Decision of the Competition and Markets Authority

Supply of Leicester City FC-branded clothing
Case 51068

31 July 2023

CMA
Competition & Markets Authority

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Confidential information in the original version of this Decision has been redacted from the published version on the public register. Redacted confidential information in the text of the published version of the Decision is denoted by [✂].

The names of individuals mentioned in the description of the infringement in the original version of this Decision have been removed from the published version on the public register. Names have been

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1. Introduction and Executive Summary

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 imposed by section 2(1) (the '**Chapter I prohibition**') of the Competition Act 1998 (the '**Act**'):

1.1.1 Leicester City Football Club Limited ('**LCFC**'), its immediate parent company King Power International Co. Limited ('**King Power**') and its ultimate parent company V & A Holding Co. Limited ('**V&A Holding**');[1] and

1.1.2 JD Sports Fashion Plc ('**JD Sports**').

1.2 The CMA finds that from 21 August 2018 to 26 January 2021 LCFC and JD Sports were parties to a single and continuous infringement (the '**SCI**') to limit the scope for competition between LCFC and JD Sports in respect of their retail sales of Leicester City-branded clothing products in the UK. In particular, the CMA finds that LCFC and JD Sports entered into the following agreements and/or concerted practices which together constitute the SCI:

1.2.1 on 21 August 2018 that JD Sports would immediately cease from retailing Leicester City-branded clothing products online for the 2018/2019 football season;

1.2.2 on 24 January 2019 that JD Sports would not undercut LCFC in respect of online sales of Leicester City-branded clothing products for the 2019/2020 football season, by applying a delivery charge to such products and disapplying its company-wide promotional offer of free online delivery for all orders over £70;

1.2.3 at least by 24 July 2020 that JD Sports would continue for the 2020/2021 football season the arrangements described above for the 2019/2020 season. Such arrangements continued at least until 26 January 2021.

1.3 The SCI, 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.

1.4 Leicester City-branded clothing products, including Leicester City replica shirts, are important products for Leicester City football fans. Due largely to LCFC's position as the largest retailer of Leicester City-branded clothing products, LCFC and JD

[1] As further explained in paragraph 5.6, King Power's and V&A Holding's liability for the infringement is on the basis of the decisive influence exercised by these entities in respect of LCFC as opposed to any evidence that King Power or V&A Holding had any knowledge of or involvement in the infringement.

Sports together accounted for most of the retail sales of Leicester City-branded clothing products during the period of the conduct.[2]

1.5 The CMA opened an investigation under section 25 of the Act on 23 September 2021. The CMA carried out inspections at the premises of LCFC under section 27 of the Act, and notices were sent to LCFC requiring the production of documents and information under section 26 of the Act. Information and documents were also provided by JD Sports without recourse to the CMA's formal powers, as part of its obligation to cooperate under the CMA's leniency policy. JD Sports had approached the CMA for leniency under the CMA's leniency policy on 29 January 2021 and was granted Type A immunity on 30 June 2023.

1.6 Following the CMA issuing a draft statement of objections[3] to the Parties on 16 June 2023, the CMA agreed on 29 June 2023 to settle the case after LCFC, King Power and V&A Holding:

1.6.1 made a clear and unequivocal admission that they had infringed the Chapter I prohibition in the terms set out in the draft statement of objections;

1.6.2 confirmed that the infringing behaviour had ceased and committed that they would refrain from engaging in the same or similar conduct;

1.6.3 accepted that a maximum penalty would be imposed;

1.6.4 agreed to cooperate in expediting the process for concluding the CMA's investigation; and

1.6.5 agreed not to challenge or appeal against the Decision to the Competition Appeal Tribunal ('**CAT**'').

1.7 On 5 July 2023, the CMA announced that it had issued the statement of objections[4] and settled the case with LCFC, King Power and V&A Holding.

1.8 By this Decision, the CMA is imposing a financial penalty on LCFC, King Power and V&A Holding under section 36 of the Act. No penalty is imposed on JD Sports by virtue of its Type A immunity.

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[2] LCFC accounts for the vast majority of the Leicester City-branded products and JD Sports only accounted for a small percentage of such sales. Document RDL-00014171, LCFC's response dated 15 September 2022 to the CMA's section 26 notice dated 9 August 2022 and Document RDL-00014175, JD Sports sales data for the retail of Leicester City-branded merchandise for the 2017/2018 football season onwards, up to 5 March 2021.

[3] CMA8, *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases ('**CMA8**')*, 31 January 2022, paragraphs 14.14 and footnote 172

[4] In accordance with section 31 of the Act and Rules 5 and 6 of the Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014, SI 2014/458.

2. Parties and relevant market

Parties

LCFC, King Power and V&A Holding

2.1 LCFC is the main operating vehicle for Leicester City Football Club, a football club in the English Premier League.

2.2 LCFC's immediate parent company is King Power and its ultimate parent company is V&A Holding. King Power and V&A Holding were LCFC's immediate and ultimate parent companies respectively throughout the period of the SCI.

2.3 LCFC is the registered owner of intellectual property rights necessary for the manufacture of Leicester City-branded clothing products. During the period of the SCI, LCFC made arrangements with Adidas for the manufacture and delivery by Adidas to LCFC of Leicester City-branded clothing products.[5] LCFC in turn made its own retail sales of Leicester City-branded clothing products in its bricks-and-mortar store at the King Power stadium and via its online retail sales platform, and also supplied the retail sector for onward sale.

2.4 The CMA considers that LCFC's involvement in the SCI took place primarily through the following individuals:

2.4.1 [Employee A] (LCFC), [✂], who led LCFC's negotiations with JD Sports;

2.4.2 [Employee B] (LCFC), [✂];

2.4.3 [Employee C] (LCFC), [✂]; and

2.4.4 [Senior Executive A] (LCFC), [✂].[6]

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 SCI, LCFC supplied JD Sports on a wholesale basis with Leicester City-branded clothing products. JD Sports sold such clothing products in a limited number of its bricks-and-mortar stores and online throughout the period of the SCI (with the exception of the period

[5] LCFC and Adidas entered into a Partner Agreement which commenced 1 June 2018 (Document RDL-00010550, as amended by Document RDL-00010549). [✂] although it appears that in practice this did not prevent LCFC from supplying other retailers which made online sales (including JD Sports and two smaller retailers) - see footnote 76 for further information.

[6] [Senior Executive A] (LCFC), [✂]. The last substantive email on the CMA's file to which [Senior Executive A] (LCFC), [✂] was party is dated [✂] (Document RDL-00003251). The CMA understands that [Senior Executive A] (LCFC), [✂] employment at LCFC ended shortly after this date.

from 21 August 2018 to the end of the 2018/2019 football season in respect of online sales, as discussed further at paragraphs 4.9 to 4.25 below).

2.6 The CMA considers that JD Sports' involvement in the SCI took place primarily through the following individuals:

2.6.1 [Employee A] (JD Sports), [✂], who led JD Sports' negotiations with LCFC; and

2.6.2 [Employee B] (JD Sports), [✂].

Relevant market

Introduction

2.7 The CMA has formed a view of the relevant market in order to calculate the Parties' 'relevant turnover' in the markets affected by the SCI, for the purposes of establishing the level of any financial penalties that the CMA may decide to impose.[7]

Relevant product market

2.8 The process of defining the relevant market starts with the focal product or products that are the subject of the SCI. In this case, the focal products of the SCI are Leicester City-branded clothing products sold by LCFC and JD Sports, namely replica kit,[8] including replica shirts, and other Leicester City-branded clothing such as training wear.

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

2.9.1 whether any of the relevant markets should include merchandise associated with other football clubs or with national teams;

2.9.2 whether Leicester City-branded replica shirts form part of a wider market with Leicester City-branded replica kit;

2.9.3 whether Leicester City-branded replica kit forms part of a wider market for Leicester City-branded merchandise; and

[7] *CMA's guidance as to the appropriate amount of a penalty*, CMA73, 16 December 2021 (the '**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.

[8] 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 LCFC's trademark is applied and which are worn by Leicester City's team players when competing in football tournaments.

2.9.4 whether Leicester City-branded clothing products form part of a wider market with Leicester City-branded non-clothing merchandise.

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

2.10 The CMA's view is that other clubs' merchandise is not part of the same market as Leicester City 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*,[9] and more recently by the CMA in *Supply of Rangers FC-branded clothing*,[10] those supporters who are sufficiently committed to Leicester City to purchase Leicester City 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.

2.11 The OFT and CMA also considered in their respective earlier decisions whether the replica kit of national teams might be substitutable. However, they 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 in this Decision is that the branded products of national teams do not form part of the same product market as Leicester City-branded merchandise.

Whether Leicester City-branded replica shirts form part of a wider market with Leicester City-branded replica kit

2.12 In *Price-fixing of Replica Football Kit* and *Supply of Rangers FC-branded clothing*, the OFT and CMA found that replica shirts formed part of a wider market with replica kit (the relevant product market was not narrower than this).

2.13 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 considers that these key facts remain true today.

[9] *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.

[10] *Supply of Rangers FC-branded clothing,* Case 50930, 27 September 2022.

Whether Leicester City-branded replica kit forms part of a wider market for Leicester City-branded merchandise

2.14 In *Price-fixing of Replica Football Kit* and *Supply of Rangers FC-branded clothing,* the OFT and CMA also found that replica kits did not form part of a wider market with other branded merchandise.

2.15 This was on the basis that other licensed merchandise was unlikely to be substitutable with replica kit, even when the merchandise was a similar item of clothing to an item of replica kit. This was because there were a range of characteristics which set replica kit apart, including: 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. The CMA considers that these characteristics still apply today.

Whether other Leicester City-branded clothing products form part of a wider market with Leicester City-branded non-clothing merchandise

2.16 The CMA's view is that other Leicester City-branded clothing such as training wear, i.e. one of the focal products, is not part of a wider market with non-clothing Leicester City-branded merchandise. While different types of Leicester City merchandise are substitutes in terms of demonstrating support for Leicester City, non-clothing items are likely to be less substitutable with clothing in terms of other attributes. Further, although LCFC retailed non-clothing merchandise during the period of the SCI, JD Sports did not do so. The CMA has therefore decided not to include Leicester City-branded non-clothing merchandise in the relevant product market for the SCI.

Relevant geographic market

2.17 The CMA considers that the relevant geographical market for Leicester City replica kit, and other Leicester City-branded clothing products, is at least UK-wide. As the OFT found in *Price-fixing of Replica Football Kit*, and the CMA found in *Supply of Rangers FC-branded clothing*, major clubs have supporters located across the UK who purchase replica kit and other club-branded clothing. Leicester City FC is a major club and when purchased online, its replica kit and other Leicester City-branded clothing products are available for delivery throughout the UK.

