elite told JD Sports that Elite's request had been prompted by pressure from Rangers and that Rangers wanted the price discrepancy to be rectified (paragraphs 4.42 and 4.43).
- (f) Elite and JD Sports agreed that JD Sports would increase the price of the RFC H18 shirt from £55 to £60. Subsequently, Elite monitored JD Sports' compliance with the agreement (paragraphs 4.29 to 4.35 and 4.42 and 4.43).
- (g) Elite reported its conversations with JD Sports to Rangers, such that Rangers was aware of the conduct of those two other Parties. Specifically, Elite communicated to Rangers that it had asked JD Sports to increase its price, and that it had agreed with JD Sports that JD Sports would increase the price of the RFC H18 shirt by £5 in order to align it with Elite's (paragraphs 4.36 to 4.41).
- (h) Rangers expressed to Elite satisfaction with the fact that, following contact from Elite, JD Sports had agreed to align its price for the RFC H18 shirt with Elite (paragraphs 4.36 to 4.41).

4.82.2 In September 2018, Elite and JD Sports also reached an agreement on the basis of a concurrence of wills or common understanding that they would align their respective retail prices for the Rangers-branded clothing products they both sold. They also exchanged commercially sensitive pricing information, thereby reducing uncertainty as to their future conduct in the market, specifically as regards their future pricing intentions (paragraphs 4.45 to 4.50).

4.82.3 In February and March 2019, once the 2018/2019 football season products started being discounted, Elite and JD Sports exchanged commercially sensitive pricing information about future pricing intentions, namely their discounting plans, on a number of occasions, and explicitly accepted the information that each other provided. There is evidence that JD Sports took account of at least some of that information when determining its own prices. Moreover, and in any event, in the absence of evidence to the contrary, it can be presumed that both Elite and JD Sports took that information into account. In addition, these exchanges are evidence of a common understanding between Elite and JD Sports that they would exchange commercially sensitive pricing information about the level and timing of discounts, with the aim of coordinating their discounting activity (timing and level of discounts). JD Sports' stated objective with those exchanges of future pricing information, according to contemporaneous evidence, was for both businesses to align prices and maximise profits and sales (paragraphs 4.60 to 4.72).

- 4.82.4 In July 2019, Elite and JD Sports agreed that they would align their retail prices for Rangers-branded clothing products for the 2019/2020 season, evidencing an agreement or common understanding between them to that effect. JD Sports' stated objective, according to contemporaneous evidence, was for the two retailers to avoid eroding their margins through price competition (paragraphs 4.73 to 4.79).
- 4.83 To the extent that it may be argued contrary to the CMA's finding that any aspects of the contacts between Elite, JD Sports and Rangers described in the paragraphs above fell short of an agreement between them, the CMA finds that their conduct, in any event, gave rise to a concerted practice. The contacts between Elite and JD Sports involved coordination between them as they exchanged commercially sensitive pricing information which resulted in a reduction of uncertainty about each other's future conduct on the market. Elite and JD Sports therefore knowingly substituted practical co-operation for the risks of competition (paragraphs 4.29 to 4.32; 4.42 to 4.50; and 4.53 to 4.79). As regards Rangers, the CMA considers that Rangers, through its communications with Elite regarding the price discrepancy 'problem', knew, or at the very least could reasonably have foreseen, that Elite would take action to sort the price discrepancy problem by asking JD Sports to raise its price for the relevant shirt to match Elite's price (paragraphs 4.22 to 4.28 and 4.33 to 4.41).
- 4.84 The CMA has not seen any evidence to rebut the presumption that that there was causality between the concertation and the Parties' conduct on the market. There is no evidence of Elite or JD Sports distancing themselves publicly from any of the contacts described in paragraphs 4.29 to 4.32, 4.42 to 4.50, and 4.55 to 4.79, nor did they report such conduct to the CMA. Throughout the duration of the Single and Continuous Infringement, Elite and JD Sports remained active in the market. The CMA is therefore entitled to presume that Elite and JD Sports took account of the information received for the purposes of determining their conduct in the market. As regards Rangers, there is no evidence that Rangers sought to distance itself publicly from the arrangement by informing Elite and JD Sports that they should not agree to align their retail prices, or communicate to each other their future pricing intentions, and/or by reporting the matter to the CMA. To the contrary, Rangers expressed satisfaction with the fact that JD Sports had increased its retail price for the RFC H18 shirt to £60, thereby resolving the matter (see paragraph 4.37 to 4.41).

### **Rangers' participation**

- 4.85 Rangers was not active in the relevant market (although TRFC held the intellectual property rights for Rangers-branded clothing products). However, the CMA finds that between 26 September 2018 and at least 15 November 2018 Rangers

participated in the agreement and/or concerted practice with Elite and JD Sports to fix the retail price for the RFC H18 shirt.<sup>208</sup> In particular:

4.85.1 As set out in paragraphs 4.82 to 4.84 above, the CMA finds that there was an agreement or at the very least a concerted practice between Elite, JD Sports and Rangers.

4.85.2 Rangers' intention to contribute by its own conduct to the common objectives pursued by Elite and JD Sports (namely, price alignment) can be inferred from Rangers' participation in the arrangement. Further, the CMA finds that:

- (a) Rangers made it clear that it wanted Elite to contact JD Sports in order to take action to address the problem for Rangers caused by the fact that JD Sports was selling the RFC H18 shirt more cheaply than Elite.
- (b) Rangers showed that it was aware of and satisfied by the fact that, following contact from Elite, JD Sports agreed to align its price for the relevant shirt with Elite, and with the fact that Elite had responded to the 'direction' from [Director A] (Rangers).
- (c) Rangers was reassured by the fact that Elite dealt with the matter, and that there was therefore no need for Rangers to contact JD Sports directly.
- (d) Rangers' participation in the arrangement occurred through Rangers' [redacted] and its [redacted] and was supported by the Rangers board.

4.85.3 In a letter to the CMA, Rangers stated that *'any communications between Rangers and third parties about the price and availability of its replica kits were motivated by the need to optimise the Rangers' fans experience and deal with complaints from fans direct to Rangers and to the press and other media, particularly given the damage caused to the club's relationship with its fans during Rangers' previous commercial relationship with [redacted]'*<sup>209</sup> However the CMA considers that this does not detract from the fact that the aim of Rangers' actions was to ensure that JD Sports' prices were increased to bring them into line with Elite's. Further, the CMA notes that at no stage there was any suggestion that the price differential

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<sup>208</sup> As explained in paragraph 3.20 above, an undertaking will be considered to have participated in an infringement and will be liable for the various elements comprising the infringement in circumstances in which *'the undertaking concerned intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk.'*

<sup>209</sup> LLL000016688, Rangers' letter to the CMA dated 1 March 2022 and Rangers' response to the CMA's s.26 notice dated 4 February 2022.



might be addressed by Elite unilaterally lowering its price to the same level as that of JD Sports.

- 4.85.4 As set out in paragraph 4.82.1, Rangers was aware of Elite and JD Sports' conduct in pursuit of the objective of price alignment, and in particular the fact that Elite would ask JD Sports to increase its price, and that JD Sports agreed to such request.
- 4.85.5 At the very least, given the shared understanding about the nature of the 'problem', and the discussions that took place between Elite and JD Sports, it was reasonably foreseeable to Rangers that the action that Elite would take to sort the problem would involve asking JD Sports to raise its prices to match those of Elite. Rangers approved of that action, whether explicitly or tacitly, and did not distance itself from it.
- 4.85.6 As noted above, the CMA considers that Rangers was actively involved in the agreement and/or concerted practice with Elite and JD Sports (for example, as noted in paragraph 4.85.2 above, by getting Elite to contact JD Sports in order to take action to address the 'problem' that was caused by the fact that JD Sports was selling the RFC H18 shirt more cheaply than Elite). Further, as set out in paragraph 4.82.1, at the very least Rangers tacitly approved of Elite's actions and took no steps to distance itself publicly from that action and/or to report it to the CMA.
- 4.85.7 Rangers had a direct and immediate interest in the successful execution of the anti-competitive agreement, namely that prices for the RFC H18 shirt became aligned thereby minimising the reputational damage vis-à-vis its fans caused by the fact that JD Sports was charging less for that replica shirt than Elite, which was seen as Rangers' retail partner. As such, the CMA considers that Rangers directly participated in the Single and Continuous Infringement.

