CASE STUDY: ANTI-COMPETITIVE PRACTICES

The following facts are loosely adapted from a UK case involving the sale of football shirts: *JJB and Allsports v OFT* [2004] CAT 17 ("*Replica Football Kits*"), which can be found on www.catribunal.org.uk

There are three retailers of team football shirts:
EverySport (ES)
Discount Sport Stores (DSS)
ReplicaKit (RK)

There is one authorised manufacturer of "official" shirts, Manufacturing Ltd (M)

The Chief Executive Officer of each firm is referred below to as ES, DSS, RK amd M

The three retailers sell 70% of all sports goods nationally. They each stock replica football kit shirts for the major clubs, including Manchester United. They purchase these under an "official" agreement with the Clubs (they are not counterfeit copies). The clubs produce a new style every year, which are extremely popular, and often purchased as birthday or Christmas presents. They cost the retailers about $20 each to purchase from the approved manufacturer, Manufacturing Ltd.

Manufacturing Ltd sets a lawful "recommended retail price" (RRP), but shops are in fact free to sell the shirts at any price.

2000/01
In the 2000/01 season all three retailers sell at the RRP, $65. Discounting has not been normal in that market and all are happy to sell at that price, and all have large sales. ES agrees with RK that ES will not export any of the shirts and RK will not sell to schools or colleges. This will save each advertising and mailing costs.

2001/02
In 2001/2 DSS, a discount store, decides to reduce his price to $55. He is reluctant to do so because he does not want to start a price war, but as a discount store customers are complaining that its prices are no cheaper than its competitors and it is worried about its reputation as a discounter. Further, some small shops and online sellers are selling the shirts much cheaper.

ES approaches DSS at a dinner in September and says he has noticed the discounting and that at the next board meeting he will propose that they discount as well. DSS, which has been selling the shirts at a $55 for a month, decides to increases the price back to RRP, $65, in order to avoid a price war. ES has a short once and for all offer in the second week of October of $50 to any customers who purchase at least $100 of other sports equipment.

M is approached by the regulator and asked if it knows of any price agreements. It does not, but decides to stop recommending a RRP.

RK tells M it finds the RRP very helpful and agrees to increase its purchases of other products from M if it continues to recommend a RRP. M continues the RRP.

RK and ESS agree to limit their expenditure on promoting the football shirts. They both agree not to buy "unofficial" shirts.

A director of RK regularly meets a director of ES at the house of a mutual friend. They meet at the end of October and agree that they will both charge the RRP. The staff of ES are very keen to increase sales by discounting. They say it will increase sales of the other sports goods because it will bring more people into their shops. ES sends a note round the department saying that ES will continue to charge the RRP, and he understands that RK will do so too. Further, he informs them that no one in the company is authorised to change the price other than himself.

2002/03

M and the retailers are worried. M must reduce its price or all the retailers' market share and its own sales will fall, because of the cheap copies that are appearing everywhere. A representative of a manufacturer, A, tells him he can manufacture shirts much more cheaply than M, so M decides to sell its manufacturing facilities (to a wetsuit company) and sub-contract manufacturing the "official" shirts to a third party.

M seeks tenders from a number of local firms, including A, who all obtain their supplies from abroad. One quote, A, is much lower than the two other offers it receives, from B and C. Three, D,E and F, refuse to quote. M discovers that B agreed with A that he, B, would not quote, and C was so busy he decided he only wanted the work if it was worth a lot of money. D, E and F generally do not quote for clothing manufacturing which they leave to A, B and C, and A, B and C do not quote for the types of work that D, E and F tend to quote for. They realise if they do start to compete prices will be more competitive, but they have never discussed it.

M still obtains a very reasonable price from A and sells the shirts to ES, RK and DSS for $12 each. He agrees to sell to an internet retailer for $10, and he also sells at $10 to a purchasing co-operative comprising a number of schools and university campus shops.

M manages to increase his profits by agreeing with the wetsuit company that bought his manufacturing plant that they will jointly purchase vehicles to enable them to supply all sports retailers jointly with both their products. They also agree that they will not distribute through any independent distributors.

2003/04

There is a price war and DSS, ES and RK's shirt prices are down to $20 or even less. The regulator wonders why they were so high before and investigates. ES asks DSS why, as a discounter, he isn't selling on the internet. DSS says he is thinking about it.

For each year, consider what agreements or concerted practices are in place, if any. Which of those are unlawful? Note any problems of evidence you are likely to encounter in proving them, as a regulator.

What penalties would you impose, if any, if the maximum you can impose is 10% of each company's turnover, each year of any infringement? Would you consider any undertakings? – if so what would they be?

What difference would it make if the regulator had learnt the facts from M who was a whistleblower?