Conclusion on the relevant market

2.18 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 LCFC and JD Sports, the relevant product markets are the supply of:

2.18.1 Leicester City replica kit in the UK; and

2.18.2 other Leicester City-branded clothing products in the UK.

3. The law

3.1 This Chapter sets out the key legal principles, including references to relevant case law and legislation, applied in this Decision.[11]

Chapter I prohibition

3.2 The CMA's findings are made by reference to the Chapter I prohibition, 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.[12]

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.*'[13] 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*.'[14] The concept covers an economic unit, even if in law that unit consists of several natural or legal persons.[15]

Coordination between undertakings

Agreements

3.4 The Chapter I prohibition is intended to catch a wide range of agreements.[16] 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*.'[17] Courts have also

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[11] 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.

[12] References to the UK are to the whole or part of the UK: section 2(7) of the Act.

[13] Judgment of 23 April 1991, *Klaus Höfner and Fritz Elser v Macrotron GmbH* C-41/90, EU:C:1991:161, paragraph 21.

[14] Judgment of 16 June 1987, *Commission v Italian Republic* C-118/85, EU:C:1987:283, paragraph 7.

[15] 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.

[16] 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.

[17] 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.[18]

3.5 The Courts have also stated:'…*it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way*…'[19]. It is not necessary to establish a joint intention to pursue an anti-competitive aim.[20]

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*.'[21]

3.7 Each economic operator must determine independently the policy it intends to adopt on the market.[22] 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.[23]

3.8 The concertation is often effected through the exchange of competitively sensitive information, whether one-way or two-way, unilaterally and accepted, or reciprocally.

3.9 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.'* [24] However, that does not necessarily mean that the conduct should produce the concrete effect of restricting, preventing or distorting competition.[25]

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[18] 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.

[19] Case T-7/89 Hercules Chemicals v Commission, EU:T:1991:75, paragraph 256.

[20] 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).

[21] Judgment of 14 July 1971, *ICI v Commission* C-48/69, EU:C:1972:70, paragraph 64.

[22] 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.

[23] 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.

[24] 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, paragraph 206(ix).

[25] 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, paragraph 206(xi).

3.10 Where an undertaking participating in a concerted practice remains active on the market, there is a presumption that it will take account of any information provided by its competitors when determining its own conduct on the market.[26] For the presumption to be rebutted, the parties concerned must adduce evidence of this.[27] 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[28] 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.[29]

Agreements and/or concerted practices

3.11 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.[30] It is therefore not necessary to distinguish between agreements and concerted practices, or to characterise conduct as exclusively an agreement or a concerted practice.[31]

Object of preventing, restricting or distorting competition

3.12 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.[32] They include agreements and concerted practices that contain obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets.[33]

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[26] 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).

[27] Judgment of 19 March 2015, *Dole Food Co. v Commission (Bananas)* C-286/13 P, EU:C:2015:184, paragraph 127.

[28] Judgment of 20 March 2002, *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft and Others v Commission* T-9/99, EU:T:2002:70, paragraph 223.

[29] 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.

[30] 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, paragraph 206(ii).

[31] *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.

[32] 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.

[33] Judgment of 15 September 1998, *European Night Services v Commission* T-374/94, EU:T:1998:198, paragraph 136.

3.13 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.[34]

3.14 An agreement may be regarded as having an anti-competitive object even if it does not have a restriction of competition as its sole aim but also pursues other legitimate objectives.[35]

3.15 It is settled law that infringements taking the form of those described in paragraph 3.18 below infringe the Chapter I prohibition by object.

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.[36]

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.[37] Anti-competitive subjective intentions on the part of the parties can be taken into account in the assessment, but they are not a necessary factor for a finding that the object of the conduct was anti-competitive.[38]

Price-fixing, market-sharing

3.18 The Chapter I prohibition applies, among other things, to:

3.18.1 agreements or concerted practices which '*share markets or sources of supply*'[39] as well as agreements or concerted practices which involve coordination between competitors in relation to their respective distribution channels.[40] The courts have held that market-sharing agreements are, by their very nature, serious restrictions of

[34] 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* C-373/14P, EU:C:2015:427, paragraph 26.

[35] Judgment of 20 November 2008, Competition Authority v Beef Industry Development Society, C-209/07 EU:C:2008:643, paragraph 21.

[36] 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.

[37] 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.

[38] 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.

[39] Section 2(2)(c) of the Act.

[40] Commission Decision of 29 September 2004 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/C.37.750/B2 - Brasseries Kronenbourg, Brasseries Heineken), paragraphs 66 - 67.

competition[41] and amount to a restriction of competition by object;[42] and

3.18.2 agreements or concerted practices which '*directly or indirectly fix purchase or selling prices or any other trading conditions.*'[43] Price-fixing agreements are, by their very nature, restrictive of competition.[44] An agreement not to undercut a competitor's price has been found to constitute a restriction of competition by object.[45] Similarly, an agreement which prohibits parties from granting their customers discounts off published rates of transport charges and surcharges has also been found to constitute a restriction of competition by object by indirectly fixing prices even if the parties do not expressly agree on the level of their published prices.[46]

Implementation

3.19 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.[47]

Single and continuous infringement

3.20 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 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*

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[41] C-373/14 *Toshiba Corporation v Commission,* EU:C:2016:26, paragraph 28; C-449/11 *Solvay Solexis v Commission*, EU:C:2013:802, paragraph 82; and C-408/12 *YKK and Others v Commission*, EU:C:2014:2153, paragraph 26.('

[42] C-373/14 *Toshiba Corporation v Commission,* EU:C:2016:26: paragraph 28; and C-239/11, C-489/11 and C-498/11 *Siemens and Others v Commission*, EU:C:2013:866, paragraph 218.

[43] Section 2(2)(a) of the Act.

[44] Judgment of 30 January 1985, *BNIC v Clair* C-123/83, EU:C:1985:33, paragraph 22.

[45] Commission Decision of 15 May 1974 (IV/400 — Agreements between manufacturers of glass containers OJ [1974] L160/1, paragraphs 34 and 35.

[46] Judgment of 19 March 2003, Commission v CMA CGM and others C-236/03 P, paragraphs 175 and 184.

[47] 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, 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.

market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.'[48]

3.21 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.[49]

3.22 Three conditions need to be satisfied in order that an undertaking's liability for a single and continuous infringement is established.[50] This will happen where:

<u>The agreements and/or concerted practices shared an overall plan pursuing a common objective or objectives</u>

3.23 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*.'[51] Several factors are relevant to assessing whether there is an overall plan pursuing a common objective (or objectives).[52] 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.[53]

3.24 The common objective must go beyond a general reference to the distortion of competition in the market[54] but the conduct may nonetheless encompass a variety of different anti-competitive practices such as price-fixing and market-sharing.[55]

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[48] Judgment of 6 December 2012, *Commission v Verhuizingen Coppens NV* C-441/11 P, EU:C:2012:778, paragraph 41.

[49] 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 to134; judgment of 22 October 2015, *AC-Treuhand AG v Commission* C-194/14 P, EU:C:2015:717, paragraph 132.

[50] Judgment of 8 July 1999, *Commission v Anic Partecipazioni* C-49/92 P, EU:C:1999:356, paragraph 8.

[51] Judgment of 8 July 1999, *Commission v Anic Partecipazioni* C-49/92 P, EU:C:1999:356, paragraph 197.

[52] 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* T-410/09, EU:T:2012:676, paragraph 174 and the case law cited.

[53] Judgment of 12 December 2012, *Almamet v Commission* 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 EU:T:2013:423, paragraphs 270–273 (appeal on other grounds mostly dismissed, Case C-634/13P EU:C:2015:614).

[54] 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.

[55] Further examples of single and continuous infringements which involved both price-fixing and market-sharing, over and above *Team Relocations* as described in the footnote above include: judgment of 24 March 2011, *Aalberts Industries v Commission* T-385/06, EU:T:2011:114, paragraph 105, in the copper fittings market; and judgment of 8 July 1999, Commission v Anic Partecipazioni C-49/92 P, EU:C:1999:356, paragraphs 19 and 26, in the polypropylene market.

3.25 It is not necessary to demonstrate that the 'series of efforts' were also complementary in nature.[56] However, an absence of complementarity can call into question the existence of an overall plan pursuing a common objective.[57]

3.26 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 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.[58]

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

3.27 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.[59] Its intention to contribute to the overall objective must not be confused with its individual motivations for behaving as it did which are not relevant to the assessment of this second condition.[60] 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.[61]

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[62]

3.28 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

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[56] Judgment of 5 December 2013, *Siemens AG v Commission* C-239/11, EU:C:2013:866, paragraphs 247-248.

[57] 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.

[58] 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.

[59] 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 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.'*

[60] Judgment of 10 November 2017, *Icap Plc v European Commission* T-180/15, EU:T:2017:795, paragraph 181.

[61] Judgment of 10 November 2017, *Icap Plc v European Commission* T-180/15, EU:T:2017:795, paragraph 180.

[62] 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.

infringement, so long as it had sufficient awareness of the overall plan and intended to contribute to it.[63]

3.29 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.[64]

Liability for a single and continuous infringement

3.30 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.[65]

3.31 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.[66] 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*.'[67]

3.32 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.[68]

Appreciable restriction of competition

3.33 An agreement or concerted practice will not infringe the Chapter I prohibition if its impact on competition is not appreciable.[69] An agreement that has an anti-

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[63] Judgment of 14 December 2006, *Raiffeisen Zentralbank Osterreich v Commission* T-259/02, EU:T:2006:396, paragraph 193.

[64] Judgment of 8 July 1999, *Commission v Anic Partecipazioni* C-49/92 P, EU:C:1999:356, paragraphs 83 to 85 and 203.

[65] Judgment of 26 September 2018, *Infineon Technologies AG v Commission* C-99/17 P, EU:C:2018:773, paragraphs 171 to 177.

[66] Judgment of 8 July 1999, *Commission v Anic Partecipazioni SpA* C-49\92 P, EU:C:1999:356, paragraph 83.

[67] 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.

[68] 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.

[69] 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 will by its nature have an appreciable restriction on competition independently of any concrete effect that it may have.[70]

Effect on trade within the UK

3.34 The Competition Appeal Tribunal 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.[71]

[70] 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.