4.86 Rangers stated to the CMA:

*'Insofar as the documents do refer to pricing, Elite's communications with Rangers confirm an understanding between the two businesses that Elite could provide "only a recommended price" to JD Sports and that neither Rangers nor Elite had any control over the actual price charged by JD Sports to end-customers.'*<sup>210</sup>

4.87 However, as explained in paragraphs 4.90 and 4.91 below, the CMA considers that the nature of the agreement between Elite, JD Sports and Rangers was patently horizontal. Further, as explained in paragraph 4.82.1(c), it was, at the very least,

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<sup>210</sup> LLL000016688, Rangers' letter to the CMA dated 1 March 2022 and Rangers' response to the CMA's s.26 notice dated 4 February 2022.

reasonably foreseeable to Rangers that the action that Elite would take to sort the price discrepancy 'problem' would involve asking JD Sports to raise its prices to match those of Elite following the discussions Elite had had with Rangers. The CMA therefore considers that Rangers could reasonably have foreseen that the contacts between Elite and JD Sports would amount to anti-competitive price coordination and was prepared to take the risk. Finally, and significantly, Rangers did not seek to distance itself publicly nor to report the matter to the CMA once it was made aware that Elite had asked JD Sports to increase its prices, and that JD Sports had agreed to such a request.

4.88 On the basis of all of the above, the CMA considers that Rangers participated in a particular aspect of the Single and Continuous Infringement, namely the agreement and/or concerted practice to fix the retail price at which Elite and JD Sports would sell the RFC H18 shirt at £60. The CMA finds that Rangers' participation lasted from 26 September 2018 until at least 15 November 2018.

### **Object to restrict competition**

4.89 The CMA considers that the overall object of the Single and Continuous Infringement was to fix prices for Rangers-branded clothing products. The Single and Continuous Infringement included agreements and/or concerted practices to:

- (a) fix the retail price at which Elite and JD Sports would sell the RFC H18 shirt at £60;
- (b) align retail prices for other Rangers-branded clothing products for the 2018/2019 football season;
- (c) exchange commercially sensitive information about the timing and level of discounts, with the objective of coordinating discounting activity; and
- (d) align retail prices for Rangers-branded clothing products for the 2019/2020 football season.

4.90 The CMA considers that the Single and Continuous Infringement is horizontal in nature because it concerns the coordination by Elite and JD Sports of their retail prices. For the purposes of the Single and Continuous Infringement (and of all the agreements and/or concerted practices that constitute it), Elite and JD Sports were competing retailers of Rangers-branded clothing products operating at the same level of trade.

4.91 As regards Rangers' involvement, the CMA finds that it was a participant in the horizontal arrangement despite not being active at the retail level of trade for reasons set out in paragraphs 4.85 to 4.88.

4.92 The CMA therefore has reached the conclusion that the Single and Continuous Infringement (as well as each of the agreements and/or concerted practices which constitute it) had as its object the prevention, restriction or distortion of competition.

### **Single and continuous infringement**

4.93 The CMA finds that the agreements and/or concerted practices detailed in paragraph 4.82 above individually infringe the Chapter I prohibition and collectively amount to a single and continuous infringement of the Chapter I prohibition. This is on the basis that:

- 4.93.1 They form a pattern of conduct that is interlinked in terms of pursuing a common anti-competitive objective, namely to fix the prices at which Rangers-branded clothing products were sold at retail level in the UK, notwithstanding that one of the agreements and/or concerted practices related specifically to a particular type of Rangers-branded product, namely the RFC H18 shirt.
- 4.93.2 The agreements and/or concerted practices shared an overall plan in the pursuit of that objective. They all involve the same two retailers (Elite and JD Sports), albeit that one of them also involves Rangers. For Elite and JD Sports, the agreements and/or concerted practices involve the same key individuals ([Director A] for Elite and [Employee A] for JD Sports). The agreements and/or concerted practices all involve various Rangers-branded clothing products, including replica kit and other Rangers-branded clothing, and the geographic scope of them all is the UK.
- 4.93.3 Further, the agreements and/or concerted practices track the various stages in the football seasons, starting with contacts relating to the 2018/2019 launch and initial sales period, the 2018/2019 discounting period, and the preparation for the 2019/2020 football season, and there is nothing within the evidence to suggest an interruption of the single and continuous infringement.
- 4.93.4 Through their own conduct, each of the Parties intended to contribute to the common objective pursued by all the Parties. An undertaking's intentional contribution to the common objectives pursued by all the participants can normally be inferred from its participation in at least one of the aspects of the cartel in respect of the period of its participation. As Elite and JD Sports participated in all of the aspects of the single and continuous infringement, the CMA finds that each of them intended through its own conduct to contribute to the common objective pursued by all of the Parties. Rangers' contribution to the agreement and/or concerted practice relating to the sale of RFC H18 shirts between 26 September 2018 and at least 15 November 2018 is discussed at paragraphs 4.85.2 to

4.85.3 above. An undertaking's conduct does not need to be identical to that of the other participants for it to be a party to the single and continuous infringement.

4.93.5 Each Party was aware of the offending conduct (planned or put into effect) of the other Parties in pursuit of the same objective, or each Party could reasonably have foreseen it and was prepared to take the risk that it would occur. Rangers' awareness of the others' conduct in relation to the agreement and/or concerted practice in relation to the sale of RFC H18 shirts between 26 September 2018 and at least 15 November 2018 is discussed above at paragraphs 4.85.4 to 4.85.5. The CMA has concluded that JD Sports was aware that Elite's request that JD Sports raise its prices for that shirt was prompted by discussions with Rangers (paragraph 4.82.1(e)). The CMA also considers that Elite must have been aware of both JD Sports' and Rangers' offending conduct as it was in direct contact with both of them regarding that conduct. Elite and JD Sports were the only parties involved in the other aspects of the Single and Continuous Infringement and were necessarily aware of each other's conduct.

4.94 The CMA therefore finds that Elite and JD Sports participated in and are liable for the totality of the Single and Continuous Infringement.

4.95 As regards Rangers, the CMA has not seen any evidence that Rangers intended to contribute to the common objective beyond the agreement and/or concerted practice relating to the sale of RFC H18 shirt between 26 September 2018 and at least 15 November 2018, or indeed that Rangers was aware of the offending conduct of Elite and JD Sports beyond that agreement and/or concerted practice. Accordingly, the CMA finds that Rangers' participation in the Single and Continuous Infringement was limited to that agreement and/or concerted practice.

## **Exclusion and exemption**

### ***Exclusion***

4.96 The Chapter I prohibition does not apply in any of the cases in which it is excluded by or as a result of section 3 of the Act.<sup>211</sup> The CMA finds that none of the exclusions from the Chapter I prohibition apply.<sup>212</sup>

### ***Block exemption***

4.97 Pursuant to section 10 of the Act, an agreement is exempt from the Chapter I prohibition if it falls within a category of agreements specified as exempt in a

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<sup>211</sup> Section 3 of the Act sets out the following exclusions, those in: Schedule 1 of the Act covering mergers and concentrations; Schedule 2 of the Act covering competition scrutiny under other enactments; and Schedule 3 of the Act covering general exclusions.

<sup>212</sup> The exclusions are set out in section 3 of the Act.

retained block exemption regulation. It is for the parties wishing to rely on this provision to prove that the restrictive agreement in question benefits from a block exemption.

