

# Decision of the Office of Fair Trading

Market sharing agreement and/or concerted practice in relation to the supply of prescription medicines to care homes in England

**20 March 2014**

Case CE/9627/12

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 [C].

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 Names have been replaced by a general descriptor of the individual's role.

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## **SECTION 1 INTRODUCTION**

### **A The purpose of this document**

1.1 By this decision (the 'Decision'), the Office of Fair Trading ('the OFT') has concluded that:

- Lloyds Pharmacy Limited ('Lloyds') and its parent Celesio AG ('Celesio'), together the Celesio group undertaking ('Celesio Group')
- Total Medication Management Services Limited, trading as Tomms Pharmacy ('Tomms'), its parent Quantum Pharmaceutical Limited ('Quantum') and its ultimate parent Hamsard 3149 Limited ('Hamsard'), together the Hamsard group undertaking ('Hamsard Group').

(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').

1.2 The Chapter I prohibition provides that agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the United Kingdom (the 'UK') and which have as their object or effect the prevention, restriction or distortion of competition within the UK are prohibited unless they are excluded by or as a result of, or exempt in accordance with, the Act.

### **B Summary of the infringement**

1.3 This case concerns the supply of prescription medicines to care homes.<sup>1</sup>

1.4 The OFT finds that between 31 May 2011 and 10 November 2011 ('the relevant period') Lloyds, Quantum and Quantum's subsidiary Tomms participated in a market sharing agreement and/or concerted practice<sup>2</sup> that had as its object the appreciable prevention, restriction or distortion of competition in relation to the supply of prescription medicines to care homes ('the infringement').

1.5 The OFT finds that during the relevant period, Lloyds and Quantum agreed that Tomms would not actively target care homes already supplied with prescription medicines by Lloyds (Lloyds-supplied care homes). The OFT also finds that (at the latest) from 3 November 2011 until 10 November 2011 Lloyds and Quantum agreed that Lloyds would not actively target care homes already supplied with prescription medicines by Tomms (Tomms-supplied care homes).

1.6 By this Decision, the OFT is imposing financial penalties under section 36 of the Act. The penalty imposed on each of Celesio Group and Hamsard Group will be in respect of each undertaking's involvement in the infringement. The imposition of

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<sup>1</sup> For more details on these products, see Section 4 (Industry Overview and Market Definition).

<sup>2</sup> Throughout this statement, where the OFT uses the noun 'agreement' or the verb 'agree' in the context of the setting out the alleged infringement, it is using it as shorthand for agreement and/or concerted practice.

any penalty is subject to the application of the OFT's leniency policy.<sup>3</sup> Lloyds made an application for immunity, which was granted on 14 January 2014.<sup>4</sup> As the relevant conditions as set out in the immunity agreement between the OFT and Celesio Group have been met, the penalty which the OFT would otherwise impose on Celesio Group has been reduced by 100 per cent. Quantum and Tomms made an application for leniency, which was granted on 11 December 2013.<sup>5</sup> As the relevant conditions as set out in the leniency agreement between the OFT and Hamsard Group have been met, the penalty which the OFT would otherwise impose on Hamsard Group has been reduced by 25 per cent. The amount of penalty to be imposed on Hamsard Group was agreed by way of settlement on 11 December 2013.<sup>6</sup>

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<sup>3</sup> OFT Guidance 423, *OFT's guidance as to the appropriate amount of a penalty* (September 2012) (the '*Penalty Guidance*').

<sup>4</sup> Signed Celesio Group leniency agreement, OFT Document Reference 0535.

<sup>5</sup> Signed Hamsard Group leniency agreement, OFT Document Reference 0523.

<sup>6</sup> See paragraphs 3.13 and 3.13 of this Statement; and the letter of agreement between the OFT and Hamsard Group, dated 11 December 2013, OFT Document Reference 0525.

## Glossary of Terms

Term	Definition
'Act'	means the Competition Act 1998
'infringement'	means the infringement of Chapter I prohibition particularised in Section 6 (EVIDENCE RELIED ON BY THE OFT IN RELATION TO THE INFRINGEMENT)
'Article 101'	means Article 101 TFEU
'CAT'	means the Competition Appeal Tribunal
'Celesio'	means Celesio AG
'Celesio Group'	means the Celesio group undertaking as a whole including Celesio and its subsidiary Lloyds
'Chapter I prohibition'	means the prohibition imposed by section 2(1) of the Competition Act 1998
'Commission'	means the European Commission
'EA02'	means the Enterprise Act 2002
'EU'	means the European Union
'European Court'	means, as defined in section 59 of the Act, the Court of Justice of the European Communities [now the Court of Justice of the European Union (the 'CJ')] and includes the General Court ('GC')]
'Hamsard'	means Hamsard 3149 Limited
'Hamsard Group'	means the Hamsard group undertaking as a whole including Hamsard, its subsidiary Quantum, and its subsidiary, Tomms
'Lloyds'	means Lloyds Pharmacy Limited
'OFT'	means the Office of Fair Trading
'OFT Rules'	means <i>The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004</i> (SI 2004/2751)
'Parties'	means Lloyds, Celesio, Tomms, Quantum and Hamsard as listed at paragraph 1.4 of Section 1 (INTRODUCTION) (each a 'Party')
'Quantum'	means Quantum Pharmaceutical Limited
'relevant documents'	means documents on the OFT's file which are directly relied on and referred to in this Decision
'relevant period'	means duration of the infringement between 31 May 2011 and 10 November 2011
'the Statement'	Means the Statement of Objections issued on 24 January 2014
'TFEU'	means the Treaty on the Functioning of the European Union
'Tomms'	means Total Medication Management Services Limited, trading as Tomms Pharmacy

## **SECTION 2 COMPANY PROFILES**

### **A Introduction**

2.1 This section sets out the details of all of the undertakings which the OFT finds liable for the infringement, including where applicable the joint and several liability of the parent company or companies of the undertakings involved in the infringement.

2.2 This section:

- describes each of the Parties' primary activities and corporate structure at the relevant times,
- sets out the Parties' total turnover for the last three financial years,
- lists the Parties' directors for each of the years spanning the relevant period, and
- sets out, for each Party, the OFT's conclusions on liability for the infringement.

### **B The OFT's approach to assessing liability**

2.3 As set out in paragraphs 5.8 to 5.18 of the Legal Background section, in order to determine which legal persons represent the undertakings who were involved in the infringement, the OFT first examines which legal persons were involved in the infringing conduct. Then it considers whether any other legal persons represent the same undertaking, and whether it is necessary to address this Decision to these legal persons in addition to, or instead of, the legal person(s) who were involved in the infringing conduct. The OFT has decided that each legal entity's liability will be joint and several.

2.4 The Parties to whom this Decision is addressed are set out in paragraph 1.1 above (Introduction). They comprise:

- the legal entities which the OFT considers had direct involvement in the infringement and
- the legal entities which the OFT presumes exercised decisive influence over those legal entities during the relevant period.

2.5 Where more than one legal entity is named in respect of a particular Party, the OFT considers that they form part of the same undertaking and should be held jointly and severally liable for the infringement and any financial penalty imposed by the OFT.

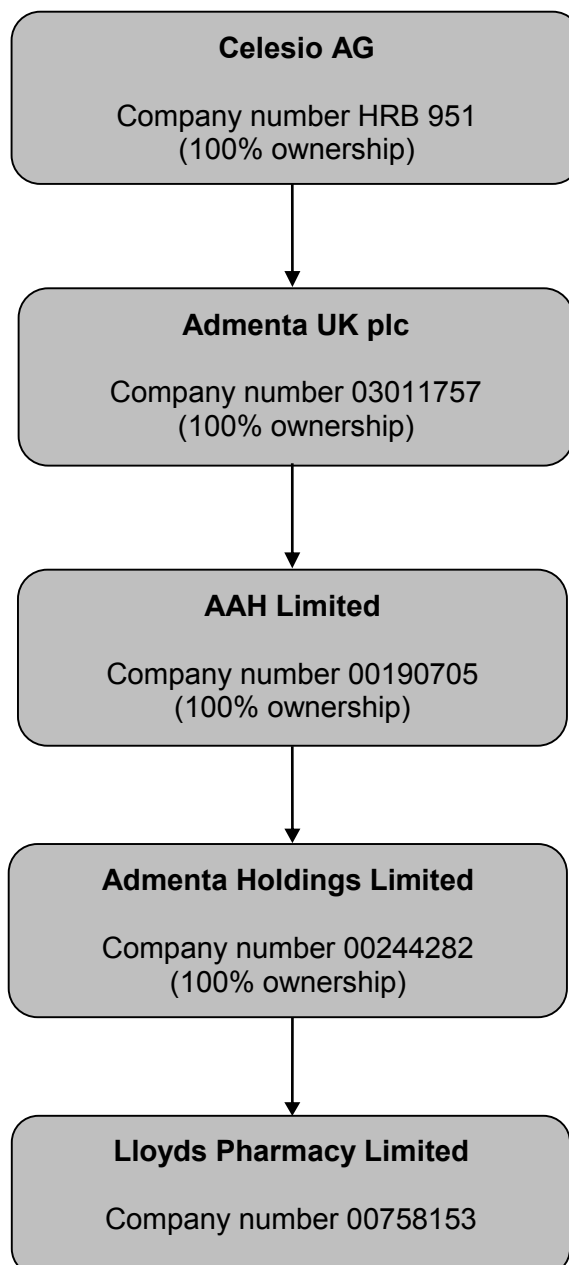
2.6 The OFT considers that all of the Parties are companies engaged in economic activity, and that they constitute undertakings for the purposes of the Chapter I prohibition.

2.7 Due to the possibility that there may have been a change in the company name, each Party's company number, as recorded at Companies House, is detailed

below. This Decision is to be construed as applying to the company registered with the stated company number, however named prior to, at, or subsequent to the time of the infringement.

**The Celesio Group undertaking: Lloyds Pharmacy Limited ('Lloyds'), and Celesio AG ('Celesio')**

- 2.8 The OFT considers that Lloyds was directly involved in the infringement throughout the relevant period. Further, throughout the relevant period, Lloyds was a 100 per cent-indirectly owned subsidiary of Celesio. This ownership can be traced through a number of Celesio's subsidiary companies, each 100 per cent-owned by its immediate parent company.
- 2.9 The registered company details of Celesio, Lloyds and these intermediate companies, and their corporate relationship, are outlined below:





## ***Lloyds***

- 2.10 Lloyds' principal activity is the operation and management of a chain of retail pharmacies, located primarily in the centre of communities as well as health centres; it is the largest community pharmacy operator in the UK.<sup>7</sup>
- 2.11 During the relevant period, Lloyds had one active wholly-owned subsidiary, 28CVR Limited, and two active majority-owned subsidiaries, AHLP Pharmacy Limited and Betterlifehealthcare Limited.<sup>8</sup> The OFT has no evidence that any of these subsidiaries was directly involved in the infringement.
- 2.12 Lloyds' ultimate indirect 100 per cent parent company is Celesio.

## ***The intermediate companies***

- 2.13 Lloyds is a wholly-owned subsidiary of Admenta Holdings Limited.<sup>9</sup>
- 2.14 Admenta Holdings Limited's principal activity is that of an investment company of which its subsidiaries are involved in the wholesaling and retailing of pharmaceutical products.<sup>10</sup> It has a number of other wholly-owned subsidiaries but the OFT has no evidence to suggest that any of these were directly involved in the infringement.
- 2.15 Admenta Holdings Limited is a wholly-owned subsidiary of AAH Limited.<sup>11</sup>
- 2.16 AAH Limited's principal activity is that of a holding company of a group of companies involved in the wholesaling and retailing of pharmaceutical products.<sup>12</sup> It has a number of other wholly-owned subsidiaries but the OFT has no evidence to suggest that any of these were directly involved in the infringement.
- 2.17 AAH Limited is a wholly-owned subsidiary of Admenta UK plc.<sup>13</sup>
- 2.18 Admenta UK plc's principal activity is that of a holding company of a group of companies involved in the wholesaling and retailing of pharmaceutical products.<sup>14</sup> It has a number of other wholly-owned subsidiaries but the OFT has no evidence to suggest that any of these were directly involved in the infringement.

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<sup>7</sup> Lloyds Financial Statements for the Year Ended 31 December 2011, OFT Document Reference 0490, page 1.

<sup>8</sup> OFT Document Reference 0490, page 22.

<sup>9</sup> Admenta Holdings Limited Directors' Report and Financial Statements for the Year Ended 31 December 2012, OFT Document Reference 0533, page 14.

<sup>10</sup> OFT Document Reference 0533, page 1.

<sup>11</sup> AAH Limited Directors' Report and Financial Statements for the Year Ended 31 December 2012, OFT Document Reference 0534, page 10.

<sup>12</sup> OFT Document Reference 0534, page 1.

<sup>13</sup> Admenta UK plc Directors' Report and Financial Statements for the Year Ended 31 December 2012, OFT Document Reference 0491, page 12.

<sup>14</sup> OFT Document Reference 0491, page 1.

2.19 Admenta UK plc is a wholly-owned subsidiary of Celesio.<sup>15</sup>

### ***Celesio***

2.20 Celesio is a leading trading company and service provider on the global pharmaceutical and healthcare markets, with around 47,000 employees and strong national and international brands in 27 countries.<sup>16</sup> It is registered in Germany<sup>17</sup> and its shares are listed on the DAX stock exchange.<sup>18</sup>

2.21 Celesio has a number of other wholly-owned subsidiaries in the UK (as well as the Isle of Man and Channel Islands). The OFT has no evidence to suggest that any of these subsidiaries were directly involved in the infringement.

### ***Lloyds's Turnover***

2.22 Lloyds turnover for the past three financial years was as follows:<sup>19</sup>

<b>Year ending</b>	<b>Turnover (thousands)</b>
<b>31/12/2011</b>	£1,760,288
<b>31/12/2010</b>	£1,758,529
<b>31/12/2009</b>	£1,740,517

### ***Celesio's consolidated turnover***

2.23 Celesio's consolidated turnover for the past three financial years were as follows:<sup>20</sup>

<b>Year ending</b>	<b>Turnover (millions)</b>
<b>31/12/2012</b>	€22,270.8
<b>31/12/2011</b>	€22,152.9
<b>31/12/2010</b>	€23,277.6

### ***Appointments***

2.24 The directors of Lloyds during the relevant period were as follows:<sup>21</sup>

<sup>15</sup> OFT Document Reference 0491, page 18.

<sup>16</sup> Celesio Annual Report 2011, OFT Document Reference 0492, page 60.

<sup>17</sup> OFT Document Reference 0491, page 18.

<sup>18</sup> OFT Document Reference 0492, page 24.

<sup>19</sup> Lloyds FAME Report, OFT Document Reference 0493.

<sup>20</sup> Celesio Dafne Report, OFT Document Reference 0495.

<sup>21</sup> OFT Document Reference 0493.