[71] *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 SCI, LCFC and JD Sports were engaged in economic activity and therefore each constituted an undertaking for the purposes of the Chapter I prohibition.[72]

4.3 Chapter 5 sets out the CMA's decision as regards the entities that it holds jointly and severally liable for the SCI. To the extent that these entities were not themselves directly involved in the SCI, the CMA has concluded that they exercised decisive influence over a company that was directly involved in the SCI. 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.[73] 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 SCI 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.[74] 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*.'[75] Competition authorities are therefore entitled to infer the existence of an anti-competitive agreement or concerted practice from fragmentary evidence.

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[72] LCFC and JD Sports were involved in the sale of Leicester City-branded clothing products, among other activities.

[73] *Tesco Stores Limited and Others v OFT* [2012] CAT 31, paragraph 88.

[74] 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.

[75] *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.

4.6 The CMA has given particular weight to contemporaneous documentary evidence in this Decision.

Conduct giving rise to the SCI

Summary of findings of fact

4.7 On the basis of the documentary evidence, the CMA finds that LCFC and JD Sports entered into a series of arrangements for the 2018/2019, 2019/2020 and part of the 2020/2021 football seasons, which had in common that they sought to limit the scope for competition as between LCFC and JD Sports in respect of their retail sales of Leicester City-branded clothing products in the UK:

4.7.1 On or around 18 August 2018, LCFC became concerned that JD Sports was selling Leicester City-branded clothing products online in addition to selling such products at several JD Sports bricks-and-mortar stores. Following communications between LCFC and JD Sports, they reached a common understanding on 21 August 2018 that JD Sports would immediately stop making online sales, which JD Sports put into effect. This left LCFC as the only online retailer of new 2018/2019 Leicester City-branded clothing products for the first part of the 2018/2019 football season and as the principal online retailer of Leicester City-branded clothing products for the latter part of the season.[76] See paragraphs 4.9 to 4.25 more generally and, in particular, paragraphs 4.14, 4.15 and 4.20.

4.7.2 Before agreeing to stop making online sales, JD Sports proposed an alternative to LCFC whereby JD Sports would sell online, but would disapply for Leicester City-branded clothing products its company-wide promotional offer of free online delivery for all orders over £70. LCFC initially rejected this alternative but indicated that it would come back to JD Sports once it had discussed the issue internally and considered a solution. See paragraphs 4.18 and 4.20.

4.7.3 Approximately 6 months later, on 24 January 2019, LCFC and JD Sports met to discuss sales arrangements for the forthcoming

[76] The LCFC/Adidas Partner Agreement commencing 1 June 2018 (Document RDL-00010550, as amended by Document RDL-00010549) appointed Adidas as LCFC's exclusive supplier of LCFC matchday and replica kit.

[✂] (quote from Document RDL-00014171, LCFC's response dated 15 September 2022 to the CMA's section 26 notice dated 9 August 2022).

The CMA also notes that in the second part of the 2018/2019 football season LCFC supplied a small online retailer, [LCFC Customer 2], [✂] which sold small volumes of clearance stock online. LCFC also supplied [LCFC Customer 2], [✂] and another online retailer [LCFC Customer 3], [✂] in subsequent seasons (Document RDL-00014171, LCFC's response dated 15 September 2022 to the CMA's section 26 notice dated 9 August 2022). The CMA therefore takes the view that nothing in LCFC's Partner Agreement with Adidas prevented such supplies (or indeed required LCFC to prevent JD Sports from selling online).

2019/2020 season which was to start in August 2019. LCFC and JD Sports entered into an arrangement which followed the proposal that JD Sports had initially made in August 2018, namely that JD Sports could sell online, in contrast to the 2018/2019 season, but that JD Sports must disapply for Leicester City-branded clothing products its company-wide promotional offer of free online delivery for all orders over £70. JD Sports started partially implementing this arrangement in May 2019 for online orders consisting exclusively of Leicester City-branded clothing products. However, it did not implement the arrangement for mixed online orders consisting of Leicester City-branded clothing products together with other products available from JD Sports.[77] See paragraphs 4.26 to 4.30 more generally and, in particular, paragraphs 4.27, 4.28 and 4.30.

4.7.4 There was a common understanding between LCFC and JD Sports that the purpose of JD Sports disapplying the free online delivery offer was to prevent JD Sports from undercutting LCFC in online sales of Leicester City-branded clothing products. See paragraphs 4.26, 4.27 and 4.29.

4.7.5 At least by 24 July 2020, so approximately 7 weeks before the start of the 2020/2021 football season, LCFC and JD Sports agreed to continue for the 2020/2021 football season the arrangements they had in place for the 2019/2020 football season and which are described directly above. These arrangements continued at least until 26 January 2021 when JD Sports took concrete internal steps to terminate its compliance with them, although after taking these internal steps, JD Sports discovered that it had not properly implemented the commitments it made to LCFC. See paragraphs 4.31 to 4.38.

4.8 The CMA considers that LCFC recognised the importance of delivery charges to its competitive performance in online sales of Leicester City-branded clothing products, which was why it considered JD Sports' free online delivery offer to be a competitive threat. See paragraph 4.39.

Findings of fact

Contacts in respect of the 2018/2019 football season - JD Sports to stop selling Leicester City-branded clothing products online

[77] The arrangement did not affect customers who were having products shipped internationally (who in any event were not eligible for free delivery) (Document RDL-00014362, JD Sports' response dated 29 March 2023 to the CMA's questions of 9 March 2023).

4.9 LCFC commenced supplying JD Sports in the 2017/2018 football season. In respect of the 2018/2019 football season, JD Sports formally placed an order for Leicester City-branded clothing products on 28 March 2018, agreeing with LCFC that it would only commence sales on 1 July 2018 at the earliest.[78]

4.10 On or shortly before 18 August 2018, [Senior Executive A] (LCFC), [✂] became aware that JD Sports was selling Leicester City-branded clothing products via its online store.[79] On 18 August 2018, he emailed a link to JD Sports' website to [Employee A] (LCFC), [✂] copying [Manager A] (Adidas), [✂] noting *'[Manager A] (Adidas), [✂] onto this!!'*,[80] before sending a follow up email to [Employee A] (LCFC), [✂] and [Manager A] (Adidas), [✂] three hours later explaining that JD Sports should not be selling Leicester City-branded clothing products online and encouraging a swift resolution: *'Guys – as I'm away from tomorrow can we action this quickly….We've supplied a small amount of stock for the Leicester Store and also Oxford St. but my understanding they cannot sell product on line [sic] or in any other store especially in the UK.'*[81]

4.11 While [Manager A] (Adidas), [✂] had initially agreed to take the matter up with JD Sports,[82] he subsequently advised LCFC on 20 August 2018 that it was for LCFC to deal with JD Sports itself.[83] This was because, on further enquiry, the stock which JD Sports was selling online was found not to have been supplied by Adidas (as LCFC had originally thought) but instead had been supplied by LCFC, and any agreement (between LCFC and JD Sports) that JD Sports would not sell online was not an agreement which Adidas considered it could influence.

4.12 [Senior Executive A] (LCFC), [✂] and [Employee A] (LCFC), [✂] then discussed between themselves how best to deal with JD Sports in an email exchange of 20 August 2018 during which [Senior Executive A] (LCFC), [✂] explained that LCFC had supplied Leicester City-branded clothing products to JD Sports on the basis that they were for sale in specific JD Sports bricks-and-mortar stores only *'**we did only ever say it was for London and limited stock for Leicester - never online.**'* [84]

4.13 He instructed [Employee A] (LCFC), [✂] to withhold supply until the Leicester City-branded clothing products had been removed from JD Sports' website.[85] He further instructed [Employee A] (LCFC), [✂] to explain to JD Sports that a reason why LCFC would not allow JD Sports to sell online related to the terms of LCFC's deal

[78] Document RDL-00001503
[79] Document RDL-00009206
[80] Document RDL-00009206
[81] Document RDL-00009206
[82] Document RDL-00009206
[83] Document RDL-00009199
[84] Document RDL-00009188
[85] Document RDL-00009188

with Adidas[86] which [Senior Executive A] (LCFC), [✂] described as ***'also meant to protect our online investment and sales****.'*

4.14 Later the same day on 20 August 2018, [Employee A] (LCFC), [✂] replied to [Senior Executive A] (LCFC), [✂] email to confirm that he had called [Employee A] (JD Sports), [✂]: '***I have* called *[Employee A] (JD Sports), [✂] and told him we will not be supplying anymore [sic] stock if they continue to sell online. I have insisted that he takes this down immediately.'***[87]

4.15 First thing the next morning on 21 August 2018, [Employee A] (JD Sports), [✂] emailed [Employee A] (LCFC), [✂] and several LCFC and JD Sports colleagues. He referred to his telephone conversation with [Employee A] (LCFC), [✂] on 20 August 2018 and confirmed that JD Sports would start to remove Leicester City-branded clothing products from sale on its website that day:

> *'**Thanks for your call yesterday** and whilst disappointing to hear it is better we salvage some business between ourselves for the future than have none at all. **We will start the process of taking your products off-line today and advise once the process is complete**….'* [88]

4.16 Shortly thereafter [Employee A] (LCFC), [✂] replied to [Employee A] (JD Sports), [✂] *'Thank you for your support on this'*.[89]

4.17 At around the same time, [Employee A] (JD Sports), [✂] forwarded the email described at paragraph 4.15 above to his JD Sports colleagues [Employee B] (JD Sports), [✂] and [Employee C] (JD Sports), [✂] and explained his understanding as to why LCFC was requiring JD Sports to stop selling online:

> '*Morning both – regarding below [i.e. the email described at paragraph 4.15 above]* ***the club have a beef that with our free shipping we are cheaper than the [sic] them so don't want us to trade on-line****... Given our new store in Highcross, I think it prudent to keep the club onside and maintain our trading relationship.*'[90]

4.18 [Employee B] (JD Sports), [✂] contacted [Employee A] (LCFC), [✂] on 21 August 2018 with a proposed alternative to JD Sports having to stop making online sales:

> *'Hi [Employee A] (LCFC), [✂],*

[86] Document RDL-00009188, The CMA infers that the reference to *'no online sales per the adidas agreement'* is a reference to [✂]. However, there is nothing within the evidence to suggest that Adidas objected to or, in particular, that it raised any objections either with LCFC or with JD Sports, to JD Sports selling online, which JD Sports did do in subsequent football seasons with LCFC's approval (see paragraphs 4.26 to 4.38).