- 4.98 For the reasons set out below, the CMA finds that none of the agreements and/or concerted practices identified (and consequently the Single and Continuous Infringement) benefits from a block exemption.<sup>213</sup>
- 4.99 In particular, the CMA has considered whether any of the agreements and/or concerted practices benefit from the Vertical Agreements Block Exemption Regulation (VABER)<sup>214</sup> but has concluded that they do not. This is because, even though Elite was also a supplier of Rangers-branded clothing products to JD Sports, Elite and JD Sports were not operating at a different level of the production or distribution chain for the purposes of any of the agreements or concerted practices; rather, all of the agreements and/or concerted practices were concerned with Elite's and JD Sports' role as competing retailers at the same level of trade. None of the agreements and/or concerted practices was therefore a 'vertical agreement' for the purposes of the VABER. This includes the agreement and/or concerted practice relating to the sale of RFC H18 shirt between 26 September 2018 and at least 15 November 2018 in which the CMA has concluded that Rangers was a participant.
- 4.100 Moreover, even if the VABER did apply, the CMA finds that all of the agreements and/or concerted practices involved price fixing. Such a restriction is excluded from the benefit of the VABER by virtue of Article 4(a) of the VABER which provides that the exemption provided by the VABER shall not apply to agreements, '*... which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object: (a) the restriction of the [parties]'s ability to determine its sale price ...*'
- 4.101 The CMA finds that no other block exemption is applicable to the agreements and/or concerted practices and that therefore that the agreements and/or concerted practices (and consequentially the Single and Continuous Infringement) are not exempt from the application of the Chapter I prohibition pursuant to section 10 of the Act.

### **Individual exemption**

- 4.102 The CMA finds that the agreements and/or concerted practices (and the Single and Continuous Infringement) are not exempt from the application of the Chapter I prohibition pursuant to section 9(1) of the Act. It is for a party claiming the benefit of

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<sup>213</sup> References in this section to the agreements and/or concerted practices also include the Single and Continuous Infringement.

<sup>214</sup> Commission Regulation No 330/2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices [2010] OJ L102/1.

an exemption under section 9(1) of the Act to prove that the conditions for exemption are satisfied.<sup>215</sup> No such evidence has been provided by any of the Parties.

### **Appreciable restriction of competition**

4.103 The CMA has found that the Single and Continuous Infringement (as well as each of the agreements and/or concerted practices which constitute it) had the object of preventing, restricting or distorting competition. Given that the effect on trade test is satisfied (see below), the CMA therefore also finds that it constitutes, by its very nature, an appreciable restriction of competition in the markets for the retail supply of Rangers replica kit and other Rangers-branded clothing in the UK for the purposes of the Chapter I prohibition.

### **Effect on trade within the UK**

4.104 The CMA considers that, by its very nature, an agreement or concerted practice between competitors to fix retail prices for Rangers-branded products in the UK is likely to affect trade within the UK.

4.105 The CMA also notes that the Single and Continuous Infringement was implemented within the UK, affecting sales made by UK-based retailers to UK-based customers. As noted at paragraph 2.25, Rangers-branded clothing products are available to be purchased via the internet for delivery throughout the UK, and Rangers has supporters located across the UK who purchase replica shirts and other Rangers-branded clothing.

4.106 Accordingly, the CMA finds that the Single and Continuous Infringement may have affected trade within the UK within the meaning of the Chapter I prohibition and that the effect on trade within the UK was appreciable.

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<sup>215</sup> Section 9(2) of the Act.

## 5. Attribution of liability

### Identification of the appropriate legal entity

5.1 For each Party which the CMA finds has infringed the Act, the CMA has first identified the legal entity directly involved in the Single and Continuous Infringement. It has then determined whether liability for the Single and Continuous Infringement should be shared with another legal entity forming part of the same undertaking, or whether liability should rest with an ‘economic successor,’ in which case each legal entity’s liability will be joint and several.

### Direct personal liability

5.2 Liability for an infringement of the Chapter I prohibition rests with the legal person(s) responsible for the operation of the undertaking at the time of the infringement (the ‘personal responsibility’ principle).<sup>216</sup>

### Indirect personal liability

5.3 A parent company may be held jointly and severally liable for an infringement committed by its subsidiary – without the parent’s knowledge or involvement<sup>217</sup> – where, as a matter of economic reality,<sup>218</sup> it exercised decisive influence over its subsidiary during its ownership period.<sup>219</sup> In such circumstances, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking.<sup>220</sup> This assessment turns not only on intervention in, or supervision of, the subsidiary’s commercial conduct in the strict sense,<sup>221</sup> but on the economic, organisational and legal links between parent and subsidiary, which may be informal.<sup>222</sup>

5.4 If the subsidiary is wholly owned by the parent company, whether directly or indirectly,<sup>223</sup> then the parent company is able to exercise decisive influence over

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<sup>216</sup> Judgment of 17 December 1991, *Enichem Anic SpA v European Commission* T-6/89, ECLI:EU:T:1991:74, paragraphs 236-237.

<sup>217</sup> Judgment of 20 January 2011, *General Química SA v Commission* C-90/09 P, ECLI:EU:C:2011:21, paragraph 102. See also judgement of 10 September 2009, *Akzo Nobel v Commission* C-97/08, ECLI:EU:C:2009:536, paragraphs 59 and 77.

<sup>218</sup> Judgment of 24 June 2015, *Del Monte v Commission* C-293/13 P, ECLI:EU:C:2015:416, paragraphs 75-78.

<sup>219</sup> Judgment of 10 September 2009, *Akzo Nobel v Commission* C-97/08, ECLI:EU:C:2009:536 paragraph 60; judgment of 26 September 2013, *Dow v Commission* C-179/12 P, ECLI:EU:C:2013:605.

<sup>220</sup> Judgment of 10 September 2009, *Akzo Nobel v Commission* C-97/08, ECLI:EU:C:2009:536, paragraph 59; *Sainsbury’s Supermarkets Ltd v MasterCard* [2016] CAT 11, paragraph 363.

<sup>221</sup> Judgment of 10 September 2009, *Akzo Nobel v Commission* C-97/08, ECLI:EU:C:2009:536, paragraph 39.

<sup>222</sup> Judgment of 11 July 2013, *Commission v Stichting Administratiekantoor Portielje and Gosselin Group NV* C-440/11, ECLI:EU:C:2013:514; judgment of 10 September 2009, *Akzo Nobel v Commission* C-97/08, ECLI:EU:C:2009:536.

<sup>223</sup> Judgment of 8 May 2013, *Eni Spa v Commission* C-508/11 P, EU:C:2013:289, paragraph 48; judgment of 27 January 2021, *Goldman Sachs v Commission* C-595/18 P, EU:C:2021:73, paragraphs 32-33.

the subsidiary and there is a rebuttable presumption in law that the parent did in fact exercise decisive influence over the commercial policy of the subsidiary.<sup>224</sup>

## Application to this case

### Elite

- 5.5 The CMA finds that Elite Sports Group Limited<sup>225</sup> was directly involved in all aspects of the Single and Continuous Infringement, and therefore finds it liable for the entire Single and Continuous Infringement.
- 5.6 On 17 October 2018, Elite Corporation Limited acquired the entire share capital of Elite Sports Group Limited (or LBJ Sports Apparel Limited as it was then known).<sup>226</sup> [3<]. The shareholders of Elite Corporation Limited are individuals.<sup>227</sup>
- 5.7 The CMA considers that, from 17 October 2018, with Elite Corporation Limited's acquisition of a 100 per cent shareholding in Elite Sports Group Limited, and on the basis that a parent is presumed to exercise a decisive influence over the commercial policy of its wholly owned subsidiaries, Elite Corporation Limited is jointly and severally liable with Elite Sports Group Limited for the Single and Continuous Infringement and for the payment of any financial penalty imposed by the CMA in respect of the Single and Continuous Infringement (Elite Corporation Limited being liable only for the period in which it was the sole ultimate parent company of Elite Sports Group Limited).
- 5.8 This Decision is therefore addressed to Elite Sports Group Limited and Elite Corporation Limited.