<b>Name</b>	<b>Appointment</b>	<b>Position in November 2011</b>
Andrew John Willetts	Prior to 2011	In post
William Shepherd	01/08/2011	In post
Fiona Jacqueline Morgan	Prior to 2011	Left post 31/07/2011
Andrew Mark Murdoch	Prior to 2011	In post
Paul O'Hanlon	Prior to 2011	Left post 01/06/2011
Anthony Robert Page	21/02/2011	In post
Philip John Streatfield	03/10/2011	In post
Steven William Gray	Prior to 2011	In post

2.25 The members of Celesio's Management Board during the relevant period were as follows:<sup>22</sup>

<b>Name</b>	<b>Appointment</b>	<b>Position in November 2011</b>
Dr Fritz Oesterle	Prior to 2011	Left post 30/06/2011
Markus Pinger	15/08/2011	In post
Stephan Borchert	01/08/2011	In post
Dr Christian Holzherr	Prior to 2011	Left post 30/11/2011
Dr Michael Lonsert	Prior to 2011	In post
Wolfgang Mähr	Prior to 2011	In post

### ***Liability***

2.26 The OFT finds that Lloyds was directly involved in the infringement during the relevant period.

2.27 The OFT concludes that Celesio, as ultimate 100 per cent indirect owner of Lloyds, had the power to exercise decisive influence over Lloyds's commercial policy during the relevant period. The OFT also presumes that Celesio did in fact

<sup>22</sup> OFT Document Reference 0492, page 290.

exercise such decisive influence. On this basis, the OFT finds that during the relevant period Celesio formed part of the same economic entity

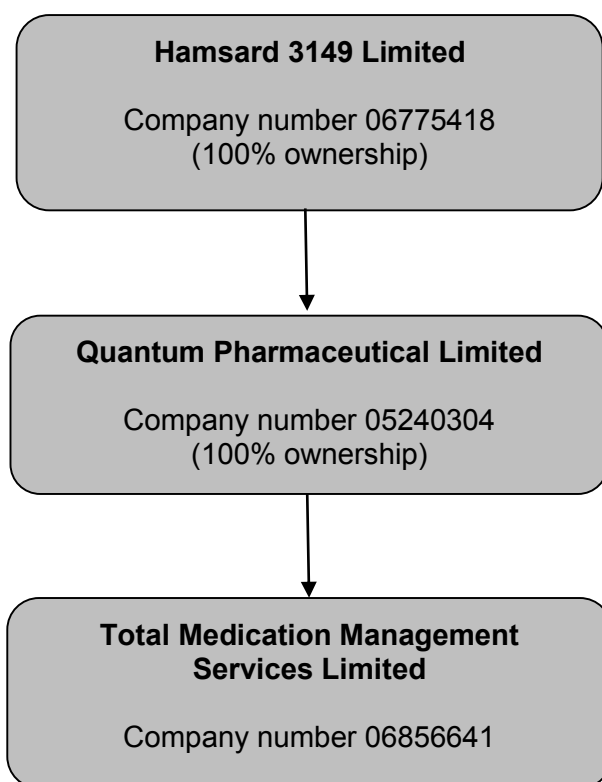
2.28 On this basis, the OFT concludes that Lloyds and Celesio are jointly and severally liable for the infringement. Accordingly, they will be jointly and severally liable for payment of any financial penalties imposed by the OFT in respect of the infringement.

2.29 Lloyds applied to the OFT for leniency in January 2012. Lloyds was the first undertaking to make a leniency application, which was made prior to commencement of the present investigation by the OFT. Lloyds was accordingly granted a marker for Type A immunity and, as the relevant conditions set out in the immunity agreement between the OFT and Celesio Group have been met, the penalty which the OFT would otherwise impose on Celesio Group has been reduced by 100 per cent.

**The Hamsard Group undertaking: Total Medication Management Services Limited (trading as Tomms Pharmacy ('Tomms')), Quantum Pharmaceutical Limited ('Quantum') and Hamsard 3149 Limited ('Hamsard')**

2.30 The OFT considers that Quantum and its 100 per cent subsidiary Tomms were directly involved in the infringement throughout the relevant period. Further, throughout the relevant period, Quantum was a 100 per cent-owned subsidiary of Hamsard.

2.31 The registered company details of Hamsard, Quantum and Tomms, and their corporate relationship, are outlined below:



**Tomms**

2.32 Tomms' principal activity is that of a supplier of prescription drugs to the care home and domiciliary care sectors.<sup>23</sup>

2.33 Tomms became a wholly-owned subsidiary of Quantum on 17 May 2011.<sup>24</sup>

### ***Quantum***

2.34 Quantum's principal activity is that of a manufacturer and supplier of unlicensed pharmaceutical products.<sup>25</sup>

2.35 During the relevant period Quantum had one other active wholly-owned subsidiary in addition to Tomms, Pern Consumer Products Limited.<sup>26</sup> The OFT has no evidence to suggest that this additional subsidiary was directly involved in the infringement.

2.36 Quantum is a wholly-owned subsidiary of Hamsard.<sup>27</sup>

### ***Hamsard***

2.37 Hamsard's principal activity is that of a management and holding company for a group engaged in the manufacture and supply of niche pharmaceutical products.<sup>28</sup>

### ***Tomms' Turnover***

2.38 Tomms' turnover for the past three financial years was as follows:

<b>Year ending</b>	<b>Turnover</b>
<b>Ten months to 31/01/2012<sup>29</sup></b>	£3,372,307
<b>31/03/2011<sup>30</sup></b>	£2,054,756
<b>31/03/2010<sup>31</sup></b>	£434,296

### ***Quantum's turnover***

2.39 Quantum's turnover for the past three financial years was as follows:

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<sup>23</sup> Tomms Directors' Report and Financial Statements 31 January 2012, OFT Document Reference 0416BC, page 1.

<sup>24</sup> Quantum Directors' Report and Financial Statements 31 January 2012, OFT Document Reference 0416BF, page 17.

<sup>25</sup> OFT Document Reference 0416BF, page 1.

<sup>26</sup> OFT Document Reference 0416BF, page 17.

<sup>27</sup> OFT Document Reference 0416BC, page 17.

<sup>28</sup> Hamsard Directors' Report and Financial statements 31 January 2013, OFT Document Reference 0498, page 1.

<sup>29</sup> OFT Document Reference 0416BC, page 5.

<sup>30</sup> OFT Document Reference 0416BC, page 5.

<sup>31</sup> Tomms Report of the Directors' and Audited Financial Statements for the Period 24 March 2009 to 31 March 2010, OFT Document Reference 0416BA, page 6.

<b>Year ending</b>	<b>Turnover (thousands)</b>
<b>31/01/2012</b> <sup>32</sup>	£33,371
<b>31/01/2011</b> <sup>33</sup>	£35,023
<b>31/01/2010</b> <sup>34</sup>	£29,665

### ***Hamsard's consolidated turnover***

2.40 Hamsard's consolidated turnover for the past three financial years was as follows:<sup>35</sup>

<b>Year ending</b>	<b>Turnover (thousands)</b>
<b>31/01/2013</b>	£48,298
<b>31/01/2012</b>	£38,346
<b>31/01/2011</b>	£35,845

### ***Appointments***

2.41 The directors of Tomms during the relevant period were as follows:<sup>36</sup>

<b>Name</b>	<b>Appointment</b>	<b>Position in November 2011</b>
Nicholas Hind	Prior to 2011	In post
Andrew Scaife	16/05/2011	In post
Joe Smith	16/05/2011	In post
Martin Such	16/05/2011	In post

2.42 The directors of Quantum during the relevant period were as follows:<sup>37</sup>

<sup>32</sup> OFT Document Reference 0416BF, page 7.

<sup>33</sup> Quantum Directors' Report and Financial statements 31 January 2011, OFT Document Reference 0416BE, page 6.

<sup>34</sup> Quantum Directors' Report and Financial statements 31 January 2010, OFT Document Reference 0416BD, page 6.

<sup>35</sup> Hamsard FAME Report, OFT Document Reference 0499.

<sup>36</sup> OFT Document Reference 0416BC, page 1.

<sup>37</sup> OFT Document Reference 0416BF, page 2.

<b>Name</b>	<b>Appointment</b>	<b>Position in November 2011</b>
AJ Scaife	Prior to 2011	In post
MJ Such	Prior to 2011	In post
V Buyer	25/02/2011	Left post 07/10/2011
T Dickinson	25/02/2011	In post
AP Mathews	04/07/2011	In post

2.43 The directors of Hamsard during the relevant period were as follows:<sup>38</sup>

<b>Name</b>	<b>Appointment</b>	<b>Position in November 2011</b>
AJ Scaife	Prior to 2011	In post
MJ Such	Prior to 2011	In post
JF Swarbrick	Prior to 2011	In post
S Stocks	Prior to 2011	In post

2.44 The OFT notes that Andrew Scaife and Martin Such were on the Board of Directors of Tomms, Quantum and Hamsard during the relevant period.

### ***Liability***

2.45 The OFT finds that Quantum and Tomms were directly involved in the infringement during the relevant period.

2.46 As regards Quantum, the OFT also considers that Quantum, as 100 per cent owner of Tomms, had the power to exercise decisive influence over Tomms' commercial policies during the relevant period. The OFT also presumes that Quantum did in fact exercise such decisive influence. On this basis, the OFT finds that during the relevant period Quantum formed part of the same economic entity as Tomms.

2.47 The OFT concludes that Hamsard, as 100 per cent owner of Quantum, and 100 per cent indirect owner of Tomms, had the power to exercise decisive influence over Quantum's and Tomms' commercial policies during the relevant period. The OFT also presumes that Hamsard did in fact exercise such decisive influence. On

<sup>38</sup> Hamsard Directors' Report and Financial statements 31 January 2012, OFT Document Reference 0500, page 3.

this basis, the OFT finds that during the relevant period Hamsard formed part of the same economic entity as Quantum and Tomms.

- 2.48 On this basis, the OFT concludes that Quantum, Tomms and Hamsard are jointly and severally liable for the infringement. Accordingly, they will be jointly and severally liable for payment of any financial penalties imposed by the OFT in respect of the infringement.
- 2.49 Tomms and Quantum jointly applied to the OFT for leniency in June 2013. They were not the first undertaking to make a leniency application. The OFT had already commenced its investigation. They were accordingly granted a marker for Type C leniency and, as the relevant conditions set out in the leniency agreement between Hamsard Group and the OFT have been met, the penalty which the OFT would otherwise impose on the Hamsard Group has been reduced by 25 per cent.
- 2.50 As part of the OFT's settlement agreement with Hamsard Group, the penalty which the OFT would otherwise impose on them after any discount for leniency has been reduced by 20 per cent, as the relevant conditions set out in the settlement agreement between Quantum and the OFT have been met.



## SECTION 3 THE OFT'S INVESTIGATION

### A Lloyds' leniency application

- 3.1 On 27 January 2012, Lloyds approached the OFT for immunity under the OFT's leniency policy and were granted a Type A immunity marker. On 8 January 2014 an immunity agreement was signed by Celesio and Lloyds in respect of Lloyd's involvement between 31 May 2011 (at the latest) and 10 November 2011 in an agreement and/or concerted practice with Quantum and its subsidiary Tomms whereby Lloyds and Quantum agreed that Tomms would not, at the very least, attempt to actively target care homes already supplied with prescription medicines by Lloyds (Lloyds-supplied care homes) and whereby as from November 2011 at the latest, Lloyds agreed not to actively target care homes supplied by Tomms (Tomms-supplied care homes).
- 3.2 To support Lloyds' application for immunity, it provided the OFT with material in relation to the alleged infringement in the form of contemporaneous documentary evidence.
- 3.3 The OFT also met with Lloyds and its representatives on 16 January 2013 and 27 March 2013.
- 3.4 In addition to the above, the OFT also obtained witness evidence from a number of current and former employees of Lloyds. These are detailed in the table below:

Name of witness	Position (at the relevant time)
[Director of Region]	Director of Region
[Regional Operations Manager]	Regional Operations Manager
[Director of Transformation and Business Performance]	Director of Transformation and Business Performance
[Regional Operations Manager]	Regional Operations Manager
[Director of Region]	Former Director of Region

### B The formal investigation

- 3.5 In March 2013, the OFT launched a formal investigation, under section 25 of the Act, having established reasonable grounds for suspecting that UK competition law had been infringed under Chapter I of the Act and/or Article 101 TFEU.

#### ***Section 27 inspections of business premises***

- 3.6 The OFT conducted the following without notice inspections, using powers provided by section 27 of the Act, at the premises of the Parties on the following dates:
- Tomms – 8 and 9 May 2013
  - Quantum – 8 and 9 May 2013

- 3.7 During these inspections the OFT obtained hardcopy email and documentary evidence. The OFT also forensically imaged IT material from the relevant servers and other electronic devices held at the respective Parties' premises. Master copies of these images were retained by the OFT whilst copies were given to the respective Parties to sift for relevant information sought by the OFT.

### ***Quantum's and Tomms' leniency application***

- 3.8 On 12 June 2013, Quantum and Tomms jointly approached the OFT for leniency under the OFT's leniency policy and were granted a Type C leniency marker. On 11 December 2013 a leniency agreement was signed by Hamsard in respect of Quantum's and Tomms' involvement between 31 May 2011 (at the latest) and 10 November 2011 in an agreement and/or concerted practice with Lloyds whereby Quantum and Lloyds agreed that Tomms would not, at the very least, attempt to actively target care homes already supplied with prescription medicines by Lloyds (Lloyds-supplied care homes) and whereby as from November 2011 at the latest, Lloyds also took on the obligation not to actively target care homes supplied by Tomms (Tomms-supplied care homes).

### ***Section 26 notices and information obtained without use of formal powers***

- 3.9 During the course of its investigation, the OFT sent to Hamsard Group a number of notices under section 26 of the Act requiring the production of documents and information, as well as letters requesting documents and information as part of its obligation to cooperate under leniency.

### ***Interviews conducted***

- 3.10 In addition to the witness interviews conducted prior to the formal investigation (see paragraph 3.2 above) the OFT conducted interviews with a further four individuals following the section 27 inspections and the initial analysis of the evidence. Further details are provided in the table below:

<b>Name of Party</b>	<b>Name of witness</b>	<b>Position (at the relevant time)</b>
Lloyds	[Head of Sales Managed Domiciliary Care]	Head of Sales Managed Domiciliary Care
	[Director of Procurement]	Director of Procurement
Quantum	[Managing Director]	Managing Director
Tomms	[Managing Director]	Managing Director

- 3.11 Each interviewee was informed at the start of their interview that it would be an offence to knowingly provide the OFT with false or misleading information.
- 3.12 When quoting from interview transcripts (as well as from documents from the Parties), the OFT has not corrected any matters such as typographical or grammatical errors, or spelling mistakes.