[87] Document RDL-00009188

[88] Document RDL-00014185 and Document RDL-00009155

[89] Document RDL-00009155

[90] Document RDL-00014185

Hope you are well. I just wanted to touch base on this ***to see if there is anything we can do to resolve the issue before having to bring it off site****.*

* *Our free delivery threshold is £70 so any item on its own will be charged at £3.99 delivery.*

* *It's only when you add multiple items that it takes you over the delivery threshold,* ***if this is the point of concern I can add the list of products to an exclusion list so they won't contribute to the threshold****.*

** If you can let us know where the main point of concern is & hopefully we can resolve it without needing to take it off site.'*[91]

4.19 However, this alternative proposal was rejected by LCFC. [Senior Executive A] (LCFC), [✂] forwarded [Employee B] (JD Sports), [✂] email to [Employee A] (LCFC), [✂] on 21 August 2018 commenting: *'???* ***It just shouldn't be sold online****…! Does he get it?'* [92]

4.20 [Employee B] (JD Sports), [✂] discussed JD Sports' alternative proposal with [Employee A] (LCFC), [✂] and summarised the outcome in an email he sent to several LCFC and JD Sports employees:

'Just to confirm as per my conversation with [Employee A] (LCFC), [✂] that ***we will take Leicester City product off the site given the club concerns****.*

[Employee A] (LCFC), [✂] will pick up regarding hopefully finding a solution for this going forward *& come back to us once he has been able to discuss internally'.* [93]

4.21 The LCFC and JD Sports employees referred to[94] within the email exchanges described in paragraphs 4.15 to 4.20 above included [Senior Executive A] (LCFC), [✂], [Employee B] (LCFC), [✂], [Employee A] (JD Sports), [✂], [Employee B] (JD Sports), [✂] and [Employee C] (JD Sports), [✂].

4.22 Later the same morning on 21 August 2018, [Senior Executive A] (LCFC), [✂] forwarded the email chain described at paragraphs 4.15 and 4.16 to [Senior Executive B] (LCFC), [✂] stating '*FYI [Senior Executive B] (LCFC), [✂] now coming down. Their HQ presumed they could sell online like other clubs but are now taking it down.'*[95] [Senior Executive B] (LCFC), [✂] responded the same day noting that '*in the long run we may want to move volume like this but it needs to be*

[91] Document RDL-00014209 and Document RDL-00009171

[92] Document RDL-00009171

[93] Document RDL-00014209, Document RDL-00014187 and Document RDL-00014209

[94] Whether as senders, recipients or having been copied.

[95] Document RDL-00009155

part of the plan!',[96] to which [Senior Executive A] (LCFC), [✂] replied *'Yes, that how we used them last season and to give exposure and penetration in London but then they jumped this season and went online. Naughty.'*[97]

4.23 JD Sports started removing Leicester City-branded clothing products from online sale on 21 August 2018.[98] JD Sports made its final full priced online sale of the season on 4 September 2018, although reduced price online sales continued for the remainder of the season.[99]

4.24 On 22 August 2018, JD Sports further discussed the matter internally. [Employee D] (JD Sports), [✂] emailed [Employee B] (JD Sports), [✂]:

> '*I've just been made aware of this. Am I correct in understanding that they want us to remove product from selling online because our free delivery offer makes us cheaper? Can they actually do this? Is it legal?'*[100]

4.25 [Employee B] (JD Sports), [✂] replied:

> '*This was what was originally suggested but when speaking to them about finding a solution* ***it wasn't the only blocker****, they said that* ***without an agreed set of 'rules' the senior team at the club don't want it retailed online****.*
>
> *… [ ]…*
>
> ***The club did say they would pick this back up when the [Senior Executive A] (LCFC), [✂] returns with a view to getting it back online****.*'[101]

Contacts in respect of the 2019/2020 football season - JD Sports to apply a delivery charge for online orders over £70

4.26 As explained in paragraph 4.20 above, JD Sports understood from LCFC that LCFC would *'hopefully'* be re-considering their arrangement that JD Sports should not sell Leicester City-branded clothing products online: *'{[Employee A] (LCFC), [✂]} will pick up regarding hopefully finding a solution for this going forward & come back to us once he has been able to discuss internally'*.

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[96] Document RDL-00009155

[97] Document RDL-00009155

[98] Document RDL-00014209

[99] Document RDL-00014175, JD Sports sales data for the retail of Leicester City-branded merchandise for the 2017/2018 football season onwards, up to 5 March 2021. See paragraph 3.19 which explains that parties cannot avoid liability for an infringement by arguing that the agreement or concerted practice was never implemented or put into effect by them or that they 'cheated' on it.

[100] Document RDL-00014187

[101] Document RDL-00014187

4.27 On 24 January 2019, approximately five months after their August 2018 exchange, LCFC and JD Sports met in order to discuss sales arrangements for the forthcoming 2019/2020 season. [Employee A] (JD Sports), [✂] recorded details of the discussion (and his understanding of the terms on which LCFC would supply JD Sports for that season) in an email he sent to various LCFC personnel the following day on 25 January 2019:

> *'Hi guys (please forward to [Employee E] (LCFC), [✂] also)*
>
> *Thanks again for your time yesterday – a pleasure as always. Just a couple of points in summary further to me completing the orders next week:*
>
> - ***For 2019/20 season we will resume selling on-line and ensure we always attach a delivery charge so our pricing/offer is aligned with the club.***
>
> ***...[ ]...*** [102]

4.28 [Employee B] (LCFC), [✂] acknowledged [Employee A] (JD Sports), [✂] email on the same day, noting that the content of [Employee A] (JD Sports), [✂] email was *'correct and fine [LCFC's] side of things…'*.[103] Neither [Employee B] (LCFC), [✂] nor any of his LCFC colleagues copied into the email[104] contradicted [Employee A] (JD Sports), [✂] comment that JD Sports should apply a delivery charge and that this was to ensure that JD Sports' pricing/offer was aligned with the club.

4.29 As both JD Sports and LCFC were pricing Leicester City-branded clothing products at the same level, at least on product launch,[105] the CMA considers that the difference in their online delivery charges was the main pricing component on the basis of which LCFC and JD Sports were competing and that the common understanding for the 2019/2020 season involved removing that difference:

4.29.1 In [Employee A] (JD Sports), [✂] email of 24 January 2019 to LCFC described at paragraph 4.27 above, he explained that the purpose of JD Sports attaching a delivery charge to online sales '***so [JD Sports']***

[102] Document RDL-0001782 and Document RDL-00014190

[103] Document RDL-0001782 and Document RDL-00014190

[104] [Employee D] (LCFC), [✂] and [Employee A] (LCFC), [✂].

[105] JD Sports told the CMA that on product launch in the 2018/2019 and 2019/2020 football seasons, JD Sports priced Leicester City-branded clothing products at what it understood to be the RRPs which LCFC had communicated to JD Sports. Furthermore, for product launch in the 2020/2021 football season, JD Sports did not consider that it received any RRPs from LCFC such that it observed LCFC's prices on LCFC's website and applied them to its own stock of Leicester City-branded clothing products. In other words, JD Sports matched LCFC's prices.

JD Sports also told the CMA of its understanding that such an approach is typical across football club licensed merchandising markets, i.e. that retailers generally price at RRP on product launch and then choose to introduce discounts of varying sizes and sales duration at a later stage in the products' lifecycles (Document RDL-00014362, JD Sports' response dated 29 March 2023 to the CMA's questions of 9 March 2023).

pricing/offer is aligned with the club'. LCFC did not contradict this assessment;[106]

4.29.2 In an internal JD Sports email of 28 January 2019 discussing the agreement, it was noted that *'**[LCFC's] main issue….was the free delivery (because most products are over the threshold) – {[Employee A] (JD Sports), [✂]} has agreed that we can have it online next year providing we exclude it from free delivery to align with the clubs offering**'*;[107]

4.29.3 In [Employee A] (JD Sports), [✂] email of 5 February 2019 to LCFC (copied to several JD Sports colleagues) in which he sends his stock order for the forthcoming 2019/2020 season, he noted '*JD team – please note we have agreed a)* ***all on-line business must include delivery charges so our pricing is aligned with the club site***.'[108] LCFC did not contradict this assessment;

4.29.4 In an internal LCFC email of 1 August 2019 explaining why JD Sports had resumed selling online, [Employee D] (LCFC), [✂] noted that '***We only pulled it from their website last season as they offered free delivery so therefore were undercutting us. This year we agreed they are to put it back online but to charge for delivery***.'[109]

4.30 In May 2019, JD Sports made arrangements for Leicester City-branded clothing products to be sold on its website with a delivery charge for all online orders of such products through disapplying its company-wide promotional offer of free delivery for online orders over £70.[110] However, these special arrangements covered only online orders consisting exclusively of Leicester City-branded clothing products. It did not cover mixed online orders of Leicester City-branded clothing products together with other products available from JD Sports (i.e. free delivery for online orders over £70 continued to apply to such purchases). Furthermore, the arrangements did not affect customers who were having products shipped internationally (who in any event were not eligible for free delivery).[111]

Contacts between LCFC and JD Sports in respect of the 2020/2021 football season - JD Sports to continue to apply a delivery charge for online orders over £70

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[106] Document RDL-0001782 and Document RDL-00014190

[107] Document RDL-00014189

[108] Document RDL-00004390 and Document RDL-00014215

[109] Document RDL-00009076. Although the evidence on the CMA's file does not suggest that [Employee D] (LCFC), [✂] was directly involved in the SCI at the outset, the CMA considers that some weight can nonetheless be attached to this document as (i) [Employee D] (LCFC), [✂] was at the time of the email employed within LCFC's retail team and (ii) the email is consistent with the various internal JD Sports communications describing the common understanding (see paragraphs 4.29.1 to 4.29.3 above).

[110] Document RDL-00014194, Document RDL-00014195 and Document RDL-00014196

[111] Document RDL-00014362, JD Sports' response dated 29 March 2023 to the CMA's questions of 9 March 2023

4.31 The CMA considers that LCFC and JD Sports agreed to continue into the 2020/2021 season the common understanding they had for the 2019/2020 football season at least by 24 July 2020.