### JD Sports

- 5.9 The CMA finds that JD Sports Fashion Plc was directly involved in all aspects of the Single and Continuous Infringement, and therefore finds it liable for the entire Single and Continuous Infringement.
- 5.10 This Decision is therefore addressed to JD Sports Fashion Plc.<sup>228</sup>

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<sup>224</sup> Judgment of 10 September 2009, *Akzo Nobel v Commission* C-97/08, ECLI:EU:C:2009:536, paragraphs 60 and 61; judgment of 27 October 2010, *Alliance One & Others v European Commission* T-24/05, ECLI:EU:T:2010:453, paragraphs 126-130.

<sup>225</sup> Elite Sports Group Limited was known as LBJ Sports Apparel Limited until 24 August 2021, when it changed its name. See certificate of incorporation on change of name dated 24 August 2021, as filed at Companies House.

<sup>226</sup> Elite Corporation Limited group of companies accounts made up to 31 March 2021, page 26, as filed at Companies House.

<sup>227</sup> LLL000001857; LLL000001858.

<sup>228</sup> For the avoidance of doubt, the CMA has not made a finding as to whether Pentland Group Holdings Limited and Pentland Capital Holdings Limited formed part of the same undertaking as JD Sports Fashion Plc at the relevant time for the purposes of the Chapter I prohibition.



## Rangers

- 5.11 The CMA finds that the Rangers Football Club Limited participated in one aspect of the Single and Continuous Infringement, namely the agreement and/or concerted practice to fix the retail price at which Elite and JD Sports would sell the RFC H18 shirt at £60 between 26 September 2018 and at least 15 November 2018, and therefore finds it liable for that aspect of the Single and Continuous Infringement, as well as for the payment of any financial penalty imposed by the CMA in respect of that aspect of the Single and Continuous Infringement.
- 5.12 Rangers International Football Club Plc owns a 100 per cent shareholding in the Rangers Football Club Limited,<sup>229</sup> and did so throughout the duration of the latter's involvement in the Single and Continuous Infringement. On the basis that a parent is presumed to exercise a decisive influence over the commercial policy of its wholly owned subsidiaries, the CMA finds Rangers International Football Club Plc jointly and severally liable with the Rangers Football Club Limited for the same aspect of the Single and Continuous Infringement as the Rangers Football Club Limited, as well as for the payment of any financial penalty imposed by the CMA in respect of that aspect of the Single and Continuous Infringement.
- 5.13 This Decision is therefore addressed to the Rangers Football Club Limited and Rangers International Football Club Plc.

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<sup>229</sup> Rangers Football Club Limited accounts made up to 30 June 2021, page 48, as filed at Companies House.

## 6. The CMA's action

### The CMA's decision

- 6.1 On the basis of the evidence set out in this Decision, the CMA has made a decision that the Parties have infringed the Chapter I prohibition of the Act.

### Directions

- 6.2 Section 32(1) of the Act provides that if the CMA 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.
- 6.3 As the CMA finds that the Single and Continuous Infringement has already come to an end, it will not issue directions in this case.

### Financial penalties

- 6.4 Where the CMA makes a decision that an agreement or concerted practice has infringed the Chapter I prohibition, the CMA may require an undertaking which is a party to that agreement and/or concerted practice to pay a penalty in respect of the infringement if it is satisfied that the infringement has been committed intentionally or negligently.<sup>230</sup>

### Intention/negligence

- 6.5 The CMA is not obliged to specify whether it considers the infringement to be intentional or merely negligent for the purposes of determining whether it may exercise its discretion to impose a penalty.<sup>231</sup> The CAT has defined the terms 'intentionally' and 'negligently' as follows:

*'...an infringement is committed intentionally for the purposes of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition.'*<sup>232</sup>

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<sup>230</sup> Section 36(1) and 36(3) of the Act.

<sup>231</sup> *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1, paragraphs 453 to 457. See also judgment of 25 March 1996, *SPO and Others v Commission* C-137/95 P, EU:C:1996:130, paragraphs 53-57.

<sup>232</sup> *Argos Limited and Littlewoods Limited v OFT* [2006] CAT 13, paragraph 221. See also *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1, paragraph 456.

- 6.6 Ignorance or a mistake of law does not prevent a finding of intentional infringement.<sup>233</sup>
- 6.7 The CMA has found that the Single and Continuous Infringement (as well as each of the agreements and/or concerted practices which constitute it) involved the fixing of retail prices for Rangers-branded clothing products in the UK. As set out in paragraph 3.11 above, price fixing has the object of preventing, restricting or distorting competition and is an obvious restriction of competition that can be regarded, by its very nature, as being harmful to the proper functioning of competition. It follows that the Parties must have been aware, or could not have been unaware, that their conduct was anti-competitive.
- 6.8 For the purposes of determining whether to exercise its discretion to impose a penalty, the CMA has therefore decided that the Single and Continuous Infringement (as well as each of the agreements and/or concerted practices which constitute it) was committed intentionally, or at least negligently.
- 6.9 The CMA considers that it is appropriate in the circumstances of this case to exercise its discretion under section 36(1) of the Act to impose a financial penalty on Elite, JD Sports and Rangers in respect of the Single and Continuous Infringement. In fixing the penalty, the CMA has had regard to the seriousness of the infringement and the desirability of deterring similar conduct in the future in accordance with section 36(7A) of the Act.

### **The CMA's margin of appreciation in determining the appropriate penalty**

- 6.10 The CMA has a margin of appreciation when determining the appropriate amount of a penalty under the Act, provided the penalties it imposes in a particular case are: (i) within the range of penalties permitted by section 36(8) of the Act and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (the '**2000 Order**'),<sup>234</sup> and (ii) the CMA has had regard to the Penalty Guidance in accordance with section 38(8) of the Act.<sup>235</sup> The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.<sup>236</sup> Rather, the CMA makes its assessment on a case-by-case basis<sup>237</sup> having regard to all relevant circumstances and the objectives of its policy on financial penalties.

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<sup>233</sup> Judgment of 18 June 2013, *Bundeswettbewerbshörde and Bundeskartellanwalt v Schenker & Co. AG and Others* C-681/11, EU:C:2013:404, paragraph 38.

<sup>234</sup> SI 2000/309, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

<sup>235</sup> *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, paragraph 168, and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, paragraphs 102 and 103.

<sup>236</sup> For example, *Eden Brown and Others v OFT* [2011] CAT 8 (*Eden Brown*), paragraph 78.