**C Settlement discussions**

- 3.13 On 23 October 2013 the OFT issued a Summary Statement of Facts to Hamsard Group for the purpose of enabling Hamsard Group to determine its position regarding a possible settlement of this case.
- 3.14 On 11 December 2013 Hamsard Group entered into a settlement agreement with the OFT. It admitted that it had infringed competition law and agreed to co-operate in expediting the process for concluding the investigation. The letter of agreement between the OFT and Hamsard Group dated 9 December 2013 (and signed by each party on 11 and 10 December respectively) sets out all the conditions of the agreement.

## SECTION 4 INDUSTRY OVERVIEW AND MARKET DEFINITION

- 4.1 This section comprises two parts. ‘Industry Overview’ provides an overview of the supply of prescription medicines to the care home industry. ‘Market Definition’ sets out the markets affected by the infringement, with the objective of identifying the relevant turnover for the purposes of penalty calculation.

### **Industry Overview**

- 4.2 There are currently approximately 13,500 community pharmacies across the UK which are licensed and regulated by the General Pharmaceutical Council.<sup>39</sup> The majority are predominantly retail focussed, but a large number offer different services and target different sectors.<sup>40</sup> The sector the OFT is interested in for the purpose of its investigation is the supply of prescription medicines to care homes.<sup>41</sup>
- 4.3 There are two categories of prescription medicines supplied by the pharmacies to care homes: (i) the ‘bulks’ and (ii) the ‘acutes’. The infringement concerns the supply of both bulks and acutes, and this section therefore covers both categories.

### **A Bulks**

- 4.4 Bulks are medicines supplied as a part of a regular order of monthly prescription medication for an individual in a care home. They are medicines for patients with chronic long-term conditions and part of a 28-day cycle.
- 4.5 Bulks are part of a regular monthly order and for that reason pharmacies can plan their delivery in advance with little uncertainty and can thus supply them either from a hub or from any pharmacy in the area close to the care home location.

### **B Acutes**

- 4.6 Acutes refer to medication requests that are required immediately and which are not part of a monthly regular order. Acute products with respect to care homes tend to be medicines such as antibiotics, (end of life) painkillers or medicines for chronic condition management that have been prescribed as part of a recommended change in a regular medication regimen. Acutes are usually supplied by pharmacies in the proximity of the care homes in order to deliver the medicines efficiently and on time.

### **C How the industry works**

- 4.7 Pharmacies do not charge care homes directly for the supply of prescription medicines because their residents are entitled to free prescriptions. Pharmacies collect the prescriptions from the care homes and, once they have supplied the medicines, pass the prescriptions on to the NHS for reimbursement. Subsequently the NHS reimburses the pharmacy on the basis of a drug tariff prices or at cost if

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<sup>39</sup> OFT Document Reference 0380A.

<sup>40</sup> OFT Document Reference 0380A.

<sup>41</sup> The care homes are usually regional chains or independent units. Although the large majority are privately owned, care homes operate in an environment closely controlled by the government. The administration of medicines in care homes is regulated by the Commission for Social Care Inspection (CSCI).

the medicine is a special not covered by the drug tariff. Thus care homes do not pay pharmacies directly for products.

- 4.8 Although pharmacies do not compete on price the OFT has collected evidence indicating that they do compete on the level and quality of the services they provide.<sup>42</sup> Indeed, care homes are sensitive to quality of the services provided by pharmacies, as poor service affects residents and ultimately could make the care home less attractive to residents. Care homes' main requirements are the certainty of supply of repeat prescriptions every 28 days and a commitment to fulfil urgent prescriptions, such as acute medicines, in a timely way. Pharmacies may also offer other ancillary services or goods in order to attract care homes, for example the collection of the prescriptions, waste storage solutions, and trays to dispense medicines in correct doses (such as the 'Monitored Dosage System') and other equipment.

## **Market Definition**

### **A Introduction**

- 4.9 The relationship between care homes and suppliers may be governed by a Service Level Agreement ('SLA') setting out the terms of supply and the services to be offered. The cost of switching providers for care homes is low and the OFT has found evidence that they will change providers if the level of the services is not adequate.<sup>43</sup>
- 4.10 When applying the Chapter I prohibition, the OFT is not obliged to define the relevant market unless it is impossible, without such a definition, to determine whether the agreement or concerted practice is liable to affect trade in the UK, and whether it has as its object or effect the appreciable prevention, restriction or distortion of competition.<sup>44</sup>
- 4.11 It is not necessary to define the relevant market in this case in order to determine the existence of the infringement. For the reasons set out in the Legal Assessment at Section 6 (Evidence relied on by the OFT in relation to the infringement), the OFT has concluded that the infringement involved an agreement and/or concerted practice which had as its object the appreciable prevention, restriction or distortion of competition in the United Kingdom (and which affected trade in the United Kingdom) regardless of how the relevant market is defined. Accordingly, the OFT is not obliged to define the relevant market in order to consider that the arrangement in this case is an infringement of the Chapter I prohibition.
- 4.12 However, the OFT does need to form a view of the relevant market for the purposes of assessing the relevant turnover when determining the appropriate

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<sup>42</sup> For example see, [Lloyds Director of Transformation and Business Performance] interview transcript, OFT Document Reference 0428, page 15 and [Tomms Managing Director] interview transcript, OFT Document Reference 0435, pages 38 and 39.

<sup>43</sup> [Lloyds Director of Region] interview transcript, OFT Document Reference 0487, page 39.

<sup>44</sup> Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707 ('*Volkswagen*'), paragraph 230 and Case T-29/92 *SPO and Others v Commission* [1995] ECR II-289, paragraph 74.

level of a financial penalty.<sup>45</sup> Accordingly, the purpose of this section is to identify the relevant market in order to assess each Party's relevant turnover.

- 4.13 Relevant turnover is the turnover of the undertaking in the relevant product and geographic market(s) affected by the infringement in the undertaking's last business year.<sup>46</sup> Therefore, the OFT must consider what products or services are most likely to account for relevant turnover for the purposes of determining the appropriate level of the financial penalties.
- 4.14 To that effect, the OFT must be '*satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement*'.<sup>47</sup> The Court of Appeal has made clear that the market which is taken for the purposes of penalty assessments may properly be assessed on a broad view of the particular trade which has been affected by the proved infringement, rather than by a relatively exact application of principles that would be relevant for a formal analysis.<sup>48</sup> It is also relevant to consider the commercial reality, insofar as it can reasonably be shown, that the products so grouped were affected by the infringement.<sup>49</sup> The OFT considers that this principle also applies when assessing the relevant geographic market.
- 4.15 The OFT is not bound by market definitions adopted in previous cases, although earlier definitions can, on occasion, be informative when considering the appropriate market definition. Equally, although previous cases can provide useful information, the relevant market must be identified according to the particular facts of the case in hand.
- 4.16 In this case, the OFT has adopted a conservative approach to market definition which may result in a narrower relevant market being defined than would be the case if the OFT carried out a full economic analysis of the relevant market(s).
- 4.17 The analysis below first considers what products and services are part of the relevant market in this case (the relevant product market), then considers the geographic scope of the relevant market in this case (the relevant geographic market), and, finally, sets out the OFT's findings on the relevant market in this case (conclusion on the relevant market).

## **B Product market**

- 4.18 The OFT finds that the infringement concerned the supply of both bulk and acute prescription medicines to care homes. The OFT refers to these as the 'affected products'. The OFT has treated the relevant product market as the market for the affected products (notwithstanding that it may be wider).

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<sup>45</sup> *Penalty Guidance* (fn3).

<sup>46</sup> *Penalty Guidance* (fn3), paragraph 2.7. In this context, an undertaking's last business year is the financial year preceding the date when the infringement ended.

<sup>47</sup> *Argos Limited and Littlewoods Limited v Office of Fair Trading and JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318 ('*Argos, Littlewoods and JJB*'), at [170].

<sup>48</sup> *Argos, Littlewoods and JJB* (fn47), at [173].

<sup>49</sup> *Argos, Littlewoods and JJB* (fn47), at [170] to [173] and [228].

## **C      Geographic market**

- 4.19      In this case the OFT has taken the same approach to determining the relevant geographic market as it has to determining the relevant product market.
- 4.20      The Parties make no (or no material) sales of the affected products to customers in other countries (including other EU Member States).
- 4.21      Accordingly, the OFT has concluded that the relevant geographic market is no wider than the UK. The OFT notes that it is not necessary to be conclusive as to whether the relevant geographic market is national, local or regional, as all the turnover derived from the supply of the affected products in the UK will form part of the relevant turnover.

## **D      Conclusion on definition of relevant markets**

- 4.22      The OFT has concluded that the infringement is an infringement of the Chapter I prohibition by object. As such, it will not be necessary to define the relevant market in order to determine whether the infringement had an appreciable effect on competition and affected trade in the UK.
- 4.23      For the purpose of the calculation of the penalty in this case the OFT has concluded that the relevant turnover is that achieved from the supply of the affected products to care homes in the UK.
- 4.24      The OFT is defining the relevant product and geographic markets in this case for the sole purpose of determining the level of the applicable financial penalty. It does so without prejudice to the OFT's discretion to adopt a different market definition in any subsequent case in the light of the relevant facts and circumstances in that case, including the purpose for which the market is defined.

## SECTION 5 LEGAL BACKGROUND

### A Introduction

- 5.1 This Section sets out the legal framework against which the OFT has considered the evidence in this case.
- 5.2 The legal provisions prohibiting agreements, concerted practices and decisions by associations of undertakings which prevent, restrict or distort competition are contained in the Chapter I prohibition of the Competition Act 1998 and Article 101 of the Treaty on the Functioning of the European Union ('TFEU'). The relevant parts of both provisions are set out below, with a detailed examination of the key concepts contained within each, as is the law on the burden and standard of proof.
- 5.3 As discussed in paragraphs 6.148 – 6.149 below the OFT considers that it has no grounds for action under Article 101. However, Article 101 is still relevant in view of section 60 of the Act,<sup>50</sup> and references to it will therefore be made where appropriate.

### B The Chapter I prohibition

- 5.4 The Chapter I prohibition makes unlawful agreements between undertakings, decisions by associations of undertakings and/or concerted practices which may affect trade within the UK<sup>51</sup> and which have as their object or effect the prevention, restriction or distortion of competition within the UK, unless they are excluded or exempt in accordance with the provisions of Part I of the Act.<sup>52</sup>

#### ***Application of section 60 of the Act - consistency with EU law***

- 5.5 Section 60 of the Act provides that, so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising in relation to competition within the UK should be dealt with in a manner which is consistent with the treatment of corresponding questions under EU competition law.
- 5.6 The OFT must act (so far as is compatible with the provisions of the Act) and decide cases (so far as it is compatible with the provisions of Part I of the Act) in a manner consistent with the principles laid down by the TFEU and the European Court,<sup>53</sup> and any relevant decision of that Court. The OFT must, in addition, have regard to any relevant decision or statement of the European Commission.<sup>54</sup>

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<sup>50</sup> See paragraphs 5.5 to 5.7.

<sup>51</sup> Under section 2(3) of the Act, subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the UK, and under section 2(7), 'United Kingdom' means, in relation to an agreement which operates or is intended to operate only in a part of the UK, that part.

<sup>52</sup> Competition Act 1998 (Commencement No 5) Order 2000 SI 2000/344, Article 2 and Schedule 1.

<sup>53</sup> The '*European Court*' means, as defined in section 59 of the Act, the Court of Justice of the European Communities [now the Court of Justice of the European Union (the 'CJ')] and includes the General Court ('GC').

<sup>54</sup> The CJ recently held that national competition authorities '*may take into account*' guidance contained in non-legally binding Commission Notices (specifically the Notice on agreements of minor importance which



- 5.7 The Chapter I prohibition is modelled on Article 101 TFEU. Accordingly, the case law of the European Court and decisional practice of the European Commission concerning Article 101 TFEU are relevant when applying the Chapter I prohibition.

## **C Undertakings**

- 5.8 The Chapter I prohibition applies to agreements and concerted practices between ‘undertakings’.

### ***The concept of an undertaking***

- 5.9 The concept of ‘undertaking’ has an economic scope: it encompasses any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.<sup>55</sup> The concept designates an economic unit even if in law that unit consists of several natural or legal persons.<sup>56</sup> The undertaking that committed the infringement can therefore be larger than the legal entity whose representatives actually took part in the infringing activities. When an undertaking infringes the competition rules, it is for that entity, according to the principle of personal responsibility, to answer for that infringement.<sup>57</sup>

### ***Single undertakings and the attribution of liability***

- 5.10 Notwithstanding the fact that it is an undertaking which commits an infringement of the competition rules, infringements must be imputed unequivocally to a legal person on whom fines may be imposed.<sup>58</sup> This Decision must therefore be addressed to legal persons. It is accordingly necessary for the OFT to identify, for each undertaking that is to be held accountable for an infringement, one or more legal persons that represent the undertaking concerned. It is also necessary that the Decision indicates in which capacity a legal person is called on to answer the findings contained within it.<sup>59</sup>
- 5.11 In order to determine which legal persons represent the undertaking concerned, the OFT will first examine which legal persons were involved in the infringing conduct. Then it will consider whether any other legal persons represent the same undertaking, and whether it is necessary to address the Decision to these legal persons in addition to, or instead of, the legal person(s) who were involved in the infringing conduct.

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do not appreciably restrict competition under Article 81(1) [EC] (*De minimis Notice*), (OJ [2001] C368/13, Vol II) but such authorities are not obliged to do so, Case C-226/11 *Expedia v Autorité de la concurrence and Others*, not yet reported (*‘Expedia’*), paragraph 31.

<sup>55</sup> Case C-41/90 *Hofner and Elser v Macroton* [1991] ECR I-1979, paragraph 21 and Case C-97/08 P *Akzo Nobel NV v Commission* [2009] ECR I-8237 (*‘Akzo Nobel’*), paragraph 54. See also Joined Cases C-628/10 P etc *Alliance One International Inc (and others) v Commission*, not yet reported (*‘Alliance One’*), paragraph 42. The CAT has followed the approach taken in *Akzo*: see, for example, Case 1121/1/1/09 *Durkan Holdings and others v Office of Fair Trading (‘Durkan’)* [2011] CAT 6 at [22].

<sup>56</sup> *Akzo Nobel* (fn55), paragraph 55.

<sup>57</sup> *Akzo Nobel* (fn55), paragraph 56.

<sup>58</sup> *Akzo Nobel* (fn55), paragraph 57.

<sup>59</sup> *Akzo Nobel* (fn55), paragraph 57.