4.32 [Employee A] (JD Sports), [✄] and [Employee C] (LCFC), [✄] had email exchanges between March and July 2020 and a telephone call on 24 July 2020 to discuss JD Sports' stock requirements/sales for the 2020/2021 football season which was just about to start.[112] [Employee A] (JD Sports), [✄] followed up the call with an email on 24 July 2020 to [Employee C] (LCFC), [✄] and [Employee B] (JD Sports), [✄], copied to several JD Sports colleagues:

> *'[Employee C] (LCFC), [✄], good to catch up earlier, and appreciate the full and frank update…as soon as you can confirm prices we will return POs as quickly as possible so we can start the booking in process.*
>
> *…[ ]…*
>
> *@[Employee B] (JD Sports), [✄]* ***can you please also remember when we receipt our stock that we agreed with Leicester last year we would not offer free a [sic] delivery service so we are not under-cutting the club****'.*[113]

4.33 [Employee B] (JD Sports), [✄] responded to this email later on 24 July 2020, including to [Employee C] (LCFC), [✄], with instructions for a JD Sports colleague to put into effect JD Sports' agreement not to offer a free delivery service: *'[Employee C] (JD Sports), [✄], FYI & once we have PLUs[114] we just need to pick up with content to have them excluded from the campaigns'.*

4.34 [Employee C] (LCFC), [✄] then followed [Employee B] (JD Sports), [✄] later on 24 July 2020 with his own reply to the email exchange, which included: '…***Originally I believe that LCFC supplied kit to JD to support the stores in the local area****, but the focus has shifted considerably online given the situation, and we need to be mindful of that'.*[115]

4.35 On 27 July 2020, [Employee A] (JD Sports), [✄] replied to the same email chain, noting '*The original supply agreement was for store and on-line but* ***it was highlighted to us last year that our free delivery threshold was under-cutting the club so we removed the kit till we could get a fix for this****'.*[116]

4.36 [Employee C] (LCFC), [✄] did not contradict [Employee A] (JD Sports), [✄] or [Employee B] (JD Sports), [✄] understanding, as expressed in their emails to him,

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[112] Document RDL-00002242 and Document RDL-00014198

[113] Document RDL-00002242 and Document RDL-00014198

[114] This refers to 'Price Look Ups'.

[115] Document RDL-00002242 and Document RDL-00014198

[116] Document RDL-00002242 and Document RDL-00014198

that JD Sports was to remove Leicester City-branded clothing products from its free online delivery offer.

4.37 JD Sports' understanding that this is what LCFC was seeking from JD Sports is further evidenced in the following communications:

4.37.1 On 15 September 2020, the minutes of JD Sports' Replica Team meeting were circulated which included a note that '***Free Delivery threshold to be removed from Leicester City Kits following complaints from the club'***.[117]

4.37.2 On 28 September 2020, internal JD Sports emails noted '*Need to get Leicester City on-line…* ***REMEMBER no free delivery mechanism please!'***[118] **and** ***can we please remove all Leicester City lines from the free delivery promotion. This is at the request of the club so we don't undercut them***'.[119]

4.37.3 internal JD Sports emails of 1 and 2 October 2020 included a '***reminder we need to add Leicester into promo/free delivery exclusions please***.'[120] and show that this was implemented.[121]

4.38 The common understanding lasted at least until 26 January 2021 when JD Sports took '*concrete internal steps to terminate its compliance with the commitments* [it made to LCFC for the 2020/2021 season]*…'*.[122] After taking these internal steps, JD Sports discovered that it had not '*properly implemented at a technical level*' the commitments it had made to LCFC. As a result, JD Sports was unaware of any online purchase of Leicester City-branded clothing products in the 2020/2021 football season in which it had in fact disapplied its promotional offer of free delivery for online orders over £70.[123]

The importance of delivery charges to competition in online sales

4.39 There is evidence that delivery charges are important to competition in online sales. Specifically, in its Ecommerce Marketing Action Plan 2020-2021,[124] LCFC stated that: '*Delivery cost is a key barrier to purchase,* [✂]. LCFC also acknowledged that when it introduced its own promotion of free delivery for online

[117] Document RDL-00014202

[118] Document RDL-00014203

[119] Document RDL-00014204

[120] Document RDL-00014206

[121] Document RDL-00014207

[122] Document RDL-00014362, JD Sports' response dated 29 March 2023 to the CMA's questions of 9 March 2023

[123] Document RDL-00014362, JD Sports' response dated 29 March 2023 to the CMA's questions of 9 March 2023

[124] Document RDL-00011756. The Marketing Action Plan 2020-2021 refers to competitive conditions during the period in which the SCI took place.

orders over £70 in November and December 2020: *'there was a [30 – 60%] increase in transactions over £70 (*[✂]*)*[125]*.*

Legal assessment

4.40 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

4.41 The CMA finds that, from 21 August 2018 at least until 26 January 2021, LCFC and JD Sports were parties to an SCI to limit the scope for competition between LCFC and JD Sports in respect of their retail sales of Leicester City-branded clothing products in the UK.

4.42 In particular, the CMA finds that:

4.42.1 On 21 August 2018, LCFC and JD Sports reached an agreement in respect of the 2018/2019 season that JD Sports would immediately cease making online sales of Leicester City-branded clothing products, which left LCFC as the only online retailer of new 2018/2019 Leicester City-branded clothing products for the first part of the 2018/2019 football season and as the principal online retailer of Leicester City-branded clothing products for the latter part of the season.[126]

4.42.2 On 24 January 2019, LCFC and JD Sports reached an agreement in respect of the 2019/2020 season that JD Sports would not undercut LCFC in respect of online sales of Leicester City-branded clothing products. Specifically, it was agreed that JD Sports would apply a delivery charge for all online orders of such products and disapply its company-wide promotional offer of free online delivery for all orders over £70 which would in effect remove the price differential arising from the fact that JD Sports offered free online delivery for orders over £70 whereas LCFC did not. Even though JD Sports did not fully implement this agreement (it applied it only to online purchases consisting exclusively of Leicester City-branded clothing products), that does not undermine the CMA's conclusion that LCFC and JD Sports entered into an infringing agreement.[127]

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125 [✂].

126 See paragraph 4.7.1 and footnotes 5 and 76 for further information.

127 See paragraph 3.19 which explains that parties cannot avoid liability for an infringement by arguing that the agreement or concerted practice was never implemented or put into effect by them or that they 'cheated' on it.

4.42.3 At least by 24 July 2020, LCFC and JD Sports reached an agreement to continue for the 2020/2021 football season the arrangements they had in place for the 2019/2020 football season and which are described in paragraph 4.42.2 above. This agreement continued at least until 26 January 2021 when JD Sports took concrete internal steps to terminate its compliance with it.[128] Even though JD Sports subsequently realised that it had not in practice implemented this agreement for the 2020/2021 season, i.e. its promotional offer continued to apply to all online orders over £70 irrespective or not of whether the basket consisted exclusively of Leicester City-branded clothing products, that does not affect the CMA's conclusion that LCFC and JD Sports entered into an infringing agreement.[129]

4.43 The CMA finds that in respect of the agreements described in paragraph 4.42 above, there was a concurrence of wills as between LCFC and JD Sports, which is evident from the direct communications between LCFC and JD Sports:

4.43.1 In respect of their agreement for the 2018/2019 football season, the communications of 20-21 August 2018 between [Employee A] (LCFC), [✂] and [Employee A] (JD Sports), [✂] reveal LCFC's and JD Sports' common understanding that LCFC had asked JD Sports to stop selling online[130] and that JD Sports had agreed to stop selling online.[131] That agreement resulted in JD Sports subsequently stopping selling online for the remainder of the 2018/2019 football season.[132]

4.43.2 In respect of their agreement for the 2019/2020 football season, LCFC's and JD Sports' common understanding that JD Sports could resume selling online subject to attaching a delivery charge to ensure that JD Sports' offer was in line with LCFC's, was clearly set out in [Employee A] (JD Sports), [✂] email summary of key actions agreed between them at their meeting on 24 January 2019,[133] which [Employee B] (LCFC), [✂] specifically approved on behalf of LCFC,

[128] Document RDL-00014362, JD Sports' response dated 29 March 2023 to the CMA's questions of 9 March 2023

[129] See paragraph 3.19 which explains that parties cannot avoid liability for an infringement by arguing that the agreement or concerted practice was never implemented or put into effect by them or that they 'cheated' on it.

[130] See [Employee A] (LCFC), [✂] call to [Employee A] (JD Sports), [✂] on 20 August 2018, as described more fully at paragraph 4.14.

[131] See [Employee A] (JD Sports), [✂] email confirmation of this on 21 August 2018, as described more fully at paragraph 4.15.

[132] As described more fully at paragraph 4.23. It is not necessary for the purposes of establishing a breach of the Chapter I prohibition to show that a particular agreement was implemented (see paragraph 3.19). However, that it was implemented in this instance is a further indicator of the common understanding between LCFC and JD Sports.

[133] As described more fully at paragraph 4.27.

and which other LCFC recipients of the key actions did not object to, or counter.[134]

4.43.3 In respect of their agreement for 2020/2021 football season to continue the arrangements they had in place for the 2019/2020 football season, LCFC's and JD Sports' common understanding was apparent from [Employee A] (JD Sports), [✄] email of 24 July 2020 to JD Sports colleagues and [Employee C] (LCFC), [✄], which set out that the previous year's arrangements were to continue. [Employee C] (LCFC), [✄] did not object to, or counter, the intentions expressed in the email.[135] The CMA finds that the common understanding (and the concurrence of wills) continued at least until 26 January 2021 when JD Sports took concrete internal steps to terminate its compliance with the common understanding.

4.44 To the extent that it may be argued contrary to the CMA's finding that any aspects of the contacts between LCFC and JD Sports described in paragraphs 4.9 to 4.35 above fell short of an agreement between them, the CMA finds that LCFC's and JD Sports' conduct, in any event, gave rise to a concerted practice. The contacts between LCFC and JD Sports involved coordination between them in the form of a unilateral exchange of competitively sensitive pricing information about JD Sports' future intentions in relation to selling online and/or applying delivery charges,[136] which resulted in a reduction of uncertainty about JD Sports' future conduct on the market. LCFC and JD Sports therefore knowingly substituted practical co-operation for the risks of competition.

4.45 The CMA has not seen any evidence to rebut the presumption that that there was causality between the concerted practices and LCFC's and JD Sports' conduct on the market. There is no evidence of LCFC distancing itself publicly from any of the contacts described in paragraphs 4.9 to 4.35 above, nor did it report such conduct to the CMA. Throughout the duration of the SCI, LCFC and JD Sports remained active in the market. The CMA is therefore entitled to presume that LCFC took account of the reduction of uncertainty about JD Sports' future conduct for the purposes of determining its own conduct in the market.

Object to restrict competition

4.46 The CMA considers that the overall object of the SCI was to limit the scope for competition between LCFC and JD Sports in respect of their retail sales of Leicester City-branded clothing products in the UK. The SCI included agreements and/or concerted practices between competitors whose object was to:

[134] As described more fully at paragraph 4.28.

[135] As described more fully at paragraphs 4.32 to 4.36.

[136] For example, at paragraphs 4.15 and 4.27.