<sup>237</sup> For example, *Kier Group and Others v OFT* [2011] CAT 3, paragraph 116, where the CAT noted that '*other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent.*' See also *Eden Brown*, paragraph 97, where the CAT observed that '*[d]ecisions by this Tribunal on penalty appeals are very closely related to the particular facts of the case.*'

## Calculation of the financial penalties

6.11 In accordance with section 38(8) of the Act, the CMA must have regard to the guidance on penalties in force at the time when setting the amount of the penalty. The Penalty Guidance sets out a six-step approach for calculating the penalty.<sup>238</sup>

### Step 1 – starting point

6.12 The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated having regard to the seriousness of the infringement and the need for general deterrence, and the relevant turnover of the undertaking.<sup>239</sup> This is a case specific assessment, taking into account overall: how likely it is for the type of infringement at issue, by its nature, to harm competition; the extent and likelihood of harm to competition in the specific relevant circumstances of the individual case; and whether the starting point is sufficient for the purpose of general deterrence.<sup>240</sup>

### Percentage starting point

6.13 As set out at paragraph 1.2, the Single and Continuous Infringement concerns price-fixing. It is therefore appropriate to use a starting point percentage within the 21 to 30% range.<sup>241</sup>

6.14 In addition to the type of infringement (price-fixing), the CMA considers that the following factors are relevant in determining the appropriate starting point in this case:<sup>242</sup>

#### 6.14.1 Nature of the product

- (a) Rangers-branded clothing products are consumer goods, albeit that these products are most likely to be of interest to a specific group of

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<sup>238</sup> Penalty Guidance, paragraph 2.1. See also footnote 13 of the Penalty Guidance, which provides that ‘in applying the steps to individual undertakings in multi-party cases, the CMA has a duty to observe the requirements of procedural fairness and rationality (*R (on the application of Gallaher Group Ltd and others) (Respondents) v The Competition and Markets Authority*, [2018] UKSC 25, at [24] to [41]). In doing so, the CMA will take account of the judgment of the CAT in *Kier* that, ‘...it is perfectly rational for a bigger undertaking to receive a more severe penalty than a smaller company ... However, this does not mean that penalties should be precisely proportionate to the relative sizes of the undertakings on which they are imposed ... it will not necessarily be fair or proportionate to impose on a bigger company a penalty which reflects the same proportion of its total worldwide turnover as a penalty imposed on a smaller company represents in relation to the latter’s turnover.’ (See *Kier Group plc and others v Office of Fair Trading* [2011] CAT 3, at [177]). In this context, the CMA also notes the CAT’s judgment in *GF Tomlinson Group Limited v Office of Fair Trading* [2011] CAT 7 at [158] which recognises that the principle of equal treatment is not breached where fines imposed on undertakings vary in size as a result of other factors coming into play. This has also been articulated by the Court of First Instance (now the General Court) in the *Tokai Carbon* case as follows: ‘The fact none the less remains that ... [the Commission] must comply with the principle of equal treatment, according to which it is prohibited to treat similar situations differently and different situations in the same way, unless such treatment is objectively justified (FETTCSA, paragraph 406).’ (See *Case T-236/01 Tokai Carbon Co. Ltd and Others v Commission* [2004] ECR II-1181, at [219]).’

<sup>239</sup> Penalty Guidance, paragraphs 2.2 to 2.13.

<sup>240</sup> Penalty Guidance, paragraph 2.4.

<sup>241</sup> Penalty Guidance, paragraph 2.5.

<sup>242</sup> Penalty Guidance, paragraph 2.7.

consumers, that is, Rangers supporters. Football is one of the UK's most important national sports and pastimes. Fan loyalty creates further demand and tends to decrease price-sensitivity. Many consumers of replica shirts are children or parents/carers who are asked by their children to purchase the latest replica shirt. Further, there was pent up demand<sup>243</sup> around the time when the Single and Continuous Infringement started, following a period when some fans refused to purchase Rangers-branded products.

#### 6.14.2 Structure of the market and market coverage

- (a) The CMA's view is that other clubs' merchandise is not part of the same market as Rangers merchandise because demand side substitution between the replica kit of different teams is virtually non-existent.<sup>244</sup> During the period of the Single and Continuous Infringement, Elite accounted for 100% of the wholesale supply of the 2018/2019 and 2019/2020 football season Rangers-branded clothing products to retailers. Elite was therefore able to control other retailers' prospects of entry into the relevant market, as in fact it did by entering into a commercial arrangement with JD Sports (which is a major international multichannel retailer with over 300 stores in the UK and 850 worldwide) under which JD Sports was the only national high street retailer selling the relevant products.
- (b) JD Sports and Elite accounted for the vast majority of the retail supply of Rangers-branded clothing products.<sup>245,246</sup> This means that the vast majority of the retail supply of current season Rangers replica kit and other Rangers-branded clothing products was affected by the Single and Continuous Infringement.
- (c) The scope of the Single and Continuous Infringement was UK-wide: Rangers-branded clothing products were available to consumers throughout the UK via Elite's and JD Sports' respective online stores.

#### 6.14.3 Actual or potential harm caused to consumers whether directly or indirectly

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<sup>243</sup> Paragraph 4.8.

<sup>244</sup> Paragraph 2.13.

<sup>245</sup> LLL000016674, Elite updated response dated 15 December 2021 to the CMA's information request dated 24 September 2021.

<sup>246</sup> A small number of small independent retailers also sold a limited amount of Rangers-branded products during the period of the Single and Continuous Infringement. In interview, [Director A] (Elite) indicated that JD Sports and Greaves Sports were Elite's main competitors at the retail level, and that JD Sports was Elite's most important customer (transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767, pages 46 and 57). In addition, [redacted] continued to sell Rangers-branded products relating to previous Scottish Professional Football League seasons (manufactured by [redacted]) at the [redacted] and through the [redacted] domain (LLL000001893, paragraph 13, page 6).

- (a) As the Single and Continuous Infringement is an object infringement, the CMA is not required to assess its actual effects for the purposes of establishing an infringement.<sup>247</sup> However, the Single and Continuous Infringement concerned the fixing of retail prices. For example, following Elite's discussions with Rangers, Elite contacted JD Sports and the two agreed that JD Sports would increase the price of the RFC H18 shirt by £5.<sup>248</sup>
- (b) The fact that replica kit is typically priced at RRP at launch, when customer anticipation and demand are at their highest, could be taken to suggest that there is not usually much price competition between retailers during the launch periods. However, in this case the Single and Continuous Infringement eliminated what remained of uncertainty between Elite and JD Sports as to each other's behaviour during those launch periods; and the structure of the market (as set out in paragraph 6.14.2) increased the potential for harm to be caused to consumers. Further, the Single and Continuous Infringement also covered products other than the replica kit, the demand for which the CMA considers is likely to follow a less clearly defined and cyclical lifecycle<sup>249</sup> such that there is a greater likelihood of price competition.
- (c) Further, the Single and Continuous Infringement related not only to sale prices during a key selling period, namely at the launch of Rangers' replica kit,<sup>250</sup> but also during the discounting period for the 2018/2019 season.<sup>251</sup> The conduct which took place during the discounting period for the 2018/2019 season was particularly likely to have caused harm because that was when more price-sensitive consumers would have been more likely to purchase relevant products and to have benefitted from competition between retailers.<sup>252</sup>

6.15 In setting the starting point, the CMA has also considered whether it is sufficient for the purpose of deterring other undertakings, whether in the same market or more broadly, from engaging in the same or similar conduct.<sup>253</sup> Such deterrence would appear to be necessary notwithstanding the fines imposed by the CMA's

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<sup>247</sup> Judgment in *Consten and Grundig v Commission*, joined cases C-56/64 and C-58/64, EU:C:1966:41, page 342. See also *Cityhook Limited v OFT* [2007] CAT 18, paragraph 269.

<sup>248</sup> Paragraphs 4.7.2, and 4.29 to 4.32.

<sup>249</sup> *Price-fixing of Replica Football Kit*, OFT decision No CA98/06/2003, 1 August 2003, paragraph 547.

<sup>250</sup> Paragraphs 4.7.1 to 4.7.8 and 4.14 to 4.59.

<sup>251</sup> Paragraphs 4.7.9 and 4.7.10 and 4.60 to 4.72.4.

<sup>252</sup> See also paragraphs 4.68 to 4.71, which describe contemporaneous evidence that JD Sports considered that the objective of contacts during this period was to ensure that both Parties (Elite and JD Sports) maximised their profit margins.

<sup>253</sup> Penalty Guidance, paragraph 2.8.

predecessor the OFT, in 2003 following its finding of an infringement in the replica football kit industry.<sup>254</sup>

- 6.16 Taking all of these factors in the round, the CMA has concluded that a starting point of 27% is appropriate in this case to reflect both the seriousness of the Single and Continuous Infringement and the need for general deterrence.