- 5.12 It is well established in European case law that the conduct of a subsidiary may be imputed to its parent company (at the time the infringement was committed) in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.<sup>60</sup> In such a situation, since the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of the Chapter I prohibition, the OFT may address a decision imposing fines to the parent company, without having to establish its personal involvement in the infringement.<sup>61</sup> The OFT may choose to penalise either the subsidiary that participated in the infringement, or the parent company that controlled it during the relevant period, or both of them jointly and severally.<sup>62</sup>
- 5.13 In order to establish whether a subsidiary determines its conduct on the market independently, the OFT will take into consideration the economic, organisational and legal links which tie that subsidiary to the parent company.<sup>63</sup> In order to be able to impute the conduct of a subsidiary to a parent company, the OFT cannot merely find that the parent company is in a position to exercise decisive influence over the conduct of its subsidiary, but must also check whether that influence was actually exercised.<sup>64</sup>
- 5.14 Where, during the period of the infringement, a parent company has a 100 per cent shareholding in a subsidiary, the parent company is able to exercise decisive influence over the conduct of its subsidiary. There is also a rebuttable presumption that the parent company does in fact exercise such influence (such that the subsidiary does not act independently on the market).<sup>65</sup>
- 5.15 In these circumstances, it is sufficient for the OFT to prove that the entire capital of the subsidiary is held by its parent company in order for it to be presumed that the parent exercises decisive influence over the commercial policy of that subsidiary. In order to rebut the presumption that a parent and subsidiary are a single economic entity, an undertaking must adduce evidence relating to the economic and legal organisational links between the two legal entities, in order to demonstrate that the subsidiary operates autonomously on the market.<sup>66</sup>
- 5.16 Liability for the acts of a subsidiary may also be imputed to a holding company which did not directly own the share capital of the subsidiary, in the same manner as liability can be imputed to a parent of a subsidiary. Liability can be imputed to a holding company where it can be established that (at the time of the infringement) a holding company exercises decisive influence over a subsidiary. In such a situation, the holding company, the interposed company, and the last subsidiary in

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<sup>60</sup> See for example, *Akzo Nobel* (fn55), paragraph 58 and *Alliance One* (fn55), paragraph 43.

<sup>61</sup> See for example, *Akzo Nobel* (fn55), paragraph 58, and *Alliance One* (fn55), paragraph 44.

<sup>62</sup> Case T-146/09 *Parker ITR Srl and Parker-Hannifin Corp. v European Commission*, not yet reported, paragraph 125.

<sup>63</sup> See for example, *Akzo Nobel* (fn55), paragraph 74, and *Alliance One* (fn55), paragraph 45.

<sup>64</sup> Case T-77/08 *The Dow Chemical Company v European Commission*, not yet reported, paragraph 75.

<sup>65</sup> See for example, *Alliance One* (fn55), paragraph 46.

<sup>66</sup> *Akzo Nobel* (fn55), paragraphs 73 to 74.

the group form part of the same economic unit, and therefore constitute a single undertaking for the purposes of EU competition law.<sup>67</sup>

- 5.17 In particular, the same rebuttable presumption will apply in relation to 100 per cent shareholdings. Where a holding company holds 100 per cent of the share capital of an interposed company which, in turn, holds the entire capital of a subsidiary of its group, there is a rebuttable presumption that the holding company exercises decisive influence over the conduct of the interposed company and also indirectly, via that company, over the conduct of the subsidiary company.<sup>68</sup>
- 5.18 Where the presumption of decisive influence arises, the OFT is entitled to find that the parent and subsidiary together form a single undertaking, and to hold the parent company responsible for an infringement committed by its subsidiary, unless the parent company has proved that the subsidiary determines its conduct on the market autonomously.<sup>69</sup>

## **D Agreements and concerted practices between undertakings**

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

- 5.19 The Chapter I prohibition applies to ‘agreements’ as well as to ‘concerted practices’.<sup>70</sup>
- 5.20 It is not necessary, for the purposes of finding an infringement, to characterise the arrangement exclusively as an agreement or as a concerted practice.<sup>71</sup> The concepts of agreement and concerted practice are not mutually exclusive and there is no rigid dividing line between the two. On the contrary, the CJ has found that they are intended *‘to catch forms of collusion having the same nature and only distinguishable from each other by their intensity and the forms in which they manifest themselves’*.<sup>72</sup>
- 5.21 This reasoning has been followed by UK Courts in several recent cases.<sup>73</sup>
- 5.22 The OFT is therefore not required to come to a conclusion as to whether the conduct of the Parties should be specifically characterised as an agreement or as a concerted practice, in order to demonstrate an infringement of the Chapter I prohibition.

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<sup>67</sup> Case C-90/09 P *General Química SA v European Commission* [2011] ECR I-00001 (*‘General Química’*), paragraphs 86 and 87.

<sup>68</sup> *General Química* (fn67), paragraph 88.

<sup>69</sup> *Akzo Nobel* (fn55), paragraphs 54 to 78.

<sup>70</sup> Section 2(1) of the Act and Article 101(1) of the TFEU.

<sup>71</sup> Case C-49/92P *Commission v Anic Participazioni* [1999] ECR I-4125 (*‘Anic’*), paragraph 132 and Case T-9/99 *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft and Others v Commission* [2002] ECR II-1487 (*‘HFB Holding’*), paragraph 189.

<sup>72</sup> *Anic* (fn71), paragraph 131; followed in Case C-8/08 *T-Mobile Netherlands and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529 (*‘T-Mobile Netherlands’*), paragraph 23, *Argos, Littlewoods and JJB* (fn47), at [21(iii)] and *Apex Asphalt and Paving v OFT* [2005] CAT 4 (*‘Apex Asphalt’*), at [206(ii)] (followed in *Makers UK v OFT* [2007] CAT 11 (*‘Makers’*), at [103(ii)]).

<sup>73</sup> See for example, *Argos, Littlewoods and JJB* (fn47), at [21] and most recently *Makers* (fn72) at [103(ii)].

## **Agreements**

- 5.23 An agreement does not have to be a formal written agreement to be caught by the Chapter I prohibition. Nor does an agreement have to be legally binding or contain any enforcement mechanisms.<sup>74</sup> The Chapter I prohibition is intended to catch a wide range of agreements, including oral agreements<sup>75</sup> and ‘gentlemen’s agreements’,<sup>76</sup> since anti-competitive agreements are, by their nature, rarely in written form.<sup>77</sup> An agreement may be express or it may be implied from the conduct of the parties.<sup>78</sup> It may also consist of either an isolated act or a series of acts or a course of conduct.<sup>79</sup>
- 5.24 The key question is whether there has been ‘*a concurrence of wills between at least two parties, the form in which it is manifested being unimportant, so long as it constitutes the faithful expression of the parties’ intention*’.<sup>80</sup>
- 5.25 Although it is necessary to show the existence of a joint intention to act on the market in a specific way in accordance with the terms of the agreement, the OFT is not required to establish a joint intention to pursue an anti-competitive aim.<sup>81</sup>
- 5.26 The form in which the parties’ intention to behave on the market in accordance with the terms of the relevant agreement is manifested is unimportant.<sup>82</sup> It is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way,<sup>83</sup> so long as it constitutes the faithful expression of the parties’ intention.<sup>84</sup> It may also consist of either an isolated act or a series of acts or a course of conduct.<sup>85</sup>

## **Concerted practices**

- 5.27 A concerted practice is:

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<sup>74</sup> Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.865 – PVC) (OJ 1994 L 239/14), paragraph 30 and *JJB Sports v OFT* and *Allsports v OFT* [2004] CAT 17 (*JJB/Allsports*), at [155] and [156].

<sup>75</sup> Case 28/77 *Tepea v Commission* [1978] ECR 1391 (*Tepea*), paragraph 41.

<sup>76</sup> Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, paragraphs 106 to 114.

<sup>77</sup> See also OFT Guidance 401, *Agreements and concerted practices* (December 2004) (the ‘*Agreements and Concerted Practices Guidance*’), paragraph 2.7.

<sup>78</sup> See for example *Tepea* (fn75).

<sup>79</sup> *Anic* (fn71), paragraph 81.

<sup>80</sup> Case T-41/96 *Bayer v Commission* [2000] ECR II-3383 (*Bayer GC*), paragraphs 67 to 69 (upheld on appeal in Joined Cases C-2/01 P and C-3/01 P *BAI and Commission v Bayer* [2004] ECR I-23). See also *JJB/Allsports* (fn74), at [156] and [637]; *Argos and Littlewoods v OFT* [2004] CAT 24 (*Argos/Littlewoods*), at [151] and [658] and *Argos, Littlewoods and JJB* (fn47), at [21(iv)].

<sup>81</sup> Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969 (*Glaxo GC*), paragraph 77 (upheld in Case C-501/06 P etc *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291 (*Glaxo CJ*)).

<sup>82</sup> *Bayer GC* (fn80), paragraph 69.

<sup>83</sup> Joined cases T-305/94 etc *Limburgse Vinyl Maatchappij NV and others v Commission* (*‘PVC II’*) [1999] ECR II-931, paragraph 715.

<sup>84</sup> *Bayer GC* (fn80), paragraph 69.

<sup>85</sup> *Anic* (fn71), paragraph 81.

*'a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition'.<sup>86</sup>*

- 5.28 The concept of a concerted practice must be understood in light of the principle whereby each economic operator must determine its policy on the market independently. In its judgment in *Anic*, the CJ explained the requirement of independence as follows:

*'[a]ccording to [the Court's] case-law, although [the] requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market'.<sup>87</sup>*

- 5.29 In order to prove a concerted practice, it is therefore not necessary to show that the competitor in question has formally undertaken, in respect of one or several others, to adopt a particular course of conduct or that the competitors have expressly agreed a particular course of conduct on the market. The mere receipt of information concerning competitors may be sufficient to give rise to a concerted practice.<sup>88</sup>
- 5.30 The concept of a concerted practice requires, in addition to undertakings acting in concert with one another, conduct on the market pursuant to such collective practices and a relationship of cause and effect between the two.<sup>89</sup> However, where an undertaking participating in a concerted arrangement remains active on the market, there is a presumption that it will take account of information exchanged with its competitors.<sup>90</sup> This presumption is applied subject to proof to the contrary, which it is for the undertakings concerned to adduce.<sup>91</sup>
- 5.31 Furthermore, although the concept of a concerted practice presupposes conduct of the participating undertakings on the market, it does not necessarily require that such conduct produce the concrete effect of restricting, preventing or distorting

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<sup>86</sup> *T-Mobile Netherlands* (fn72), paragraph 26. See also *JJB/Allsports* (fn74), at [151] to [153].

<sup>87</sup> *Anic* (fn71), paragraph 117 (followed in Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287 ('*Hüls*'), paragraphs 159 to 160 and *HFB Holding* (fn71), paragraph 212). See also *Apex Asphalt* (fn72), at [198] and [206(v)] (followed in *Makers* (fn72), at [102] and [103(v)]).

<sup>88</sup> This was reflected in *JJB/Allsports* (fn74), at [658].

<sup>89</sup> *Anic* (fn71), paragraph 118 and *Hüls* (fn87), paragraph 161. See also *Apex Asphalt* (fn72), at [206(ix)] (followed in *Makers* (fn72), at [103(ix)]).

<sup>90</sup> See *Anic* (fn71), paragraph 121; and Joined Cases T-25/95 etc. *Cimenteries and Others v Commission* [2000] ECR II 491 ('*Cimenteries*'), paragraphs 1865 and 1910. See also *Apex Asphalt* (fn72), at [206(x)] (followed in *Makers* (fn72), at [103(x)]).

<sup>91</sup> *T-Mobile Netherlands* (fn72), paragraphs 51 to 52 and 61 to 62.

competition.<sup>92</sup> As the CJ observed in *Hüls*, a concerted practice which has as its object the prevention, restriction or distortion of competition will infringe competition law even where there is no effect on the market.<sup>93</sup>

### ***Participation and commitment to an agreement or concerted practice***

- 5.32 The fact that an undertaking may have played only a limited part in establishing an agreement or concerted practice, or may not be fully committed to its implementation, or may have participated only under pressure from other undertakings, does not mean that it is not party to the agreement or concerted practice.<sup>94</sup>
- 5.33 An agreement or concerted practice may be made on an undertaking's behalf by its employees acting in the ordinary course of their employment, despite the ignorance of more senior management.<sup>95</sup> Even if the employees were acting contrary to instructions, this does not affect the liability of the undertaking.<sup>96</sup>
- 5.34 The parties may show varying degrees of commitment to the common plan and there may well be internal conflict. The fact that an undertaking does not fully abide by an agreement or concerted practice which is manifestly anti-competitive does not relieve that undertaking of responsibility for it.<sup>97</sup> Equally, the fact that an undertaking does not respect the agreement or concerted practice at all times or comes to recognise that in practice it can 'cheat' on the agreement or concerted practice at certain times does not preclude a finding that there was an infringement.<sup>98</sup>
- 5.35 Where two or more undertakings engage in a series of anti-competitive actions in pursuit of a common objective or objectives, it is not necessary to divide the conduct by treating it as consisting of a number of separate infringements where there is sufficient consensus to adhere to a plan limiting the commercial freedom of the Parties.<sup>99</sup> Nor is the characterisation of a complex cartel as a single and continuous infringement affected by the possibility that one or more elements of a

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<sup>92</sup> *Anic* (fn71), paragraph 124. See also *Apex Asphalt* (fn72), at [206(xi)] (followed in *Makers* (fn72), at [103(xi)]).

<sup>93</sup> *Hüls* (fn87), paragraphs 163 to 164 and *Anic* (fn71), paragraph 123. See also *Apex Asphalt* (fn72), at [206(xii)] (followed in *Makers* (fn72), at [103(xii)]).

<sup>94</sup> *Agreements and Concerted Practices Guidance* (fn77), paragraph 2.8. See for example also *Anic* (fn71), paragraph 80; *Cimenteries* (fn90), paragraphs 1389 and 2557 and Case T-28/99 *Sigma Technologie di Rivestimento v Commission* [2002] ECR II-1845 ('*Sigma Technologie*'), paragraph 40.

<sup>95</sup> Joined Cases 100/80 to 103/80 *Musique Diffusion française v Commission* [1983] ECR 1825 ('*Musique Diffusion française*'), paragraph 97.

<sup>96</sup> Case T-53/03 *BPB v Commission* [2008] ECR II-1333, paragraphs 360 and 431.

<sup>97</sup> Case T-141/89 *Tréfileurope Sales v Commission* [1995] ECR II-791 ('*Tréfileurope Sales*'), paragraphs 53 to 60 and 72.

<sup>98</sup> Case 246/86 *SC Belasco and Others v Commission* [1989] ECR 2117 ('*SC Belasco*'), paragraphs 12 to 16; Commission Decision of 15 October 2008 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/39188 – *Bananas*) C(2008) 5955 ('*Bananas*'), paragraph 324 (citing Case T-308/94 *Cascades v Commission* [1998] ECR II-925, paragraph 230) and Case T-59/02 *Archer Daniels Midland v Commission* [2006] ECR II-3627 ('*Archer Daniels Midland*'), paragraph 189.