4.46.1 share markets (by coordinating the use of particular sales channels) as a result of JD Sports agreeing with LCFC on 21 August 2018 that it would no longer make online sales of Leicester City-branded clothing products for the 2018/19 football season; and

4.46.2 indirectly fix prices as a result of JD Sports agreeing with LCFC: (i) on 24 January 2019 that it would apply a delivery charge for all online orders of Leicester City-branded clothing products for the 2019/2020 football season and disapply its company-wide promotional offer of free online delivery for all orders over £70; and (ii) at least by 24 July 2020 that JD Sports would continue the arrangements that it had in place for the 2019/20 football season and which are described directly above for the 2020/2021 season.

4.47 The CMA considers that the SCI is horizontal in nature because for the purposes of the individual instances of agreement and/or concerted practice described in paragraph 4.46 above, each of which concerns the retail sale of Leicester City-branded clothing products in the UK, LCFC and JD Sports were acting at the same level of trade, i.e. as competing retailers of such clothing products.[137]

4.48 The following exchanges between LCFC and JD Sports further support the CMA's finding that the SCI is horizontal in nature. In particular, they reveal that a key driver of the conduct from a competition perspective was to ensure that LCFC would avoid being undercut by JD Sports on retail price through JD Sports' offer of free delivery for online orders over £70:[138]

4.48.1 In respect of the 2018/2019 football season, JD Sports' internal communications indicate that it had understood from LCFC that LCFC did not wish JD Sports to undercut it on price as a result of JD Sports' promotional offer of free delivery for orders over £70 (see paragraph 4.17) and that LCFC did not want JD Sports to sell online without an agreed set of 'rules' (see paragraph 4.25).

4.48.2 LCFC also acknowledged in August 2019 in an internal communication that one reason LCFC had required JD Sports to cease online sales in the 2018/2019 season was that JD Sports was undercutting it on price through its offer of free delivery for online orders over £70 (see paragraph 4.29.4).

[137] Even if the agreements and/or concerted practices forming part of the SCI were characterised as vertical, and the CMA does not consider that they should be, the CMA considers that they would still breach the Chapter I prohibition. This is on the basis that a supplier (LCFC) prohibiting its reseller (JD Sports) from making online sales amounts to an 'object' infringement. A supplier (LCFC) requiring its reseller (JD Sports) always to apply a delivery charge for online sales would amount to resale price maintenance, which is also an 'object' infringement.

[138] This is notwithstanding that LCFC and JD Sports expressed other subjective considerations for their conduct in the communications described at paragraphs 4.12, 4.22 and 4.25.

4.48.3 In respect of the 2019/2020 football season, JD Sports again understood and communicated to LCFC that LCFC, through requiring JD Sports to apply a delivery charge for online orders over £70, was seeking to ensure that JD Sports aligned its retail prices with those of LCFC (see paragraphs 4.27, 4.29.1 and 4.29.3).

4.48.4 In respect of the 2020/2021 football season, JD Sports again understood, and communicated to LCFC its understanding, that LCFC was seeking to avoid JD Sports undercutting it on price (see paragraph 4.32).

4.49 The CMA therefore considers that the SCI (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

4.50 The CMA finds that the agreements and/or concerted practices detailed in paragraph 4.42 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:

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

4.50.1 They formed a pattern of conduct that, viewed objectively, pursued a common anti-competitive objective, namely to limit the scope for competition between LCFC and JD Sports in respect of their retail sales of Leicester City-branded clothing products in the UK. This was achieved by LCFC and JD Sports agreeing that JD Sports would cease to make online sales in the 2018/2019 season and that JD Sports would apply a delivery charge for Leicester City-branded clothing products in the UK in the 2019/2020 and part of the 2020/2021 seasons.

4.50.2 The agreements and/or concerted practices shared an overall plan in the pursuit of the common objective described above. They all involved the same two retailers (LCFC and JD Sports) and the same key individuals representing those retailers. This included, at the minimum, [Employee A] (LCFC), [✂] for LCFC and [Employee A] (JD Sports), [✂] for JD Sports. The agreements and/or concerted practices all involved Leicester City-branded clothing products, and the geographic scope of the agreements and/or concerted practices was the same, i.e. the UK.

4.50.3 Further, the agreements and/or concerted practices were continuous in that they tracked the three football seasons 2018/2019 to 2020/2021.[139] LCFC and JD Sports formed each agreement and/or concerted practice in advance of, or just before, the start of each football season, and the agreement and/or concerted practice applied for the duration of that season. There is nothing within the evidence to suggest an interruption of the single and continuous infringement.

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

4.50.4 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 LCFC and JD Sports participated in all of the aspects of the SCI, the CMA finds that each of them intended through their own conduct to contribute to the common objective pursued by both of them.

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

4.50.5 LCFC and JD Sports were the only parties involved in the SCI. Consequently, their direct contacts (and communications) with each other in respect of the 2018/2019, 2019/2020 and 2020/2021 football seasons (up until 26 January 2021), as described at paragraphs 4.9 to 4.35, meant that they were aware of each other's offending conduct in pursuit of the same objective.

4.51 The CMA therefore finds that LCFC and JD Sports participated in, and are liable for, all of the SCI.

Exclusion and exemption

Exclusion

[139] At least up to 26 January 2021 when the SCI ended.

4.52 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.[140] The CMA finds that none of the exclusions from the Chapter I prohibition apply.[141]

Block exemption

4.53 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 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.

4.54 For the reasons set out below, the CMA finds that none of the agreements and/or concerted practices identified (and consequently the SCI) benefits from a block exemption.[142]

4.55 In particular, the CMA has considered whether any of the agreements and/or concerted practices benefit from the Vertical Agreements Block Exemption Regulation ('**VABER**')[143] but has concluded that they do not. This is because, even though LCFC was also a supplier of Leicester City-branded clothing products to JD Sports, LCFC 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 conduct was concerned with LCFC's and JD Sports' role as competing retailers acting at the same level of trade. None of the conduct was therefore a 'vertical agreement' for the purposes of the VABER.[144]

4.56 Moreover, even if the VABER did apply, the CMA finds that all of the agreements and/or concerted practices involved either price-fixing or market-sharing (for the reasons explained in paragraph 4.46 above) such that VABER cannot apply to exempt the agreement and/or concerted practice:

4.56.1 Article 4(a) of the VABER 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 buyer's ability to determine its sale price …';*

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[140] 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.

[141] The exclusions are set out in section 3 of the Act.

[142] References in this section to the agreements and/or concerted practices also include the SCI.

[143] 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.

[144] In addition to the reasons explained elsewhere in paragraphs 4.55 and 4.56, it may also be the case that the 30% market share threshold in Article 3(1) VABER is exceeded. The CMA reserves its position on this point.

4.56.2 Article 4(b) of the VABER provides that the exemption provided by the VABER shall not apply to agreements which have as their object: '*the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services*' except, amongst other things, where the buyer makes active sales into a territory allocated to another buyer or to the seller. The restriction in this case involved LCFC restricting JD Sports from making online sales, which are passive, not active sales for this purpose.[145]

4.57 The CMA finds that no other block exemption is applicable to the agreements and/or concerted practices and therefore that the agreements and/or concerted practices (and consequentially the SCI) are not exempt from the application of the Chapter I prohibition pursuant to section 10 of the Act.

Individual exemption

4.58 The CMA finds that the agreements and/or concerted practices (and the SCI) 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 an exemption under section 9(1) of the Act to prove that the conditions for exemption are satisfied.[146] No such evidence has been provided by any of the Parties.

Appreciable restriction of competition

4.59 The CMA finds that the SCI (as well as each of the agreements and/or concerted practices which constitute it) had the object of preventing, restricting or distorting competition in the markets for the retail supply of Leicester City replica kit and other Leicester City-branded clothing in the UK. Given that the agreements and/or concerted practices had an anti-competitive object, the CMA therefore also finds for the purposes of the Chapter I prohibition that the restriction of competition was, by its very nature, appreciable.

Effect on trade within the UK

4.60 The CMA considers that, by its very nature, an agreement or concerted practice between competitors to fix markets and/or retail prices for Leicester City-branded clothing products in the UK is likely to affect trade within the UK.

[145] Paragraph 52 and 52(c) of the European Commission's Guidelines on Vertical Restraints, dated 10 May 2010, which applied during the period of the SCI. The European Commission's most recent Guidelines on Vertical Restraints dated 10 May 2022 contain the same conclusion (at paragraph 212) as does the CMA's recent Guidance on the application of the Vertical Block Exemption Order dated 12 July 2022 (at paragraph 8.34).

[146] Section 9(2) of the Act.

4.61 The CMA also notes that the SCI was implemented within the UK, affecting sales made by UK-based retailers to UK-based customers. As noted at paragraph 2.17, when Leicester City-branded clothing products are purchased via the internet, they are available for delivery throughout the UK, and LCFC has supporters located across the UK who purchase Leicester City-branded clothing products.

4.62 Accordingly, the CMA finds that the SCI may have affected trade within the UK within the meaning of the Chapter I prohibition.

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 SCI. It has then determined whether liability for the SCI 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).[147]

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[148] – where, as a matter of economic reality,[149] it exercised decisive influence over its subsidiary during its ownership period.[150] In such circumstances, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking.[151] This assessment turns not only on intervention in, or supervision of, the subsidiary's commercial conduct in the strict sense,[152] but on the economic, organisational and legal links between parent and subsidiary, which may be informal.[153]

5.4 Where a parent company holds, whether directly or indirectly,[154] 100% (or nearly 100%)[155] of the shares or voting rights[156] in a subsidiary then the parent company

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[147] Judgment of 17 December 1991, *Enichem Anic SpA v European Commission* T-6/89, ECLI:EU:T:1991:74, paragraphs 236-237.

[148] 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.

[149] Judgment of 24 June 2015, *Del Monte v Commission* C-293/13 P, ECLI:EU:C:2015:416, paragraphs 75-78.

[150] 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.

[151] 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.

[152] Judgment of 10 September 2009, *Akzo Nobel v Commission* C-97/08, ECLI:EU:C:2009:536, paragraph 39.

[153] 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.

[154] 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.

[155] T-217/06 Arkema France, Altuglas International SA, Altumax Europe SAS v Commission EU:T:2011:251, paragraph 53.