### ***Relevant turnover***

- 6.17 The relevant turnover is the turnover of the undertaking in the relevant product and geographic market affected by the infringement in the undertaking's last business year, that is, the financial year preceding the date when the infringement ended.<sup>255</sup>
- 6.18 Normally, the CMA will base relevant turnover on figures from an undertaking's audited accounts. However, in certain circumstances it may be appropriate to use a different figure as reflecting the true scale of an undertaking's activities in the relevant market.<sup>256</sup>

### ***Application in this case***

- 6.19 The CMA has found that, for the purposes of determining the financial penalty, the relevant markets in this case are the retail supply of (i) Rangers replica kit and (ii) other Rangers-branded clothing products in the UK.<sup>257</sup>

### **Relevant business year**

- 6.20 The Single and Continuous Infringement ended on 8 July 2019. The last business year (that is, a party's financial year preceding the date when the infringement ended) for each of the Parties is as follows:
- (a) Elite: 1 January 2018 to 31 December 2018
  - (b) JD Sports: 3 February 2018 to 2 February 2019
  - (c) Rangers: 1 July 2018 to 30 June 2019
- 6.21 However, the CMA notes that Elite was a new entrant in the relevant market at the time when the Single and Continuous Infringement started. On 30 March 2018,<sup>258</sup> Elite was appointed by TRFC as exclusive worldwide supplier of official and replica

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<sup>254</sup> *Price-fixing of Replica Football Kit*, OFT decision No CA98/06/2003, 1 August 2003.

<sup>255</sup> Penalty Guidance, paragraph 2.10.

<sup>256</sup> Penalty Guidance, paragraph 2.11.

<sup>257</sup> Paragraph 2.27.

<sup>258</sup> The agreement came into effect on 1 June 2018, see paragraph 2.2.

kit for Rangers, and only on 11 September 2018<sup>259</sup> did TRFC license Elite to deal with the sale of Rangers-branded products.<sup>260</sup>

- 6.22 Given that the Single and Continuous Infringement relates specifically to Rangers-branded clothing products supplied by Elite, and is intrinsically linked with Elite's dual role as both wholesale supplier and retailer, the CMA considers that in this case applying the relevant turnover from the period indicated by the Penalty Guidance would not reflect the true scale of the Parties' activities in the relevant market.
- 6.23 The CMA has decided, having had regard to the Penalty Guidance, that a more appropriate approach in the particular circumstances of this case is to use, for each undertaking,<sup>261</sup> the 12-month period starting from the month in which the Single and Continuous Infringement began, that is, from 1 September 2018 to 31 August 2019.

#### **Relevant turnover for Elite**

- 6.24 Taking into account paragraphs 6.19 to 6.23, the CMA considers that Elite's relevant turnover is **£8,514,903**.<sup>262</sup>

#### **Relevant turnover for JD Sports**

- 6.25 Taking into account paragraphs 6.19 to 6.23, the CMA considers that JD Sports' relevant turnover is **£2,282,514**.<sup>263</sup>

#### **Relevant turnover for Rangers**

- 6.26 As explained at paragraphs 2.20 to 2.24 and at paragraphs 2.26 and 2.28, the CMA's view is that, for the purpose of determining the level of the penalty that the CMA is, by this Decision, imposing on Rangers, the relevant market is the supply of intellectual property rights for Rangers replica kit in the UK.
- 6.27 According to Rangers, the total turnover received from Elite as the third party appointed to manufacture, distribute and retail Rangers-branded products during

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<sup>259</sup> The agreements came into effect on 15 September 2018, see paragraph 2.2.

<sup>260</sup> Paragraph 2.2.

<sup>261</sup> On the basis that the turnover of each Party in the relevant markets affected by the Single and Continuous Infringement relates specifically to Rangers-branded clothing products supplied by Elite.

<sup>262</sup> LLL000016674, Elite updated response dated 15 December 2021 to the CMA's information request dated 24 September 2021.

<sup>263</sup> LLL000016680, JD Sports updated response dated 14 December 2021 to the CMA's information request dated 24 September 2021.



the relevant year (that is, from 1 September 2018 to 31 August 2019) was £1,660,979.<sup>264</sup>

- 6.28 The CMA notes that that figure is likely to include turnover from Rangers-branded products which would fall outside the market definition for Rangers. On the other hand, replica kit represents a large proportion of total sales of Rangers-branded clothing products and therefore a large proportion of that turnover will refer to relevant products. The CMA also notes that Rangers did not include in the figure indicated in paragraph 6.27 any invoices dated after 5 March 2019 (on the basis that, as a result of litigation proceedings with Elite, Rangers has not received any payments from Elite after that date).<sup>265</sup>
- 6.29 The CMA therefore considers that, although the figure indicated in paragraph 6.27 may not precisely reflect the true scale of Rangers' activity in the relevant market, it is an adequate proxy in the absence of more precise information.
- 6.30 The CMA therefore considers that Rangers' relevant turnover is **£1,660,979**.

### **Conclusion on step 1**

6.31 Taking the above into account, the penalties at the end of step 1 are:

- (a) Elite: **£2,299,024**
- (b) JD Sports: **£616,279**
- (c) Rangers: **£448,464**

### **Step 2 – adjustment for duration**

- 6.32 The amount resulting from step 1 may be increased or, in particular circumstances, decreased to take into account the duration of an infringement.<sup>266</sup>
- 6.33 Where the total duration of an infringement is less than one year, the CMA will treat the duration as a full year for the purpose of calculating the number of years of the infringement. In exceptional circumstances, the starting point may be decreased where the duration of the infringement is less than one year.<sup>267</sup>

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<sup>264</sup> LLL000016688 and LLL000016689. Rangers stated to the CMA that it was unable to provide or estimate the turnover that it generated (indirectly) from the retail sale of Rangers-branded products on a product-by-product basis because it did not have access to detailed information regarding retail sales, and due to it having '*limited and unreliable visibility*' over the sales operations and financial returns regarding Rangers-branded products.

<sup>265</sup> LLL000016688.

<sup>266</sup> Penalty Guidance, paragraph 2.14.

<sup>267</sup> Penalty Guidance, paragraph 2.14.

### ***Application in this case***

- 6.34 The Single and Continuous Infringement lasted for just under one year.
- 6.35 The CMA is not persuaded that the duration of Rangers' involvement in the Single and Continuous Infringement constitutes an exceptional circumstance requiring a departure from the standard approach such as to warrant a multiplier of less than 1. The CMA does not consider it appropriate to take into account the fact that Rangers was involved in the Single and Continuous Infringement for a shorter period of time than Elite and JD Sports (between 26 September 2018 and at least 15 November 2018) at step 2. The CMA has however taken that fact into account at steps 4 and 5.
- 6.36 The CMA does not consider that in this case there are any other exceptional circumstances requiring a departure from the standard approach such as to warrant a multiplier of less than 1. The CMA has therefore applied a multiplier of 1 to the figure reached at the end of step 1.

### **Step 3 – adjustment for aggravating and mitigating factors**

- 6.37 The amount of the penalty, adjusted as appropriate at step 2, may be increased where there are aggravating factors, or decreased where there are mitigating factors.<sup>268</sup>

### ***Aggravating factor – involvement of director/senior management***

- 6.38 The involvement of directors or senior management in an infringement can be an aggravating factor.<sup>269</sup> The CMA considers that company directors have an additional responsibility, beyond that of other employees, to ensure that their companies do not infringe the law, no matter the size of the undertaking.

#### **Elite**

- 6.39 The CMA finds that [§<] [Director A] (Elite)<sup>270</sup> was directly involved in the Single and Continuous Infringement. Indeed, Elite's conduct throughout the Single and Continuous Infringement was carried out principally by [Director A] (Elite).
- 6.40 The CMA therefore considers that an uplift of 15% for director or senior management involvement is appropriate.

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<sup>268</sup> Penalty Guidance, paragraph 2.15 to 2.17.

<sup>269</sup> Penalty Guidance, paragraph 2.16.