<sup>99</sup> Case T-1/89 *Rhône-Poulenc SA v Commission of the European Communities* [1991] ECR II-867, paragraph 126.

series of actions or of a continuous course of conduct could individually and in themselves constitute infringements.<sup>100</sup>

## **E Prevention, restriction or distortion of competition**

- 5.36 Section 2(2) of the Act contains a non-exhaustive, illustrative list of the types of agreement and/or concerted practice which may infringe the Chapter I prohibition.<sup>101</sup> A similar non-exhaustive, illustrative list is also provided by Article 101(1) of the TFEU.
- 5.37 Section 2(2)(c) of the Act provides that the Chapter I prohibition applies to agreements and/or concerted practices which '*share markets or sources of supply*'.<sup>102</sup> Undertakings may agree to share markets in a number of different ways. For example, market sharing may take the form of an agreement to divide markets on a territorial basis, with each participant agreeing not to compete within the others' agreed territory.<sup>103</sup> It may also occur through the allocation of customers on the basis of existing commercial relationships.<sup>104</sup>

### ***The law on anti-competitive object***

- 5.38 Object infringements are those forms of collusion between undertakings that can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.<sup>105</sup>
- 5.39 For a finding that an agreement has an anti-competitive object, it is not necessary to demonstrate that final consumers be deprived of the advantages of effective competition in terms of supply or price. The restrictive effect on competition is presumed:<sup>106</sup>

*'there is no need to take account of the concrete effects of an agreement once it has as its object the prevention, restriction or distortion of competition'.*

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<sup>100</sup> *Anic* (fn71), paragraphs 111 to 114.

<sup>101</sup> *Agreements and Concerted Practices Guidance* (fn77), paragraphs 2.2 to 2.3.

<sup>102</sup> See also *Agreements and Concerted Practices Guidance* (fn77), paragraph 3.10.

<sup>103</sup> Case 40/73 *Suiker Unie v Commission* [1975] ECR 1663 ('*Suiker Unie*'); Case T-30/91 *Solvay v Commission* [1995] ECR II-1775 and Case T-36/91 *ICI v Commission* [1995] ECR II-1847.

<sup>104</sup> Commission Decision 83/546/EEC of 17 October 1983 relating to a proceeding under Article 85 pf the EEC Treaty (IV/30.064 – *Cast iron and steel rolls*) [1984] 11 CMLR 694 ('*Cast Iron and Steel Rolls*'); Commission Decision 86/399/EEC of 10 July 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.371 – *Roofing Felt*) (OJ 1991 L 232/15) and Commission Decision 2002/759/EC of 5 December 2001 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/37.800/F3 – *Luxembourg Brewers*) (OJ 2002 L 253/21) (appeals dismissed in Joined Cases T-49/02 to T-51/02 *Brasserie Nationale v Commission* [2005] ECR II-3033, [2006] 4 CMLR 266).

<sup>105</sup> Case C-209/07 *Competition Authority v Beef Industry Development Society and Barry Brothers (Carrigmore) Meats* [2008] ECR I-8637 ('*BIDS and Barry Brothers*'), paragraph 17 and *T-Mobile Netherlands* (fn72), paragraph 29.

<sup>106</sup> Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, page 342; and more recently, *T-Mobile Netherlands* (fn72), paragraph 29.

- 5.40 A finding that an agreement and/or concerted practice has an anti-competitive object is not rebuttable by an analysis of the actual effects of the agreement or concerted practice.<sup>107</sup>
- 5.41 In order to determine whether an agreement or a concerted practice has as its object the restriction of competition, close regard must be paid in particular to the objectives which it is intended to attain and to its economic and legal context.<sup>108</sup> It is not necessary to verify that the parties had a common intent at the time the agreement was concluded.<sup>109</sup> Nonetheless, while intention is not an essential factor in determining whether a concerted practice is restrictive, there is nothing to prevent the OFT from taking it into account.<sup>110</sup>
- 5.42 The fact that legitimate objectives or aims are pursued in tandem with objectives or aims which infringe the Chapter I prohibition cannot justify or supersede the infringing objectives or aims.<sup>111</sup> As clarified by EU case law, *'...an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives'*.<sup>112</sup>

*Market sharing agreements and/or concerted practices*

- 5.43 Market sharing agreements and/or concerted practices have been held to have as their object the prevention, restriction or distortion of competition.<sup>113</sup>
- 5.44 This position has also been adopted in guidelines, notices and other policy statements issued by both the European Commission and the OFT. For instance, the European Commission's *'Guidelines on the application of Article 81(3) of the Treaty'*, state that *'[i]n the case of horizontal agreements restrictions by object include price fixing, output limitation and sharing of markets and customers'*.<sup>114</sup>
- 5.45 Similarly, the OFT's guidelines on *'Agreements and Concerted Practices'* provide that:

*'Undertakings may agree to share markets, whether by territory, type or size of customer, or in some other way. This may be as well as or instead of agreeing on the prices to be charged, especially where the product is reasonably standardised. Where the object of the agreement is to share markets in this way, it will almost invariably infringe Article 81 and/or the Chapter I prohibition. The OFT considers*

<sup>107</sup> *T-Mobile Netherlands* (fn72), paragraph 38 and *Glaxo CJ* (fn81), paragraph 29.

<sup>108</sup> *T-Mobile Netherlands* (fn72), paragraph 27.

<sup>109</sup> Joined Cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines and Rheinzinc v Commission* [1984] ECR 1679 ('CRAM'), paragraph 26.

<sup>110</sup> *T-Mobile Netherlands* (fn72), paragraph 27; see also *BIDS and Barry Brothers* (fn105), paragraphs 16 and 21.

<sup>111</sup> Case C-551/03P *General Motors v Commission* [2006] ECR I-3173 ('General Motors'), paragraph 64.

<sup>112</sup> *BIDS and Barry Brothers* (fn105), paragraph 21.

<sup>113</sup> In addition to the EU case law cited above please see, for UK precedents, *Achilles Paper Group Limited v OFT* [2006] CAT 24 (*Stock Check Pads*) and *Double Quick Supply Line and Precision Concepts Limited v OFT* [2007] CAT 13 (*Spacer Bars*) and Decision of the Director General of Fair Trading No. CA98/9/2002 *Market sharing by Arriva plc and FirstGroup plc.* of 30 January 2002.

<sup>114</sup> *'Guidelines on the application of Article 81(3) of the Treaty'* (2004/C 101/08), paragraph 23.



*that such market-sharing agreements, by their very nature, restrict competition to an appreciable extent.*<sup>115</sup>

## **F Appreciable prevention, restriction or distortion of competition**

5.46 The CJ has held the following:

*'an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition'.*<sup>116</sup>

5.47 The OFT interprets this to indicate that agreements which do not affect trade between Member States and which have an anti-competitive object also constitute an appreciable restriction on competition.

5.48 The OFT has also had regard to the European Commission's *De minimis Notice*.<sup>117</sup> The *De minimis Notice* states that agreements between undertakings which are competitors will not be appreciable where they have market shares below 10 per cent. The *De minimis Notice* also states this threshold does not apply in the case of hardcore restrictions. Agreements which have as their object the allocation of markets or customers constitute hardcore restrictions.<sup>118</sup>

## **G Single continuous infringement**

5.49 Agreements and/or concerted practices may also constitute a single continuous infringement notwithstanding that they vary in intensity and effectiveness, or even if the arrangement in question is suspended during a short period.<sup>119</sup>

5.50 Moreover, a finding of an agreement and/or concerted practice does not require a finding that all the parties have given their express or implied consent to each and every aspect of the agreement.<sup>120</sup> Rather, the Parties may show varying degrees of commitment to the common plan and there may well be internal conflict. The mere fact that a party does not abide fully by an agreement or concerted practice which is manifestly anti-competitive does not relieve that party of responsibility for it.<sup>121</sup> Equally, the fact that a party may come to recognise that, in practice, it can cheat on the agreement and/or concerted practice at certain times does not preclude a finding that there was a continuing single overall infringement.<sup>122</sup>

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

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<sup>115</sup> *Agreements and concerted practices Guidance* (fn77), paragraph 3.10.

<sup>116</sup> *Expedia* (fn54), paragraph 37.

<sup>117</sup> *De minimis Notice* (fn54).

<sup>118</sup> The OFT notes that the Commission is consulting on changes to the *De minimis Notice*, in light of the recent CJ judgment in *Expedia* (fn54).

<sup>119</sup> Case T-23/99 *LR AF v Commission* [2002] ECR II-1705, paragraphs 106 to 109.

<sup>120</sup> *Anic* (fn71), paragraph 80 and *Sigma Technologie* (fn94), paragraph 40.

<sup>121</sup> *Tréfileurope Sales* (fn97), paragraphs 53 to 60.

<sup>122</sup> *SC Belasco* (fn98), paragraphs 10 to 16 and *Archer Daniels Midland* (fn98), paragraph 189.

- 5.51 By virtue of section 2(1)(a) of the Act, the Chapter I prohibition applies only to agreements and/or concerted practices which ‘*may affect trade within the United Kingdom*’.
- 5.52 For the purposes of the Chapter I prohibition, the UK includes any part of the UK where an agreement and/or concerted practice operates or is intended to operate.<sup>123</sup> However, the test is not read as importing a requirement that the effect on trade within the UK should be appreciable.<sup>124</sup> Effect on trade within the UK is a purely jurisdictional test to demarcate the boundary line between the application of EU competition law and national competition law.<sup>125</sup>
- 5.53 It should be noted that, in order to infringe the Chapter I prohibition, an agreement and/or concerted practice is not in fact required to affect trade provided it is capable of doing so.<sup>126</sup>
- 5.54 The European Commission has noted that market sharing agreements are by their very nature capable of affecting trade.<sup>127</sup>

## **I Effect on trade between Member States**

- 5.55 Where the OFT applies national competition law to agreements or concerted practices which may affect trade between EU Member States, the OFT must also apply Article 101.<sup>128</sup>
- 5.56 For the purposes of assessing whether an agreement and/or concerted practice may affect trade between EU Member States the OFT follows the approach set out in the Commission's published guidance.<sup>129</sup>
- 5.57 Agreements which cover only part of an EU Member State are not likely to appreciably affect trade between EU Member States, unless they have the effect of hindering competitors from other EU Member States from gaining access to part of the EU Member State, which constitutes a substantial part of the internal market.<sup>130</sup> Agreements which are local in nature are by their nature unlikely to have this effect.<sup>131</sup>

<sup>123</sup> Section 2(7) of the Act provides that ‘the United Kingdom’ means, in relation to an agreement which operates or is intended to operate only in a part of the United Kingdom, that part.

<sup>124</sup> *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11 (*‘Aberdeen Journals’*), at [459] and [460]. The CAT considered this again in *North Midland Construction plc v Office Of Fair Trading* [2011] CAT 14 (see [48] to [51] and [62]) but considered that it was ‘*not necessary [...] to reach a conclusion*’).

<sup>125</sup> Case 22/78 *Hugin Kassaregister and Hugin Cash Registers v Commission* [1979] ECR 1869 (*‘Hugin’*), paragraph 17; see also *Aberdeen Journals* (fn124), at [459] to [460].

<sup>126</sup> Cases T-202/98 etc *Tate & Lyle plc v Commission* [2001] ECR II-2035, paragraph 78.

<sup>127</sup> Commission Notice Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C101/07) (the ‘*Notice on the Effect on Trade*’), paragraph 64.

<sup>128</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 3.

<sup>129</sup> *Notice on the Effect on Trade* (fn127), page 81.

<sup>130</sup> *Notice on the Effect on Trade* (fn127) page 81, paragraphs 89 and 92.

<sup>131</sup> *Notice on the Effect on Trade* (fn127) page 81, paragraph 91.

- 5.58 The agreement or concerted practice must affect trade between EU Member States to an appreciable extent.<sup>132</sup> This is a jurisdictional requirement demarcating the boundary between EU competition law and national competition law.<sup>133</sup> Appreciability may be assessed by reference to the market position and importance of the undertakings concerned, and it will be absent where the effect on the market is insignificant because of the undertakings' weak position on the market.<sup>134</sup>

## **J Burden and standard of proof**

### ***Burden of proof***

- 5.59 The burden of proving an infringement of the Chapter I prohibition lies with the OFT.<sup>135</sup> However, this burden does not preclude the OFT from relying, where appropriate, on evidential presumptions.<sup>136</sup>

### ***Standard of proof***

- 5.60 The applicable standard of proof is the civil standard. The OFT is therefore required to demonstrate that an infringement has occurred on the balance of probabilities, nothing more and nothing less.<sup>137</sup>

### ***Evidential weight***

- 5.61 In considering whether the evidence obtained demonstrates an infringement of the Chapter I prohibition, the OFT will assess the extent and weight of that evidence.
- 5.62 It is well established that, in cases involving infringements of the Chapter I prohibition, the evidence available may be limited. As the CJ stated in *Aalborg Portland*:

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<sup>132</sup> Case 5/69, *Völk v Vervaecke* [1969] ECR 295 ('*Völk*'), paragraph 5/7 and Case 22-71 *Béguelin Import v SAGL Import Export* [1971] ECR 949, paragraph 16. See also *Notice on the Effect on Trade* (fn127), page 81.

<sup>133</sup> *Hugin* (fn125), paragraph 17. See also *Aberdeen Journals* (fn124), paragraph 459 and *Notice on the Effect on Trade* (fn127), page 81, paragraph 44.

<sup>134</sup> *Völk* (fn132), paragraph 5/7; Case T-77/92 *Parker Pen v Commission* [1994] ECR II-549, paragraph 40 and *Notice on the Effect on Trade* (fn127), page 81, paragraph 44.

<sup>135</sup> *Napp Pharmaceutical Holdings v Director General of Fair Trading*, [2002] CAT 1 ('*Napp*'), at [95] and [100]. The CAT has confirmed this approach in *JJB/Allsports* (fn74), at [164].

<sup>136</sup> *Napp* (fn135), at [110]: 'That approach does not in our view preclude [the OFT], in discharging the burden of proof, from relying in certain circumstances, on inferences or presumptions that would, in the absence of any countervailing indications, normally flow from a given set of facts, for example... that an undertakings' presence at a meeting with a manifestly anti-competitive purpose implies, in the absence of explanation, participation in the cartel alleged'.

<sup>137</sup> *Re S-B* [2010] 2 WLR, at [34]. See also *Re H (Minors)* [1986] AC 563, at [586]; *Re D (Northern Ireland)* [2008] 1 WLR 1499, at [28]; and *Re B* [2009] 1 AC 11, at [13].

*'55. Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum.*

*'56. Even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction.*

*'57. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules'.<sup>138</sup>*

5.63 In a number of recent judgments, the GC has reiterated the principles set out in *Aalborg Portland* and confirmed that while *'the Commission has to provide sufficiently precise and consistent evidence'* to support a finding that an infringement took place, *'it is important to emphasise that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement; it is sufficient if the body of evidence relied on by the institution, viewed as whole, meets that requirement'*.<sup>139</sup>

5.64 As regards evidence obtained in the context of a leniency application, in *Quarmby*, a claim that evidence provided by a witness *'was "tainted" because it was given in the context of [a] leniency application'* was dismissed by the CAT as *'unsubstantiated'*. In particular, the CAT noted that the undertaking providing the underlying evidence to the OFT and the witness commenting on that evidence were under a duty of continuous and complete cooperation (as a condition of leniency) and were aware of the criminal sanctions which they faced if they provided false or misleading information to the OFT.<sup>140</sup>

## **K Exclusion, legal exemption and parallel exemption**

### ***Exclusion***

5.65 Section 3 of the Act provides that certain cases are excluded from the Chapter I prohibition. It is for a Party wishing to rely on such an exclusion to adduce evidence that the exclusion applies.