[156] Goldman Sachs v Commission, T-419/14, EU:T:2018:445, paragraphs 50 to 52 and 64, upheld in Goldman Sachs v Commission, C-595/18P, EU:C:2021:73, paragraphs 35-36.

is able to exercise decisive influence over 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.[157]

Application to this case

LCFC, King Power and V&A Holding

5.5 The CMA finds that LCFC was directly involved in the SCI, and therefore finds it liable for the SCI.

5.6 The CMA also finds that King Power and V&A Holding (both registered in Thailand) are jointly and severally liable with LCFC for the SCI and for the payment of any financial penalty imposed by the CMA in respect of the SCI. This is on the basis of the decisive influence exercised by these entities in respect of LCFC as opposed to any evidence that King Power or V&A Holding had any knowledge of or involvement in the SCI.

5.7 King Power held [70 - 100%] of the share capital in LCFC throughout the period of the SCI.[158] It can therefore be presumed to have exercised decisive influence over LCFC during the period of the SCI, and to form part of the same undertaking.

5.8 In turn, V&A Holding held [70 - 100%] of the share capital of King Power during the period of the SCI.[159] It can therefore be presumed to have exercised decisive influence over King Power during the period of the SCI, and to form part of the same undertaking as King Power and LCFC.[160]

5.9 This Decision is therefore addressed to V&A Holding, King Power and LCFC.

JD Sports

5.10 The CMA finds that JD Sports Fashion Plc was directly involved in all aspects of the SCI, and therefore finds it liable for the entire SCI.

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[157] 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.

[158] Document RDL-00014354, LCFC's response to the CMA's section 26 notice dated 14 December 2022, updated version dated 3 March 2023: LCFC told the CMA that King Power holds all save for one of the shares in LCFC (its holding amounts to 129,702,873 shares in total). The exception is one redeemable share held by K Power Holdings Co. Limited, a company registered in the British Virgin Islands. The one redeemable share in LCFC carries the same voting rights (one vote) as do each of the 129,702,873 shares held by King Power.

[159] Document RDL-00014354, LCFC's response to the CMA's section 26 notice dated 14 December 2022, updated version dated 3 March 2023.

[160] The remaining shares in King Power are held by [✂]. [✂] also own all of the shares in V & A Holdings (Document RDL-00014354, LCFC's response to the CMA's section 26 notice dated 14 December 2022, updated version dated 3 March 2023).

5.11 This Decision is therefore addressed to JD Sports Fashion Plc.[161]

[161] 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.

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 decided 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 considers that the SCI 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.[162]

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.[163] 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.'*[164]

[162] Section 36(1) and 36(3) of the Act.

[163] *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.

[164] *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.[165]

6.7 The CMA has found that the SCI (as well as each of the agreements and/or concerted practices which constitute it) involved:

6.7.1 market-sharing, in that LCFC and JD Sports agreed that JD Sports would not sell Leicester City-branded clothing products online in the 2018/2019 football season; and

6.7.2 indirect price-fixing, in that LCFC and JD Sports agreed that JD Sports would always apply a delivery charge for online sales of Leicester City-branded clothing products in the 2019/2020 and during part of the 2020/2021 football seasons.

6.8 As set out in paragraph 3.18 above, market-sharing and price-fixing have the object of preventing, restricting or distorting competition and are an obvious restriction of competition that can be regarded, by their very nature, as being harmful to the proper functioning of competition. It follows that LCFC and JD Sports must have been aware, or could not have been unaware, that their conduct was anti-competitive.

6.9 For the purposes of determining whether to exercise its discretion to impose a penalty, the CMA has therefore decided that the SCI (as well as each of the agreements and/or concerted practices which constitute it) was committed intentionally, or at least negligently.

Whether to impose a penalty

6.10 The CMA considers it appropriate in the circumstances of this case to exercise its discretion under section 36(1) of the Act to impose a financial penalty on LCFC, King Power and V&A Holding in respect of the SCI.

6.11 The CMA considers that it is not appropriate to impose a financial penalty on JD Sports. This follows JD Sports' approach to the CMA on 29 January 2021 pursuant to the CMA's leniency policy. No financial penalty will be imposed on JD Sports, provided that it meets the conditions of the leniency agreement between JD Sports and the CMA dated 30 June 2023. Consequently, the CMA has not calculated the level of any financial penalty that would be applied to JD Sports if immunity had not been granted.

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[165] Judgment of 18 June 2013, *Bundeswettbewerbsbehörde and Bundeskartellanwalt v Schenker & Co. AG and Others* C-681/11, EU:C:2013:404, paragraph 38.

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

6.12 The CMA has a margin of appreciation when determining the appropriate amount of a penalty under the Act, provided that 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**'),[166] and (ii) the CMA has had regard to the Penalty Guidance in accordance with section 38(8) of the Act.[167] The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.[168] Rather, the CMA makes its assessment on a case-by-case basis[169] having regard to all relevant circumstances and the objectives of its policy on financial penalties.

Calculation of the financial penalty

6.13 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.[170]

Step 1 – starting point

6.14 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.[171] 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.[172]

<u>Percentage starting point</u>

6.15 As set out in above, the CMA's view is that the SCI concerns cartel activity in the form of market-sharing (by coordinating the use of particular sales channels) and

[166] SI 2000/309, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

[167] *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.

[168] For example, *Eden Brown and Others v OFT* [2011] CAT 8 (*Eden Brown*), paragraph 78.

[169] 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.*'

[170] Penalty Guidance, paragraph 2.1.

[171] Penalty Guidance, paragraphs 2.3 to 2.13.

[172] Penalty Guidance, paragraph 2.4.

indirectly fixing prices.[173] It is therefore appropriate to use a starting point percentage within the 21 to 30% range.[174]

6.16 In addition to the type of infringement (sharing markets and indirectly fixing prices), the CMA considers that the following factors are relevant in determining the appropriate starting point in this case:[175]

6.16.1 Nature of the product

(a) LCFC-branded clothing products are consumer goods, albeit that these products are most likely to be of interest to a specific group of consumers, that is, LCFC 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 end users of Leicester City-branded clothing products are children or parents/carers who are asked by their children to purchase the latest products.

6.16.2 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 LCFC merchandise because demand side substitution between Leicester City replica kit and other Leicester City-branded clothing products of different teams is virtually non-existent.[176]

(b) During the period of the SCI, LCFC was the registered owner of intellectual property rights necessary for the manufacture and sale of Leicester City replica kit and other Leicester City-branded clothing products (see paragraph 2.3 above) and it was therefore able to control other retailers' prospects of entry into the relevant market, as in fact it did by entering into commercial arrangements with JD Sports and Adidas.[177]

(c) During the period of the SCI, LCFC was the main retailer of Leicester City replica kit and other Leicester City-branded clothing products both online and in bricks-and-mortar stores, with between [70 - 95%] of all Leicester City-branded clothing products that were available for retail sale being allocated to it during the period of the SCI.[178] JD Sports and

[173] See in particular paragraphs 1.2 and 4.46 above.

[174] Penalty Guidance, paragraph 2.5.

[175] Penalty Guidance, paragraph 2.7.

[176] Paragraphs 2.10 and 2.11 above.

[177] As explained in paragraph 2.3 above, during the period of the SCI, LCFC made arrangements with Adidas for the manufacture and delivery by Adidas to LCFC of Leicester City-branded clothing products. [✂]

[178] RDL-00014171, LCFC's Response dated 15 September 2022 to the CMA's section 26 notice dated 9 August 2022.

another retailer that was not involved in the conduct ([LCFC Customer 4], [✂]) retailed most of the remainder.[179]

(d) While LCFC and JD Sports sold the relevant products both online and in bricks-and-mortar stores, the SCI related directly to online sales only. Online sales accounted for approximately [✂] LCFC's total UK retail sales of Leicester City-branded clothing products during the period of the SCI.[180]

(e) The scope of the SCI was UK-wide: the online stores of both LCFC and JD Sports were available to consumers throughout the UK.

6.16.3 Actual or potential harm caused to consumers whether directly or indirectly

(a) As the SCI is an object infringement, the CMA is not required to assess its actual effects for the purposes of establishing an infringement.[181] However, the CMA notes that the SCI involved the most serious restrictions of competition, namely market-sharing and price-fixing,[182] which, by their very nature, cause most harm to competition.[183]

(b) Further, part of the SCI relating to the 2019/2020 and 2020/2021 football seasons took place during the Covid-19 pandemic, a period when online sales were unusually important.

(c) Several factors, however, point to the impact of the SCI being more limited than it might otherwise might have been:

i. the scope for competition between LCFC and JD Sports was limited because LCFC only supplied JD Sports with a certain volume of stock (which meant that of all the Leicester City-branded clothing products available for retail sale, only circa [3-8%] of them were allocated to JD Sports during the period of the SCI);[184]

ii. the market-sharing element of the SCI was for a relatively short period (10 months), although it commenced at the start of the

[179] JD Sports was allocated between [3-8%] of the stock available for retail sale during the period of the SCI and [LCFC Customer 4], [✂] share was between [1-10%]. LCFC told the CMA that towards the end of each football season, it would [✂] to [✂] online retailers. RDL-00014171, LCFC's Response dated 15 September 2022 to the CMA's section 26 notice dated 9 August 2022.

[180] RDL-00014232, Annex 1 to LCFC's section 26 response dated 20 January 2023.

[181] 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.

[182] See in particular paragraphs 1.2 and 4.46 above.

[183] Penalty Guidance, paragraph 2.5.

[184] See paragraph 6.16.2(c).

2018/2019 football season when demand for the products was highest (albeit price competition might have been weakest);

iii. the market-sharing element of the SCI may have only affected sales of replica kit and not of other Leicester-City branded clothing products;[185]

iv. the indirect fixing of prices aspect of the SCI (which occurred in the 2019/2020 and part of the 2020/2021 football seasons) only related to the delivery charges payable by consumers (and not the prices of the products themselves). Furthermore, it did not apply to all delivery charges, only to those delivery charges arising from transactions over £70 and which normally would have attracted JD Sports' standard offer of free delivery for orders over £70; and

v. There is no evidence of any monitoring activity to ensure that JD Sports complied with the agreements and/or concerted practices which together constitute the SCI.

6.17 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.[186] Such deterrence would appear to be necessary notwithstanding the fines imposed by the CMA's predecessor the Office of Fair Trading, in 2003 following its finding of an infringement in the replica football kit industry.[187]

6.18 Taking all of these factors in the round, the CMA considers that a starting point of 22% is appropriate in this case to reflect both the seriousness of the SCI and the need for general deterrence.

Relevant turnover

6.19 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.[188]

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[185] See paragraph 4.23. JD Sports did not purchase any other Leicester City-branded clothing products from LCFC during the 2018/2019 season, and the only sales of such products that JD Sports made during that season had been purchased prior to the period of the SCI and were sold online and in bricks-and-mortar stores at a discounted price. RDL-00014171, LCFC's Response dated 15 September 2022 to the CMA's section 26 notice dated 9 August 2022

[186] Penalty Guidance, paragraph 2.8.