<sup>270</sup> LLL000001858. [Director A] (Elite) also confirmed in interview that he had been [§<] (transcript of interview with [Director A] (Elite) held on 28 July 2021, LLL000016767 page 6). The CMA notes however that, according to Companies House, [Director A] (Elite) was appointed as a [§<].

## Rangers

- 6.41 The CMA finds that the [redacted] [Director A] (Rangers) and the then [redacted] of Rangers [Director B] (Rangers) were directly involved in the Single and Continuous Infringement.<sup>271</sup> Indeed, Rangers' conduct in relation to the Single and Continuous Infringement described in this Decision was primarily carried out by [Director B] (Rangers) and, to a more limited extent, by [Director A] (Rangers).
- 6.42 The CMA therefore considers that an uplift of 15% for director or senior management involvement is appropriate.

## JD Sports

- 6.43 No directors or senior management of JD Sports were involved in the Single and Continuous Infringement. Therefore the CMA considers that no uplift should be made for director or senior management involvement.

## *Mitigating factor – cooperation*<sup>272</sup>

### Rangers

- 6.44 Rangers made its [redacted] [Director A] (Rangers) available for voluntary interview. The CMA considers that this enabled the enforcement process to be concluded more effectively and speedily such that it is appropriate to apply a reduction of 5% to Rangers' penalty at this step.

## Conclusion on step 3

- 6.45 Taking the above into account, the penalties at the end of step 3 are:
- (a) Elite: **£2,643,877**
  - (b) JD Sports: **£616,279**
  - (c) Rangers: **£493,311**

## Step 4 – adjustment for specific deterrence

- 6.46 The penalty figure reached after steps 1 to 3 may be increased to ensure that the penalty to be imposed on the undertaking is sufficient to deter it from breaching competition law in the future.<sup>273</sup>

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<sup>271</sup> The CMA understands that [Director B] (Rangers) is not a [redacted].

<sup>272</sup> In accordance with footnote 31 of the Penalty Guidance, Elite and JD Sports, who are each benefitting from the CMA's leniency programme, have not received an additional reduction in financial penalties under this head (since continuous and complete cooperation is a condition of leniency).

<sup>273</sup> Penalty Guidance, paragraph 2.19.

- 6.47 It will often be necessary to impose a higher penalty on a larger undertaking than a smaller undertaking involved in the same infringement to achieve the required deterrent effect. In that regard, when assessing an undertaking's financial position for the purposes of deterrence, the CMA will generally take into account its total worldwide turnover as the primary indicator of the undertaking's size and economic power, unless the circumstances of the case indicate that other metrics are more appropriate.<sup>274</sup>
- 6.48 An increase at this step will be appropriate, for example, in situations in which an undertaking has a significant proportion of its turnover outside the relevant market, or where the potential fine is otherwise too low to achieve the objective of deterrence in view of the undertaking's size and financial position.<sup>275</sup>

### ***Application in this case***

#### **Elite**

- 6.49 Elite Corporation Limited's worldwide turnover for the financial year ending 31 March 2022 was £[redacted].<sup>276</sup>
- 6.50 Elite is a medium sized enterprise, which in recent years saw growth across all of its business units, including expanding the number of clubs that it acts as a retail partner and technical kit supplier to.<sup>277</sup> Revenues have grown in the most recent year.<sup>278</sup> In the absence of any circumstances to indicate that other metrics would be more appropriate, the CMA considers that Elite's worldwide turnover should be the primary indicator of size and financial position when considering any uplift at step 4.
- 6.51 The CMA considers that the penalty after step 3 of **£2,643,877** is sufficient to deter Elite from infringing competition law in the future and adequately reflects its size and financial position, even while taking into account the nature of the Single and Continuous Infringement and Elite's role in it (in particular the fact that it participated in all aspects of the Single and Continuous Infringement). The CMA concludes that an uplift for specific deterrence is therefore not required.
- 6.52 Taking the above into account, Elite's penalty at the end of step 4 is **£2,643,877**.

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<sup>274</sup> Penalty Guidance, paragraph 2.20.

<sup>275</sup> Penalty Guidance, paragraph 2.21.

<sup>276</sup> Elite Corporation Limited's consolidated, unpublished profit and loss account for the year ended 31 March 2022. Elite Corporation Limited's worldwide turnover for the financial year ended 31 March 2021 was £16,811,083 (Elite Corporation Limited's consolidated financial statements for the year ended 31 March 2021, as filed at Companies House).

<sup>277</sup> Elite Corporation Limited's consolidated financial statements for the year ended 31 March 2021, as filed at Companies House, page 2, and Elite Sports Group Limited's financial statement for the year ended 31 March 2021, as filed at Companies House, page 2.

<sup>278</sup> Elite Corporation Limited's consolidated, unpublished profit and loss account for the year ended 31 March 2022.

## JD Sports

- 6.53 JD Sports Fashion Plc's worldwide turnover for the financial year ending 30 January 2021 was £6,167,300,000.<sup>279</sup>
- 6.54 JD Sports is a large global retailer that has seen group revenues increase over each of the last three years, rising by more than one billion pounds over this time. On top of increasing revenues, the business earns profits in the hundreds of millions of pounds. The Single and Continuous Infringement relates to a very small fraction of JD Sports' business, such that the vast majority of JD Sports' turnover is outside the relevant market. In the absence of any circumstances to indicate that other metrics would be more appropriate, the CMA considers that JD Sports' worldwide turnover should be the primary indicator when considering any uplift at step 4.
- 6.55 The CMA considers that the penalty after step 3 of **£616,279** accounts for an insignificant proportion of JD Sports' worldwide turnover. On this basis, the CMA considers that its penalty should be increased to **£3,000,000** to ensure that the penalty has a sufficient deterrent effect on JD Sports whilst also taking into account the nature of the Single and Continuous Infringement and JD Sports' role in it (in particular the fact that it participated in all aspects of the Single and Continuous Infringement).
- 6.56 Taking the above into account, JD Sports' penalty at the end of step 4 is **£3,000,000**.

## Rangers

- 6.57 Rangers International Football Club Plc's worldwide turnover for the financial year ending 30 June 2021 was £47,746,000.<sup>280</sup> However, as set out in further detail at paragraph 6.70, Rangers has struggled financially since it entered into administration in 2012. The CMA therefore considers that, as well as taking into account the undertaking's total worldwide turnover, it is appropriate in the circumstances of this case also to take into account the fact that Rangers has made significant losses (see paragraph 6.70 below) when considering any uplift at step 4.
- 6.58 Taking into account Rangers' size and financial position, the CMA considers that the penalty after step 3 of **£493,311** is sufficient to deter Rangers from infringing competition law in the future whilst also taking into account the nature of the Single and Continuous Infringement and Rangers' role in it, in particular the fact that

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<sup>279</sup> JD Sports Fashion Plc's group of companies accounts for the year ended 30 January 2021, as filed at Companies House. These were the most recently published accounts for the business at the time settlement discussions commenced.

<sup>280</sup> Rangers International Football Club Plc's group of companies accounts for the year ended 30 June 2021, as filed at Companies House.

Rangers' participation in the Single and Continuous Infringement was limited to the agreement and/or concerted practice to fix the retail price at which Elite and JD Sports would sell the RFC H18 shirt at £60 between 26 September 2018 and at least 15 November 2018. The CMA concludes that an uplift for specific deterrence is therefore not required.