### ***Exemption***

5.66 Agreements and/or concerted practices which satisfy the criteria set out in section 9 of the Act benefit from exemption from the Chapter I prohibition.

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<sup>138</sup> Joined Cases C-204/00 P etc *Aalborg Portland A/S and Others v Commission* [2004] ECR I-123 (*'Aalborg Portland'*), paragraphs 55 to 57. See also Joined Cases T-44/02 OP etc *Dresdner Bank and Others v Commission* [2006] ECR II-3567, paragraphs 64 to 65.

<sup>139</sup> Joined Cases T-109/02 etc *Bolloré and Others v Commission* [2007] ECR II-947, paragraphs 257 to 258, citing *Volkswagen* (fn44, paragraph 43) and *PVC II* (fn83), paragraphs 513 to 520. See also Case T-191/06 *FMC Foret v Commission* [2011] ECR II-2959, paragraphs 105 to 108.

<sup>140</sup> *Quarmby Construction Company and St James Securities Holdings v OFT* [2011] CAT 11, at [114].

- 5.67 It is for the Parties to provide evidence that the conditions for exemption under section 9 of the Act are satisfied. The OFT will consider this evidence against the likely impact of the agreement and/or concerted practice on competition when assessing whether the criteria in section 9 of the Act are satisfied.

***Parallel exemption***

- 5.68 Section 10 of the Act provides that an agreement is exempt from the Chapter I prohibition if it is covered by a finding of inapplicability by the Commission<sup>141</sup> or an EU block exemption regulation, or would be covered by an EU block exemption regulation if the agreement had an effect on trade between EU Member States.<sup>142</sup>
- 5.69 The infringement is not covered by a finding of inapplicability by the Commission or by an EU block exemption regulation, and would not be covered by such a regulation if they had an effect on trade between EU Member States.

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<sup>141</sup> The Commission may find that Article 101 is inapplicable to an agreement either because the conditions of Article 101(1) are not fulfilled or because the conditions of Article 101(3) are satisfied.

<sup>142</sup> *Agreements and Concerted Practices Guidance* (fn77), paragraph 5.15.

## **SECTION 6 EVIDENCE RELIED ON BY THE OFT IN RELATION TO THE INFRINGEMENT**

### **A Introduction**

#### **The OFT's analysis of the evidence and findings**

- 6.1 The OFT finds that between 31 May 2011 and 10 November 2011 Lloyds, Quantum and Quantum's subsidiary Tomms participated in a market sharing agreement and/or concerted practice that had as its object the appreciable prevention, restriction or distortion of competition in relation to the supply of prescription medicines to care homes (the 'infringement').
- 6.2 The OFT finds that during the relevant period, Lloyds and Quantum agreed that Quantum's subsidiary Tomms would not actively target care homes already supplied with prescription medicines by Lloyds (Lloyds-supplied care homes). The OFT also finds that from 3 November 2011 (at the latest) until 10 November 2011 Lloyds and Quantum agreed that Lloyds would not actively target care homes already supplied with prescription medicines by Tomms (Tomms-supplied care homes).

### **B Evidence of the infringement**

#### **Contacts between Quantum, Tomms and Lloyds prior to the relevant period**

##### ***Quantum decision not to target Lloyds' customers***

- 6.3 This section sets out the context immediately prior to the infringement whereby Quantum took a unilateral decision that Tomms would not target Lloyds-supplied care homes.
- 6.4 Quantum acquired the entire share capital of Tomms on 17 May 2011.<sup>143</sup> Tomms competed with Lloyds in respect of the supply of prescription medicines to care homes. Lloyds was one of Quantum's [C] customers. Therefore the acquisition of Tomms meant that Quantum might directly compete with Lloyds.
- 6.5 In fact, the evidence suggests that, rather than compete with Lloyds, Quantum wished to use the acquisition to develop its commercial relationship with Lloyds, which would involve Tomms supporting Lloyds in the supply of a drug dispensing mechanism called Biodose to care homes.<sup>144</sup>
- 6.6 Biodose was a system which offered care homes a very quick and efficient method of dispensing drugs to patients. It is produced by a company called Protomed, in which Quantum owned a 20 per cent stake.<sup>145</sup> At the material time Lloyds did not use the Biodose system, although the evidence suggests it was contemplating

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<sup>143</sup> From this date the OFT finds that Quantum and Tomms formed a single undertaking for the purposes of the Chapter I prohibition.

<sup>144</sup> In his witness testimony this was described by [Quantum Managing Director] as a 'hub and spoke' arrangement: [Quantum Managing Director] interview transcript, OFT Document Reference 0433, page 59.

<sup>145</sup> Tomms was supplied with Biodose by Protomed, which at the time Quantum had a 20 per cent shareholding. This shareholding subsequently increased to 100 per cent.

acquiring it because it was losing some of its care homes to pharmacies (such as Tomms) who supplied the Biodose system.<sup>146</sup>

- 6.7 As Lloyds was [C] customer to Quantum it was keen not to take any action which would risk losing Lloyds' business. Accordingly, Quantum engaged with Lloyds prior to its acquisition of Tomms, to explain the rationale for its acquisition of Tomms. Given Quantum's 20 per cent stake in Protomed and the fact it was negotiating to acquire Tomms, Lloyds viewed Quantum as having the ability to influence matters in relation to care homes lost to Tomms.
- 6.8 Quantum subsequently took the unilateral decision<sup>147</sup> that Tomms would not target Lloyds-supplied care homes. The situation was additionally delicate because, while Tomms and Quantum discussed the acquisition, Tomms was in dispute with Lloyds over an alleged intellectual property rights infringement.
- 6.9 On 13 January 2011, [Quantum Managing Director] emailed<sup>148</sup> [Tomms Managing Director] and asked that Tomms' staff avoid taking action that would adversely affect Quantum's relationship with its customers, particularly Lloyds:

*'...Lloyds are pretty annoyed. I guess the approach re staff etc needs to be chatted through as it is essential that [C] aren't alienated at this stage as I will have to have some very sensitive conversations with them in any event (to try and stop them from moving business from Quantum) which will only be made worse if they are annoyed. If you could refrain from rattling their [Lloyds] (or anyone else's) cage at this point I would very much appreciate it. There will come a time when I'm much more relaxed about that but it isn't yet!'*

- 6.10 Contemporaneous emails indicate that, shortly after [Quantum Managing Director]'s request, Tomms "avoided" care homes serviced by Lloyds. For example, in an internal Tomms email<sup>149</sup> to [Tomms Managing Director], [Tomms' National Client Services Manager] and [Tomms' Client Services Manager] dated 22 March 2011, [Tomms' Client Services Manager] stated:

*'Please note we have done our utmost to avoid Lloyds' serviced homes although I am sure there maybe overlap.'*

- 6.11 An email<sup>150</sup> from [Tomms Managing Director] to [Quantum Managing Director], sent on 10 April 2011, shows that Tomms had ceased "targeting" Lloyds-supplied care homes:

*'You will see... that [C] serviced homes are the target and not Lloyds, intentionally, and we ceased approaching any Lloyds' personnel...'*

### **Quantum discusses proposed acquisition of Tomms with Lloyds**

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<sup>146</sup> [Lloyds Director of Region] interview transcript, OFT Document Reference 0431, page 16.

<sup>147</sup> The OFT does not have any evidence to indicate that, at that particular time, this was in response to a specific request made by Lloyds to Quantum and/or Tomms.

<sup>148</sup> OFT Document Reference 0116.

<sup>149</sup> OFT Document Reference 0313.

<sup>150</sup> OFT Document Reference 0117.

- 6.12 Two emails from [Quantum Managing Director] to [Lloyds Senior Ethical Buying Manager], dated 7 and 11 April 2011, show that, prior to completing the acquisition of Tomms, Quantum sought comfort from Lloyds that Lloyds would not perceive Quantum's purchase of Tomms as a competitive threat.
- 6.13 In the email<sup>151</sup> of 7 April 2011, [Quantum Managing Director] requested a meeting with [Lloyds Senior Ethical Buying Manager] and [Lloyds Director of Procurement] to discuss a new business opportunity:
- 'I could do with a catch up with you and in particular I have something that I would like to talk to yourself and [Lloyds Director of Procurement] about urgently(in the next two weeks)- an opportunity that has come up which I'd like your thoughts on before I proceed'.*
- 6.14 In the 11 April email<sup>152</sup> [Quantum Managing Director] clarified the purpose of the meeting:
- 'To clarify the meeting is for me to discuss an acquisition opportunity which has been presented to Quantum and which we would need to take up quickly. I'm keen to get an understanding as to how Lloyds would view it before we make the decision as to whether or not we make the acquisition.'*
- 6.15 Taking account of all of the evidence in the round, the OFT concludes that the "acquisition opportunity" which had been presented to Quantum was Tomms and that this email demonstrates that [Quantum Managing Director] was keen to understand what Lloyds' view of this acquisition would be before Quantum decided whether or not to complete the deal.
- 6.16 Further to the emails of 7 and 11 April 2011 [Quantum Managing Director] met with various Lloyds' personnel, including [Lloyds Director of Procurement] and [Lloyds Senior Ethical Buying Manager] on 21 April 2011. Following this meeting, [Quantum Managing Director] sent an email<sup>153</sup> to [Lloyds Director of Procurement] and [Lloyds Senior Ethical Buying Manager], dated 25 April 2011 confirming that Quantum would "press on" with its proposed acquisition of Tomms:
- 'Thanks for your time on Thursday to chat through the above opportunity. As discussed and as we left it, we will press on with the acquisition of Tomms, as I've heard nothing to the contrary. I anticipate that we will probably complete the transaction by 6 May 2011.'*
- 6.17 The evidence in the OFT's possession demonstrates that following Quantum's acquisition of Tomms on 17 May 2011 (and therefore shortly after the 21 April meeting), Lloyds started to exert pressure on Quantum to get Tomms to stop actively targeting Lloyds-supplied care homes.
- 6.18 The next section sets out a series of contacts between Quantum and Lloyds, by which they agreed that Tomms would not actively seek business from Lloyds-

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<sup>151</sup> OFT Document Reference 0011.

<sup>152</sup> OFT Document Reference 0012.

<sup>153</sup> OFT Document Reference 0013.



supplied care homes. It also sets out Quantum's attempts to ensure compliance with the agreement and the subsequent actions undertaken by Quantum.

## **Contacts between Quantum and Lloyds during the relevant period**

### ***Initial exchanges***

6.19 The OFT finds that an email exchange<sup>154</sup> between [Quantum Managing Director] and [Lloyds Director of Procurement] on 31 May 2011 demonstrates that, by this date, there was an agreement in place by which, at the very least, Tomms would not actively target Lloyds-supplied care homes.

6.20 In the first part of this email exchange, [Lloyds Director of Procurement] asked [Quantum Managing Director] to call her urgently regarding the progress of their discussions in the preceding weeks, alleging that Tomms were targeting Lloyds-supplied care homes and stating that this was causing “major issues”:

*‘Can you please call me urgently regarding progress on our discussions a few weeks ago. We are finding more and more of our pharmacies are being targeted which is causing major issues e.g. Bracknell area. I need to be clear on how we are to progress matters in the short and medium term on product supply.’*

6.21 [Quantum Managing Director] was keen to reassure Lloyds that Tomms was instructed not to target care homes serviced by Lloyds. In response to [Lloyds Director of Procurement]’s concerns, he said:

*‘As I mentioned to you, since we started conversations (i.e. even before we completed the transaction) with Tomms we have been very clear with them re which care homes they should be targeting and which they should be avoiding. Indeed, to ensure this happens, the previous owners are heavily incentivised to target homes supplied by certain pharmacies ([C]) and avoid others. This was again re-iterate [sic] after completion and all staff are very clear about this. The first thing I did, following completion, was to check their customer list and there are no new LP [Lloyds Pharmacy] customers on their list since January and only 4 in total since the business started trading. **It is very important to me that we ensure Tomms are only targeting [C] supplied care homes and I’m determined to ensure this continues to be achieved. Since your messages I have spoken to the MD of Tomms and have categorical assurance that the sales team have clear instructions and that no LP care homes are being targeted or converted.** Also, I have checked, and there is no Tomms sales activity at all in the Bracknell area. The noise from the LP store base is not as a result of Tomms and must be coming from other Biodose users whom I have no ability to influence.’ (Emphasis added)*

6.22 It is clear from the 31 May 2011 email exchange that Lloyds had complained to Quantum about Tomms possibly targeting care homes which Lloyds supplied. In response to Lloyds’ complaint, [Quantum Managing Director] of Quantum gave

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<sup>154</sup> OFT Document Reference 0014.

Tomms staff clear instructions not to target Lloyds-supplied care homes and communicated his actions back to Lloyds.

6.23 The combination of Lloyds' complaint and Quantum's reaction to it demonstrates a meeting of minds between the two Parties (also manifested as a joint intention) that Tomms, at the very least, would not actively target Lloyds-supplied care homes. On the basis of the evidence set out below, the OFT concludes that this meeting of minds remained in place throughout the relevant period.

6.24 [Quantum Managing Director]'s commitment that Tomms would not actively approach Lloyds-supplied care homes is further demonstrated by him asking Lloyds in the same email for a list of the care homes it supplied, so that Tomms would be able to try and ensure they did not contact these care homes:<sup>155</sup>

*'Do you have a list of the care homes which LP [Lloyds Pharmacy] supply so as even the initial call can be avoided?'*

6.25 The OFT infers that, based on the surrounding evidence – including the email chain of 31 May 2011, the reference to avoiding the *"initial call"* is a reference to Tomms avoiding making any approach to obtain business from Lloyds-supplied care homes. This email supports the finding that Quantum had agreed with Lloyds that Tomms, at the very least, would not actively target Lloyds-supplied care homes.

6.26 However, Lloyds was uncomfortable about providing its customer list to Tomms. For instance, in an email<sup>156</sup> dated 21 September 2011, sent by [Lloyds Director of Transformation and Business Performance] to other Lloyds' staff, she writes:

*'...definitely agree we would not want to give them our list!'*

6.27 This request was repeated by [Quantum Managing Director] on a number of occasions over the next six months. Lloyds decided internally not to disclose this information to Tomms.

### ***Complaints made by Lloyds to Quantum***

6.28 An internal Lloyds' email<sup>157</sup> sent by [Lloyds Director of Procurement] to various colleagues on 6 June 2011 demonstrates that she had informed Quantum it was not in its best interests to approach Lloyds-supplied care homes:

*'...I have also reiterated that it is not in their [Quantum] interests to target any LP [Lloyds Pharmacy] homes so please keep me posted should you have any issues.'*

6.29 The OFT infers that [Lloyds Director of Procurement]'s statement that she had *"reiterated"* this point to Quantum shows that this was not the first time Lloyds had raised the issue of Tomms' targeting of Lloyds-supplied care homes with

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<sup>155</sup> OFT Document Reference 0014.