[187] *Price-fixing of Replica Football Kit*, OFT decision No CA98/06/2003, 1 August 2003.

[188] Penalty Guidance, paragraph 2.10.

Application in this case

6.20 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) Leicester City replica kit in the UK and (ii) other Leicester City-branded clothing products in the UK.[189]

Relevant business year

6.21 The SCI continued until at least 26 January 2021. The CMA has therefore used the date of 26 January 2021 for the purposes of determining the relevant business year.

6.22 LCFC's[190] last business year which precedes 26 January 2021 (that is, its financial year preceding the date when the infringement ended) was the financial year ending 31 May 2020.

Relevant turnover

6.23 The CMA considers that the relevant turnover in the relevant business year is **£2,667,647**.

Conclusion on step 1

6.24 Taking the above into account, the penalty at the end of step 1 is **£586,882**.

Step 2 – adjustment for duration

6.25 The amount resulting from step 1 may be increased or, in particular circumstances, decreased to take into account the duration of an infringement.[191]

6.26 Where the total duration of an infringement is more than one year, the CMA will round up part years to the nearest quarter year.[192]

Application in this case

6.27 The duration of the SCI is from 21 August 2018, when JD Sports and LCFC reached an agreement in respect of the 2018/2019 season that JD Sports would immediately cease making online sales of Leicester City-branded clothing products online sales,[193] to at least 26 January 2021, when JD Sports took concrete internal steps to terminate its compliance with the agreement in respect of seasons 2019/2020 and 2020/2021.[194] The CMA has therefore used the dates of 21 August

[189]Paragraph 2.18 above.

[190] As the turnover in the relevant product and geographic market was all generated by LCFC, the CMA has assessed the relevant turnover by reference to LCFC's accounts and accounting periods.

[191] Penalty Guidance, paragraph 2.14.

[192] Penalty Guidance, paragraph 2.14

[193] As further explained at paragraph 4.42.1 above.

[194] As further explained at paragraph 4.42.3 above.

2018 and 26 January 2021 as the reference dates for calculating the duration of the SCI.

6.28 This results in a duration of 2 years, 5 months and 5 days. Applying the standard approach described in paragraph 6.26 above, the CMA has therefore applied a multiplier of 2.5 to the figure reached at the end of step 1.

6.29 The penalty at the end of step 2 is therefore **£1,467,206**.

Step 3 – adjustment for aggravating and mitigating factors

6.30 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.[195]

Aggravating factor – involvement of director/senior management

6.31 The involvement of directors or senior management in an infringement can be an aggravating factor.[196] 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.

6.32 The CMA finds that [✂], [Senior Executive B] (LCFC), [✂] at the time of the SCI),[197] was aware of elements of the SCI. Specifically, he had awareness of the market-sharing element of the SCI (JD Sports agreeing with LCFC that it would no longer make online sales in 2018/2019) and agreed with the strategy.[198]

6.33 The CMA therefore considers that an uplift of 5% for director involvement is appropriate.

Mitigating factor – cooperation

6.34 Cooperation which enables the enforcement process to be concluded more effectively can be a mitigating factor.[199] As noted at paragraph 1.5 above, the CMA carried out inspections at LCFC's premises under section 27 of the Act at the outset of the investigation. LCFC cooperated with the CMA during these inspections, including in particular by assisting the CMA with the processing of digital data and the production of relevant materials.

6.35 The CMA considers that this enabled the initial investigatory phase of the investigation to be concluded more effectively and speedily.

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[195] Penalty Guidance, paragraph 2.15 to 2.17.

[196] Penalty Guidance, paragraph 2.16.

[197] Paragraph 4.22 above.

[198] Paragraph 4.22 above.

[199] Penalty Guidance, paragraph 2.17.

6.36 In addition, LCFC, King Power and V&A Holding provided certain financial information in a translated form which facilitated the CMA in calculating this penalty.

6.37 In light of the factors described at paragraphs 6.34 to 6.36 above, the CMA considers that it is appropriate to apply a reduction of 5% to the penalty at this step.

Conclusion on step 3

6.38 Taking the above into account, the penalty at the end of step 3 is **£1,467,206**.

Step 4 – adjustment for specific deterrence

6.39 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.[200]

6.40 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.[201]

6.41 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.[202]

Application in this case

6.42 As LCFC, V&A Holding and King Power form part of a wider undertaking, the King Power Group of companies ('**King Power Group**'),[203] the CMA considers that for the purposes of deterrence, it is necessary to assess the financial position of the King Power Group [204] together with other relevant case-specific considerations.

[200] Penalty Guidance, paragraph 2.19.

[201] Penalty Guidance, paragraph 2.20.

[202] Penalty Guidance, paragraph 2.21.

[203] The King Power Group includes all the companies listed in RDL-00014354, LCFC's response to the CMA's section 26 notice dated 14 December 2022, updated version dated 3 March 2023 and RDL-00014731, LCFC's response to questions raised by the CMA on 15 May 2023 dated 6 June 2023.

[204] In the absence of audited consolidated financial statements for the King Power Group, the CMA has calculated the financial position of King Power Group for the periods 2020 to 2022 based on the aggregated revenues and profit after tax for the individual companies within it (excluding [✂]). While the majority of companies within the King Power Group

6.43 The King Power Group is a travel retail group based in Thailand with a focus on duty free shopping in airports. It generated worldwide revenues for the financial year ending 31 December 2022 of approximately [✂].[205] However, the COVID-19 pandemic, exacerbated by the restrictive border controls which were subsequently imposed by China and were only lifted in January 2023, has had [✂] impact on its financial position. The King Power Group's core businesses have been [✂]. LCFC's business was also loss-making during this period.[206] In aggregate, the King Power Group's business operations sustained losses in excess of [✂].

6.44 Given these circumstances, the CMA considers that the penalty after step 3 of **£1,467,206** is sufficient to deter LCFC, V&A Holding and King Power from infringing competition law in the future and adequately reflects their size and financial position, while taking into account the circumstances of the case, including the more limited nature of the harm caused by the SCI in this case, as set out above at step 1, and the particular nature of the relationship between LCFC and its parent companies.[207]

6.45 The CMA concludes that an uplift for specific deterrence is therefore not required at step 4. Taking the above into account, the penalty at the end of step 4 is **£1,467,206**.

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

6.46 At this step, the CMA will assess whether, in its view, the overall penalty is appropriate in the round;[208] 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).[209] In carrying out

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have financial periods which end on 31 December, a limited number of companies have financial reporting periods which end on a different date in the calendar year, including in particular LCFC whose financial year end was 31 May for periods up to and including 31 May 2022. For those companies with a financial year end other than 31 December, the CMA did not pro-rate the financial metrics, and instead aggregated the financial metrics by reference to the unconsolidated financial statements which end in the same calendar year. RDL-00014354, LCFC's response to the CMA's section 26 notice dated 14 December 2022, updated version dated 3 March 2023; RDL-00014498, RDL-00014499, RDL-00014500, RDL-00014501, annexes attached to LCFC's email dated 31 March 2023; RDL-00014521, annex attached to LCFC's email of 5 April 2023; RDL-00014731, LCFC's written submission of 6 June 2023 in response to the CMA's email dated 15 May 2023, and RDL-00014732, RDL-00014733, RDL-00014734, RDL-00014735, RDL-00014736, RDL-00014737, RDL-00014738 and RDL-00014739, annexes attached to LCFC's written submission of 6 June 2023 in response to the CMA's email dated 15 May 2023.

[205] Aggregated revenues for the financial year ending 31 December 2022 include the impact of [✂]. RDL-00014731, LCFC's written submission of 6 June 2023 in response to the CMA's email dated 15 May 2023, and RDL-00014732, RDL-00014733, RDL-00014734, RDL-00014735, RDL-00014736, RDL-00014737, RDL-00014738 and RDL-00014739, annexes attached to LCFC's written submission of 6 June 2023 in response to the CMA's email dated 15 May 2023.

[206] LCFC recorded a loss after tax of £92.5 million after tax in the financial year ending 31 May 2022, and expects its relegation from the English Premier League in May 2023 to have an adverse impact on future revenues and profits. RDL-00014727, LCFC's written representations to the CMA dated 5 June 2023.

[207] The CMA has taken into consideration the unusual characteristics of investment in a football club and the impact of an infringement finding on the reputation of the undertaking and its parent companies.

[208] Penalty Guidance, paragraph 2.25.

[209] Penalty Guidance, paragraphs 2.28.

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.[210]

Application in this case

6.47 The CMA considers that, in the round, a penalty of £1,467,206 after step 4 is disproportionate having regard to all the relevant circumstances. Therefore, the CMA considers that a penalty should be reduced at step 5.

6.48 In making this assessment, the CMA has taken into account the following: that only approximately [✂] LCFC's relevant turnover was directly attributable to online sales (paragraph 6.16.2(d) above); that the harm was more limited than it might otherwise have been (paragraph 6.16.3(c) above); and the fact that there is no evidence of any monitoring activity on the part of LCFC to ensure that JD Sports complied with the agreements and/or concerted practices (paragraph 6.16.3(c)(v)).

6.49 In addition, the CMA has taken into consideration that the King Power Group's core businesses, as well as LCFC, have been loss-making [✂] (paragraph 6.43) and the nature of the relationship between LCFC and its parent companies (paragraph 6.44).

6.50 The CMA therefore considers that the penalty should be reduced, and that a penalty of **£1,100,000** (reduced from £1,467,206 at step 4) would be appropriate having regard to all relevant circumstances in the round.

6.51 No further adjustment is required as the penalty does not exceed the statutory maximum of 10% of the worldwide turnover of the undertaking in its last business year.[211]

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

6.52 As part of settlement, LCFC, V&A Holding and King Power have each admitted the facts set out in this Decision and that they infringed the Chapter I prohibition. In light of these admissions and their confirmation that they have ceased the infringing behaviour, and their cooperation in expediting the process for concluding the investigation, the CMA considers that it should reduce the penalty at the end of step 5 by 20%.

Conclusion on penalties

[210] Penalty Guidance, paragraph 2.26.

[211] Penalty Guidance, paragraphs 2.28.

6.53 In light of all of the above, the CMA considers a penalty of **£880,000** to be appropriate in the circumstances of this case.

Payment of penalty

6.54 The CMA therefore requires LCFC, King Power and V&A Holding to pay a penalty of £880,000.

6.55 The penalty will become due to the CMA on 2 October 2023[212] 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

[212] The next working day two calendar months from the expected date of receipt of the Decision.