6.59 Taking the above into account, Rangers' penalty at the end of step 4 is **£493,311**.

### **Step 5 – adjustment to check that the penalty is proportionate and prevent the maximum penalty being exceeded**

6.60 At this step, the CMA will assess whether, in its view, the overall penalty is appropriate in the round;<sup>281</sup> and adjust the penalty, if necessary, to ensure that it does not exceed the appropriate maximum penalty allowed by statute (10% of the worldwide turnover of the undertaking in its last business year).<sup>282</sup> In carrying out the overall assessment of whether a penalty is proportionate, the CMA will have regard to all relevant circumstances including the nature of the infringement, the role of the undertaking in the infringement, the impact of the undertaking's infringing activity on competition, and the undertaking's size and financial position.<sup>283</sup>

6.61 In relation to all Parties, in line with paragraph 2.26 of the Penalty Guidance, the CMA has taken account, in its assessment of whether the penalty is proportionate, the fact that the Single and Continuous Infringement amounts to a very serious infringement of competition law, which is likely, by its very nature, to cause most harm to competition.

#### **Elite**

6.62 The CMA considers that Elite's position as the only wholesale supplier as well as the largest retailer of Rangers-branded clothing products during the period of the Single and Continuous Infringement means that its conduct is likely to have had a significant impact on competition in the relevant market.

6.63 In the financial year ending 31 March 2022 Elite generated a c. [£<] loss, which is significant for a business of its size, and has on average been making losses over the past three years. Elite has not paid out any dividends in recent years and the CMA considers it to have a low net asset value for a company of its size and level of turnover. The CMA considers that, taking into account Elite's size and financial position in the round with all the relevant circumstances of the case, Elite's penalty at the end of step 4 of **£2,643,877** is disproportionate.

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<sup>281</sup> Penalty Guidance, paragraph 2.25.

<sup>282</sup> Penalty Guidance, paragraphs 2.28.

<sup>283</sup> Penalty Guidance, paragraph 2.26.

- 6.64 The CMA therefore considers that Elite's penalty should be reduced, and that a penalty at the end of step 4 of **£600,000** is appropriate having regard to the nature of the infringement, Elite's role in it, the impact of Elite's infringing activity on competition and Elite's size and financial position.
- 6.65 No further adjustment is required as the penalty does not exceed the statutory maximum.

### ***JD Sports***

- 6.66 The CMA considers that JD Sports' position as the only major retailer of Rangers-branded clothing products (other than Elite) during the period of the Single and Continuous Infringement means that its conduct is likely to have had a significant impact on competition. As explained in paragraph 6.54, JD Sports is a large global retailer with increasing revenues and healthy profits. The CMA considers that there is nothing in JD Sports' size and financial position when taken in the round with all the relevant circumstances of the case that indicates that JD Sports' penalty at the end of step 4 is disproportionate.
- 6.67 Taking all of these factors in the round, the CMA considers that a penalty of **£3,000,000** is appropriate to reflect the seriousness of the Single and Continuous Infringement, and to deter both JD Sports and other businesses from engaging in anti-competitive activity.
- 6.68 No adjustment is required as the penalty does not exceed the statutory maximum.<sup>284</sup>

### ***Rangers***

- 6.69 The CMA considers that Rangers participated in only one aspect of the Single and Continuous Infringement, namely the agreement and/or concerted practice to fix the retail price of the RFC H18 shirt and that it was therefore involved in the Single and Continuous Infringement for a shorter period of time than the other parties (between 26 September 2018 and at least 15 November 2018). However, the contact between Elite and JD Sports to discuss and ultimately agree JD Sports' price increase was triggered by a discussion between Elite and Rangers (which had been initiated by Rangers). This aspect of the Single and Continuous Infringement involved not only Rangers, which had an important role as the owner of all trademarks associated with the Rangers football team, but also the two only major retailers of Rangers-branded clothing products during the period of the Single and Continuous Infringement.

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<sup>284</sup> For the purpose of calculating the statutory maximum, the CMA has had regard to JD Sports Fashion Plc's worldwide turnover for the financial year ending 31 January 2022.

- 6.70 Rangers has struggled financially since it entered into administration in 2012. It is not uncommon for football teams to make losses, but Rangers International Football Club Plc's losses are significant (a total of £53 million in losses over the last three financial years), and Rangers has not paid out any dividends in recent years. The CMA considers that, taking into account Rangers' size and financial position in the round with all the relevant circumstances of the case, Rangers' penalty at the end of step 4 of **£493,311** is disproportionate.
- 6.71 The CMA therefore considers that Rangers' penalty should be reduced, and that a penalty of **£250,000** would be appropriate having regard to the nature and impact of the infringement, Rangers' more limited role in it, and Rangers' size and financial position.
- 6.72 No adjustment is required as the penalty does not exceed the statutory maximum.

### **Step 6 – application of reductions including under the CMA's leniency programme, settlement, and approval of voluntary redress schemes**

#### ***Leniency***

- 6.73 JD Sports has admitted its involvement in the Single and Continuous Infringement and signed a leniency agreement with the CMA dated 1 June 2022. Provided JD Sports continues to co-operate and comply with the conditions of the leniency agreement, JD Sports will benefit from a leniency discount of 45%.
- 6.74 Elite has admitted its involvement in the Single and Continuous Infringement and signed a leniency agreement with the CMA dated 31 May 2022. Provided Elite continues to co-operate and comply with the conditions set out in the leniency agreement, Elite will benefit from a leniency discount of 15%.

#### ***Settlement***

- 6.75 As explained in paragraph 1.6, as part of settlement the Parties have each admitted the facts and allegations of Single and Continuous Infringement. In light of these admissions, their confirmation that they have ceased the infringing behaviour and their cooperation in expediting the process for concluding the investigation, the CMA has reduced each of the Parties' penalties by 10%.
- 6.76 Taking the above into account, the penalties at the end of step 6 are:
- (a) Elite: **£459,000**
  - (b) JD Sports: **£1,485,000**
  - (c) Rangers: **£225,000**



## Penalties imposed by the CMA

6.77 The following table sets out a summary of the penalty calculations and the penalties that the CMA requires each of the Parties to pay:

Step		Elite	JD Sports	Rangers	
	<b>Relevant turnover</b>	<b>£8,514,903</b>	<b>£2,282,514</b>	<b>£1,660,979</b>	
<b>1</b>	Starting point	27%	27%	27%	
	<b>Penalty after step 1</b>	<b>£2,299,024</b>	<b>£616,279</b>	<b>£448,464</b>	
<b>2</b>	Duration multiplier	1	1	1	
	<b>Penalty after step 2</b>	<b>£2,299,024</b>	<b>£616,279</b>	<b>£448,464</b>	
<b>3</b>	Adjustment for aggravating or mitigating factors	Director/senior management involvement	+15%	N/A	+15%
		Cooperation	N/A	N/A	-5%
	<b>Penalty after step 3</b>	<b>£2,643,877</b>	<b>£616,279</b>	<b>£493,311</b>	
<b>4</b>	Adjustment for specific deterrence	N/A	+£2,064,534	N/A	
	<b>Penalty after step 4</b>	<b>£2,643,877</b>	<b>£3,000,000</b>	<b>£493,311</b>	
<b>5</b>	Adjustment for proportionality	-£2,043,877	N/A	-£243,311	
	Adjustment to take account of the statutory maximum penalty	N/A	N/A	N/A	
	<b>Penalty after step 5</b>	<b>£600,000</b>	<b>£3,000,000</b>	<b>£250,000</b>	
<b>6</b>	Application of leniency discount	-15%	-45%	N/A	
	Application of settlement discount	-10%	-10%	-10%	
	<b>Final penalty</b>	<b>£459,000</b>	<b>£1,485,000</b>	<b>£225,000</b>	

## **Payment of penalty**

6.78 The CMA therefore requires:

- (a) Elite to pay a penalty of **£459,000**
- (b) JD Sports to pay a penalty of **£1,485,000**
- (c) Rangers to pay a penalty of **£225,000**

6.79 The penalty will become due to the CMA on 28 November 2022<sup>285</sup> and must be paid to the CMA by close of banking business on that date.

**Juliette Enser**

**Senior Director, Cartels**

**for and on behalf of the Competition and Markets Authority**

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<sup>285</sup> The next working day two calendar months from the expected date of receipt of the Decision.