<sup>156</sup> OFT Document Reference 0046.

<sup>157</sup> OFT Document Reference 0017.

Quantum. Indeed, [Lloyds Director of Procurement]'s email to [Quantum Managing Director] of 31 May 2011 demonstrates such contacts.

- 6.30 When presented with this particular email in her interview and asked whether she had been saying to [Quantum Managing Director] that Tomms should not be targeting Lloyds-supplied care homes, [Lloyds Director of Procurement] confirmed that this was the case:<sup>158</sup>

*'I guess I would have done, yeah. I mean I think, as I say, in hindsight you look at it and it's not right; you shouldn't do that because it's not appropriate, but I didn't, I suppose it just didn't make sense, I suppose, at the time because you're thinking you're working in partnership across a broad area, and yet it felt like they were also damaging the business as well by deliberately, well from the network's point of view they were deliberately going in and targeting the Lloyds' homes. But in hindsight you realise, 'Well, even if they were, it's the homes' choice where they want to go. It's their decision, not ours, as to who they do business with.'*

- 6.31 In her witness testimony [Lloyds Director of Procurement] also acknowledged to the OFT that her actions were not appropriate:<sup>159</sup>

*'Yeah, in hindsight it's not something I should have said. It was wrong. I mean I think it was because there was so much noise from the network and they felt they were being targeted, and if we were going to have a proposition where we were going to work like this, they didn't need to target the nursing homes that Lloyds were doing because actually we were going to have the Biodose proposition and we were going to work in a much broader model, really, together.'*

- 6.32 Contemporaneous documentary evidence shows that a number of key Lloyds' personnel besides [Lloyds Director of Procurement] understood that there was an arrangement whereby Tomms, at the very least, would not actively target Lloyds-supplied care homes. This is demonstrated by internal complaints made by Lloyds' staff to [Lloyds Director of Procurement] and others such as [Lloyds Head of Sales Managed Domiciliary Care] and [Lloyds Development Manager] when Lloyds believed that it had lost a care home to Tomms.

- 6.33 For example in an internal Lloyds' email,<sup>160</sup> dated 10 August 2011, [Lloyds employee] informed [Lloyds Development Manager], [Lloyds Regional Operations Manager] and [Lloyds employee],<sup>161</sup> that Lloyds had lost a care home to Tomms. This was followed by an email<sup>162</sup> from [Lloyds Development Manager] to [Lloyds Regional Operations Manager] and [Lloyds Head of Sales Managed Domiciliary Care], dated 10 August 2011 which reads:

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<sup>158</sup> [Lloyds Director of Procurement] interview transcript, OFT Document Reference 0434, page 85.

<sup>159</sup> [Lloyds Director of Procurement] interview transcript, OFT Document Reference 0434, page 84.

<sup>160</sup> OFT Document Reference 0028.

<sup>161</sup> The OFT is currently not aware of both [Lloyds employee] and [Lloyds employee]'s roles within Lloyds during the relevant period.

<sup>162</sup> OFT Document Reference 0028.

*'My understanding form [sic] the minutes from the last meeting with Tomms/Quantum was that they had instructed their sales team not to target LP [Lloyds Pharmacy] serviced homes.'*

6.34 [Lloyds Development Manager]'s email clearly demonstrates an understanding at a senior level within Lloyds that Tomms/Quantum would not *"target LP serviced homes"*.

6.35 In another email<sup>163</sup> dated 15 August 2011, [Lloyds Regional Operations Manager] wrote to [Lloyds Development Manager] reporting the loss of a further care home to a Biodose supplier:

*'Hi [Lloyds Development Manager] another loss to Biodose. Not sure what the strategy is to stop this?'*

6.36 In response, [Lloyds Head of Sales Managed Domiciliary Care] explained in an email sent to [Lloyds Regional Operations Manager] and [Lloyds Development Manager] on 30 August 2011<sup>164</sup> that the situation needed to be:

*'...worked carefully and firmly as it seems that [Quantum Managing Director] (Quantum) have a very different perception of the "relationship" and "partnership" between Tomms and ourselves. This needs to be discussed face to face and [Quantum Managing Director] is on hols until next week (as well as being really hard to get hold of anyway!!)'*

6.37 In his interview with OFT officials, [Lloyds Regional Operations Manager] was asked what his understanding of the use of the word *"relationship"* was and responded the only relationship he was aware of was *"...the fact that if they [that is Quantum/Tomms] wouldn't approach our [Lloyds] business, we wouldn't approach theirs"*.<sup>165</sup> Accordingly, the OFT finds that this passage of evidence demonstrates that Lloyds' staff understood that Tomms would not be targeting its care home customers.

6.38 Further examples of complaint emails were sent by [Lloyds Director of Region] on 30 August 2011 and [Lloyds Regional Operations Manager] dated 4 October 2011.<sup>166</sup>

6.39 During this period Lloyds continued to raise its concerns about care home losses to [Quantum Managing Director] at Quantum. [Lloyds Head of Sales Managed Domiciliary Care] appears to have played a central role in communicating these concerns to [Quantum Managing Director]. In an email<sup>167</sup> dated 31 August 2011,

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<sup>163</sup> OFT Document Reference 0032.

<sup>164</sup> OFT Document Reference 0034.

<sup>165</sup> [Lloyds Regional Operations Manager] interview transcript, OFT Document Reference 0429, page 33.

<sup>166</sup> OFT Document Reference 0033 and OFT Document Reference 0052.

<sup>167</sup> OFT Document Reference 0035.

[Lloyds Head of Sales Managed Domiciliary Care] emailed [Lloyds Director of Procurement], [Lloyds Director of Region] and [Lloyds employee]<sup>168</sup> and said:

*'I am trying to get to see him [[Quantum Managing Director]] at Tomms rather than Quantum but in light of recent events (the knowledge that Tomms was taking business) I'll push for a renewed date earlier so we can have a discussion face to face.'*

- 6.40 The OFT finds that [Lloyds Head of Sales Managed Domiciliary Care]'s email of 31 August 2011 provides further evidence that senior Lloyds staff believed that Tomms would not target Lloyds-supplied care homes.

### ***Quantum and Tomms' response to Lloyds' complaints***

- 6.41 Further evidence of an agreement between Quantum and Lloyds whereby Tomms would not, at the very least, actively target Lloyds-supplied care homes is provided by the reaction of Quantum at various points during the relevant period to the complaints it received from Lloyds. In particular, [Quantum Managing Director] instructed Tomms' staff to cease targeting Lloyds-supplied care homes, and often forwarded those instructions on to [Lloyds Director of Procurement] or [Lloyds Head of Sales Managed Domiciliary Care] at Lloyds. For example an email from [Quantum Managing Director]<sup>169</sup> to [Tomms Managing Director] dated 23 July 2011, and forwarded to [Lloyds Director of Procurement] reads:

*'It has upset them and simply must not happen again! It's now even more important that we don't take any of their care home business – please can you make sure that you check every single home that we are about to bring on to make sure it isn't Lloyds'. Also – the same applies for any future ones.'*

- 6.42 When asked to detail the actions that were implemented in relation to [Tomms Managing Director] and/or other people within Tomms, [Quantum Managing Director] explained to the OFT:<sup>170</sup>

*'Yes, so I mean I felt, given the pressure we were – I was getting, you know, from a [C] customer that, you know, I shouldn't upset them, so I wanted to be seen to be doing something. So the – I'll have – I sent emails to [Tomms Managing Director], and I no doubt had conversations with [Tomms Managing Director] where I said, 'Listen, just be careful with Lloyds. We're in discussions with them, as you know. They're a [C] customer. Don't upset them, therefore you need to get your team to – to be careful when they're out in the market.' The slight difficulty is that you don't really know who's servicing a care home till you've spoken to them.'*

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<sup>168</sup> When interviewed [Lloyds Head of Sales Managed Domiciliary Care] clarified to the OFT that [Lloyds employee] was sent this email in error. The intended recipient was [Lloyds Development Manager]: [Lloyds Head of Sales Managed Domiciliary Care] interview transcript, OFT Document Reference 0432, page 69.

<sup>169</sup> OFT Document Reference 0025.

<sup>170</sup> [Quantum Managing Director] interview transcript, OFT document 0433, page 23 and 24.

*'So, you know, you could get to the point where you'd almost sign them up before you realised that they were a Lloyds' customer. So the instruction was basically to try not to target any Lloyds – Lloyds' homes where possible.'*

- 6.43 The existence of such instructions was confirmed by [Tomms Managing Director] in his interview:<sup>171</sup>

*'I had a direct instruction from [Quantum Managing Director] saying that he was having complaints from Lloyds that we were – Lloyds Pharmacies, that we were stealing his care home clients. Or taking his care home clients away, and would we please not do this because this was upsetting his [C] customer.'*

- 6.44 When asked his thoughts about these particular emails, [Tomms Managing Director] explained:<sup>172</sup>

*'And I can understand his [[Quantum Managing Director]] statement, because what he's saying is 'don't add any more salt in the wound'. You know, damage is done with people,<sup>173</sup> don't make it worse by taking business off them as well.'*

- 6.45 [Tomms Managing Director] also confirmed that he understood that Tomms should not be targeting Lloyds-supplied care homes:<sup>174</sup>

*'But it was causing him grief because Lloyds, he [[Quantum Managing Director]] told me, represented [C] of Quantum, so if Lloyds weren't happy, he wasn't happy, and would I please instruct all the sales team not to go for Lloyds Pharmacy customers. So I said, 'I don't have a problem with that...'*

- 6.46 When asked why [Quantum Managing Director] thought it necessary to forward such emails to her, [Lloyds Director of Procurement] explained:<sup>175</sup>

*'So, for me it was just a reiteration of the fact that he [[Quantum Managing Director]] was trying to demonstrate he was doing everything in his power in order to control it. But reading it, it had gone a step too far in terms of what he was doing.'*

- 6.47 [Quantum Managing Director] confirmed this when interviewed:<sup>176</sup>

*'My objective is to protect the relationship I've got with Lloyds and our core specials side. So I want them to know that they're making complaints and I'm doing something about it; so I just demonstrate to them that 'I'm doing something about it guys, therefore we're alright on our core business, aren't we?'. So that was very much just to demonstrate and protect the core business that we were doing with them.'*

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<sup>171</sup> [Tomms Managing Director] interview transcript, OFT document 0435, page 49.

<sup>172</sup> [Tomms Managing Director] interview transcript, OFT document 0435, page 91.

<sup>173</sup> The OFT infers that "damage is done with people" refers to [C] but this is not in the scope of this investigation.

<sup>174</sup> [Tomms Managing Director] interview transcript, OFT document 0435, pages 13 and 14.

<sup>175</sup> [Lloyds Director of Procurement] interview transcript, OFT document 0434, page 76.

<sup>176</sup> [Quantum Managing Director] interview transcript, OFT document 0433, page 69.

- 6.48 The OFT finds that the evidence in these paragraphs demonstrates that [Quantum Managing Director] acted on the complaints he received from Lloyds by instructing Tomms staff not to target Lloyds-supplied care homes and then sought to reassure Lloyds that he was taking this action. This conduct is further evidence of both a meeting of minds and a shared objective between the parties. The OFT therefore finds that the evidence presented in paragraphs 6.41 to 6.47 further demonstrates that there was an agreement between Quantum and Lloyds that Tomms would not, at the very least, actively target care homes supplied by Lloyds.

***Tomms' reaction to Quantum's instructions***

- 6.49 The evidence in this section demonstrates that, at various times throughout the relevant period, Tomms acted on the instructions it received from Quantum as a result of Lloyds' complaints, and took steps to avoid targeting Lloyds-supplied care homes. These facts further demonstrate the existence of an agreement between Quantum and Lloyds.
- 6.50 Contemporaneous evidence shows that [Quantum Managing Director]'s emails would normally be followed by an email from [Tomms Managing Director] to his sales team with instructions to stop targeting Lloyds-supplied care homes. In an email<sup>177</sup> dated 23 July 2011, [Tomms Managing Director] writes to his sales staff saying:

*'Guys- can I remind everyone that, strategically, **we have agreed TOMMS will take NO care homes off Lloyds Pharmacy.**'* (Emphasis added)

- 6.51 The evidence demonstrates that Tomms' staff understood and implemented these instructions. This is supported by two emails dated 19 August 2011 and 30 August 2011 sent by [Tomms Client Services Manager]. In the first one<sup>178</sup> sent to [Tomms employee]<sup>179</sup> and [Tomms Client Services Manager], [Tomms Client Services Manager] writes:

*'Obviously the girls will have their own style and do not stick to the above as a rule, remember to ask what pharmacy they are with due to the fact **we cannot go after Lloyds business.**'* (Emphasis added)

- 6.52 [Tomms Client Services Manager]'s second email<sup>180</sup> sent on the 30 August 2011 to [Tomms employee]<sup>181</sup> and [Tomms Client Services Manager], reads:

*'[Tomms Client Services Manager] is obviously aware that any homes that have since moved to Lloyds **we would not touch.**'* (Emphasis added)

- 6.53 On some occasions Tomms' sales staff acted on the instructions and did not sign up care homes who they had been in discussions with and committed to checking whether the home was supplied by Lloyds going forwards. In an email<sup>182</sup> dated 26

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<sup>177</sup> OFT Document Reference 0325.

<sup>178</sup> OFT Document Reference 0314.

<sup>179</sup> The OFT is currently not aware of [Tomms employee]'s role within Tomms during the relevant period.

<sup>180</sup> OFT Document Reference 0317.

<sup>181</sup> The OFT is currently not aware of [Tomms employee]'s role within Tomms during the relevant period.

<sup>182</sup> OFT Document Reference 0132.

July 2011 from [Tomms' Client Services Manager] to other Tomms' colleagues, she says:

*'I am really sorry, nobody has informed us [the sales team] about this [that Tomms would not target Lloyds-supplied care homes] but I will not sign up the [Lloyds-supplied] homes and make sure that I check with all homes before I make any appointments in future.'*

6.54 Based on the context, the OFT finds that this email demonstrates that [Tomms Client Services Manager] withdrew from signing up certain care homes. Further, she said that the reason she would “*check with all homes before*” making “*any appointments in future*”, was because she would not make any approaches to Lloyds-supplied homes going forward.

6.55 On the same day [Tomms Client Services Manager] emailed<sup>183</sup> [Tomms Client Services Manager] and [Tomms' Client Services Manager] and expressly stated that two care homes she was apparently in negotiations with for Tomms to supply them were now “*on hold*” because their current supplier was Lloyds:

*'I have another sign up with [C] on 4th August. I did have a couple of others but unfortunately they are with Lloyds so they are on hold.'*

6.56 A further example of Tomms' staff acting on [Tomms Managing Director]'s instruction not to target Lloyds-supplied care homes can be found in the email correspondence from [Tomms Client Services Manager] dated 11 October 2011,<sup>184</sup> in which he informs [Tomms Managing Director] that:

*'[Tomms Client Services Manager] and I have never purposely approached a Lloyds home initially due to our leaving agreement with Lloyds and then due to the initial email you sent out regarding not approaching Lloyds business. On occasion I have even contacted ex colleagues<sup>185</sup> where I am unsure regarding target business being with Lloyds checking this is not the case. We have just completed a mailshot in the Southampton area where all known Lloyds business has been withdrawn however if any homes are contacted be rest assured that no further action is taken.'*

6.57 Similarly, on 16 October 2011 [Tomms' Client Services Manager] emailed<sup>186</sup> [Tomms Managing Director] and [Tomms National Client Services Manager], among others, informing them that he had:

*'Persuaded a 27 bed Home, (one of a group of 4 Homes) to use TOMMS only to be instructed not to sign up due to them using Lloyds.'*

### ***Lloyds' continuing complaints and Quantum's reaction***

6.58 The evidence set out below demonstrates that throughout September and October 2011 Lloyds monitored Tomms' sales activity, and flagged to Quantum occasions

<sup>183</sup> OFT Document Reference 0303.

<sup>184</sup> OFT Document Reference 0308.

<sup>185</sup> [Tomms Client Services Manager] was formerly employed by Lloyds.

<sup>186</sup> OFT Document Reference 0297.



when Lloyds believed Tomms was targeting business from Lloyds-supplied care homes. This behaviour is further evidence of an agreement during the relevant period between Lloyds and Quantum that Tomms, at the very least, would not actively target Lloyds-supplied care homes.

6.59 [Lloyds Head of Sales Managed Domiciliary Care] was key in raising complaints. In an internal Lloyds' email to [Lloyds Regional Operations Manager] dated 08 September 2011<sup>187</sup> [Lloyds Head of Sales Managed Domiciliary Care] stated that Tomms "...*absolutely should not be trying to take business, rather they should be enabling us to gain new business*".

6.60 When questioned about this particular email [Lloyds Head of Sales Managed Domiciliary Care] stated that:<sup>188</sup>

*'And I must admit, by now I clearly, from the email, believed that something had been put in place, even though that hadn't come from me. It doesn't mean to say that I liked it, but that was what I thought.'*

6.61 Given the surrounding context, the OFT finds, based on her email of 8 September and associated witness evidence, that [Lloyds Head of Sales Managed Domiciliary Care] believed that there was an agreement in place whereby Tomms, at the very least, would not attempt to actively target Lloyds-supplied care homes.

6.62 The OFT finds that [Lloyds Head of Sales Managed Domiciliary Care]'s belief that this agreement existed is further demonstrated by events on 15 September 2011. On this date a meeting was held between [Lloyds Head of Sales Managed Domiciliary Care] and [Quantum Managing Director] to discuss, among other issues, the concerns Lloyds continued to have regarding Tomms' behaviour. After that meeting [Lloyds Head of Sales Managed Domiciliary Care] sent an email<sup>189</sup> to [Quantum Managing Director] and said:

*'I trust that you'll have the discussion with Tomms around active targeting of LP [Lloyds Pharmacy] business, so I'll leave that with you!'*

6.63 The OFT finds that this email shows that [Lloyds Head of Sales Managed Domiciliary Care] complained to Quantum about Tomms' behaviour, and that she expected [Quantum Managing Director] would have a discussion with Tomms regarding this matter. The OFT further finds that the surrounding context (including [Lloyds Head of Sales Managed Domiciliary Care]'s earlier correspondence of 8 September 2011 and associated witness interview evidence) demonstrates that [Lloyds Head of Sales Managed Domiciliary Care] expected that Quantum would instruct Tomms not to actively target Lloyds-supplied care homes. This conclusion is supported by internal Lloyds' emails sent describing the outcome of the meeting.

6.64 In the first email<sup>190</sup> from [Lloyds Development Manager] to [Lloyds Director of Region] and [Lloyds Head of Sales Managed Domiciliary Care] on 21 September

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<sup>187</sup> OFT Document Reference 0044.

<sup>188</sup> [Lloyds Head of Sales Managed Domiciliary Care] interview transcript, OFT Document Reference 0432, page 83 and 84.

<sup>189</sup> OFT Document Reference 0098.

<sup>190</sup> OFT Document Reference 0049.

2011, [Lloyds Development Manager] explained that [Quantum Managing Director] had committed to [Lloyds Head of Sales Managed Domiciliary Care] that Tomms would not target Lloyds-supplied care homes:

*'I understand from [Lloyds Head of Sales Managed Domiciliary Care] that when she met with [Quantum Managing Director] at Quantum last week, **it was agreed that Tomms would stay clear.** I also by chance spoke with [Tomms Client Services Manager] (previously LP [Lloyds Pharmacy]) yesterday who confirmed that they have had recent comms from the Tomms MD to steer clear of LP customers.'* (Emphasis added)

- 6.65 In the second email<sup>191</sup>, dated 26 September 2011, [Lloyds Head of Sales Managed Domiciliary Care] herself updated [Lloyds Director of Transformation and Business Performance], [Lloyds Development Manager] and [Lloyds Director of Region] on the recent meeting she had held with [Quantum Managing Director], and stated that [Quantum Managing Director] had emailed<sup>192</sup> her following the meeting to state that Tomms would not actively pursue Lloyds-supplied care homes:

*'I can confirm that at my meeting with [Quantum Managing Director], as well as via an email he subsequently sent to myself and [Lloyds Development Manager], that he advised me that a communication which firmly stated that Tomms were not to approach LP [Lloyds Pharmacy] business had gone out and would go out again.'*

- 6.66 Emails between [Quantum Managing Director] and [Tomms Managing Director] also demonstrate that Quantum and Tomms did act on [Lloyds Head of Sales Managed Domiciliary Care]'s request. On 19 September 2011 [Quantum Managing Director] sent an email<sup>193</sup> to [Tomms Managing Director] stating:

*'I met with Lloyds last week and they were very vocal about Tomms staff visiting Lloyds care home clients.'*<sup>194</sup>

- 6.67 In this email<sup>195</sup> [Quantum Managing Director] mentioned that Lloyds had provided Quantum with details of the affected areas:

*'I asked them to send some specific details so as we can follow up. The areas they referred to where [sic] the North West, Wakefield, Sheffield and the M4 corridor.'*

- 6.68 It is evident from the email and the surrounding evidence, that [Quantum Managing Director] had met with [Lloyds Head of Sales Managed Domiciliary Care] of Lloyds in the previous week and had not only been informed that Tomms' staff were targeting Lloyds-supplied care home clients but had also been asked to

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<sup>191</sup> OFT Document Reference 0050.

<sup>192</sup> OFT Document Reference 0045.

<sup>193</sup> OFT Document Reference 0291.

<sup>194</sup> In his witness testimony [Quantum Managing Director] corroborated this: [Quantum Managing Director] interview transcript, OFT Document Reference 0433, page 64.

<sup>195</sup> OFT Document Reference 0291.

take action, and that [Quantum Managing Director] wished to follow up on these complaints.

- 6.69 It is evident that complaints from Lloyds continued into October 2011 with [Quantum Managing Director] being keen to take action in response to these complaints. In an email<sup>196</sup> dated 11 October 2011 to [Tomms Managing Director] and forwarded to [Lloyds Head of Sales Managed Domiciliary Care], [Quantum Managing Director] said:

*[Tomms Managing Director], I am still getting noise that a number of Lloyds accounts are being impacted by our sales activity. As I have stressed on many occasions this simply is not acceptable and your sales staff must be made aware of the seriousness of this. Please can you confirm/answer the following: 1. Are you aware that we are in discussions with any Lloyds accounts? If so, then these must cease immediately. 2. Please can you ensure that a clear instruction has been put out to the sales team that they must properly research BEFORE they go to a care home and that if it is a Lloyds account that they must not approach it. We simply must stop this happening with immediate effect. I trust you will action this.'*

- 6.70 Following this email, [Tomms Managing Director] continued to instruct his sales team to stay clear of Lloyds' homes:<sup>197</sup>

*'Can I once again remind everyone that NO Lloyds Pharmacy care home clients can be targeted without approval from the Board.'*

- 6.71 When asked why [Quantum Managing Director] would be emailing [Tomms Managing Director] and telling him that Tomms should not be approaching Lloyds-supplied care homes, [Lloyds Head of Sales Managed Domiciliary Care] provided the following explanation during her interview:<sup>198</sup>

*'Because I would have – or somebody, I can't remember if it was me or not, but it might well have been – would have phoned [Quantum Managing Director] and said, 'We're still losing business to Tomms Pharmacy. Is there an agreement in place? What's been said?' And I think he [[Quantum Managing Director]] felt – I think his understanding was that Tomms shouldn't be approaching us. So Quantum's approach, [Quantum Managing Director]'s approach to this was we shouldn't be approaching Lloyds' care homes. So I suppose that does infer that an agreement was in place.'*

- 6.72 Further efforts were made by Quantum with a view to preventing Tomms from targeting Lloyds-supplied care homes. [Quantum Managing Director] again suggested that Lloyds could provide Tomms with a list of care homes they service<sup>199</sup> which Lloyds declined to do.

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<sup>196</sup> OFT Document Reference 0060.

<sup>197</sup> OFT Document Reference 0101.

<sup>198</sup> [Lloyds Head of Sales Managed Domiciliary Care] interview transcript, OFT Document Reference 0432, page 93.

<sup>199</sup> OFT Document Reference 0061.

6.73 Some evidence shows that Lloyds considered informing Quantum when and where Lloyds' homes would be under threat. For example, [Lloyds Director of Transformation and Business Performance] stated:<sup>200</sup>

*'Instead could we actively flag to them [Tomms/Quantum] on a regular basis where they are stepping on our territory?'*

6.74 In response [Lloyds Director of Procurement] writes:<sup>201</sup>

*'I've [sic] spoken to [Lloyds Development Manager] and suggested an appropriate approach that is in keeping with competition law'*

6.75 [Lloyds Director of Procurement] later recounted her version of events when she provided evidence to the OFT as a witness and clearly understood that there was an arrangement in place between Quantum and Lloyds to "carve territories" in which Tomms and Lloyds would operate:<sup>202</sup>

*'To me, at that point it was quite clear that they were just trying to - and this is probably not the right word but probably trying to carve territories, as I read it to mean, which was - you just can't do things like that. And I only know that because I know from a buying perspective that if I was being supplied product which was available competitively in the market, I would expect I should be able to go to any supplier to give me that product, not have that certain supplier say, 'We can't supply Lloyds. You have to buy from over there,' you know? So that's why I was familiar with it, because I could relate to it from my buying experience as to how I'd expect a manufacturer to deal with me and that's why I started getting very nervous at that point.'*

6.76 [Quantum Managing Director] shared details of a care home ([C]) with [Lloyds Head of Sales Managed Domiciliary Care] which was looking to leave Lloyds, before Tomms had signed them up: <sup>203</sup>

*'[Lloyds Head of Sales Managed Domiciliary Care], How would you suggest we proceed in this type of situation? It seems that this home is going to move away from Lloyds anyway and have approached us to take it over. I am aware of one or two others like this too.'*

6.77 [Lloyds Head of Sales Managed Domiciliary Care] replied to this email by saying:  
<sup>204</sup>

*'Leave this one to me as it is a tricky one...'*

6.78 Again, [Quantum Managing Director]'s and [Lloyds Head of Sales Managed Domiciliary Care]'s actions are consistent with there having been a meeting of

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<sup>200</sup> OFT Document Reference 0049.

<sup>201</sup> OFT Document Reference 0049.

<sup>202</sup> [Lloyds Director of Procurement] interview transcript, OFT Document Reference 0434, page 105.

<sup>203</sup> OFT Document Reference 0105.

<sup>204</sup> OFT Document Reference 0105.

minds between Lloyds and Quantum that, at the very least, Tomms would not actively target Lloyds-supplied care homes.

- 6.79 The OFT notes that during his interview with OFT officials, although [Tomms Managing Director] recognised that the instructions from Quantum that Tomms should not actively target Lloyds-supplied care homes were quite clear, he was not aware that an agreement with Lloyds was in place:<sup>205</sup>

*‘He [[Quantum Managing Director]] did not say to me there was an agreement in place with Lloyds... So the instruction to me was quite clear, “Oi, this isn’t on. This is [C] customer; don’t upset them by taking business off them.”’*

- 6.80 The fact [Tomms Managing Director] may not have been aware of the agreement does not undermine the OFT’s proposal that an agreement existed. The OFT finds that the surrounding evidence clearly shows the existence of an agreement between Quantum and Lloyds. To the extent that [Tomms Managing Director] may not have been aware of the agreement it was because he was remote from the contacts between [Quantum Managing Director] and [Lloyds Head of Sales Managed Domiciliary Care] (amongst others). The key point is that [Tomms Managing Director] and Tomms did follow Quantum’s instructions that Tomms should not actively target Lloyds-supplied care homes.
- 6.81 On the basis of the evidence set out above, the OFT finds that the agreement pursuant to which, at the very least, Tomms staff would not actively target Lloyds-supplied care homes, was in place throughout September and October 2011.

#### **Other features of the infringement**

- 6.82 The OFT finds that the evidence in paragraphs 6.19 to 6.79 above shows that Lloyds and Quantum agreed that, at the very least, Tomms would not actively target Lloyds-supplied care homes and that Quantum took action with the aim of ensuring compliance with this agreement. However, the evidence suggests that Tomms’ staff were prepared to sign up Lloyds-supplied care homes which (i) Lloyds was likely to lose to another competitor or (ii) approached Tomms (as opposed to Tomms having actively targeted the business).

#### **Where Lloyds was likely to lose the business**

- 6.83 In an email<sup>206</sup> from [Tomms Managing Director] to [Tomms Client Services Manager], [Tomms Client Services Manager] and [Tomms employee], dated 1 September 2011, [Tomms Managing Director] clearly stated that Tomms staff were permitted to sign up Lloyds-supplied care homes where Lloyds was likely to lose the home in question to a competitor:

*‘...in the meantime the rule is that **we leave Lloyds care home client alone UNLESS they are likely to lose the business to another competitor, particularly if [C] are involved.**’ (Emphasis added)*

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<sup>205</sup> [Tomms Managing Director] interview transcript, OFT Document Reference 0435, page 54.

<sup>206</sup> OFT Document Reference 0321.

- 6.84 A chain of emails in early August 2011 demonstrates Tomms behaving consistently with such a strategy. In part of the chain is an email<sup>207</sup> from [Tomms Client Services Manager] to [Tomms Client Services Manager] and [Tomms Managing Director] dated 5 August 2011 reads:

*'...I discovered they [[C] care home] currently use Lloyds so I am not sure what to do as they officially signed before we were told that we couldn't sign any more homes using Lloyds.'*

- 6.85 It transpired that [C] had no intention of retaining Lloyds as its supplier. This prompted [Tomms Managing Director] to email<sup>208</sup> [Quantum Managing Director] on 8 August 2011, to recommend that in these circumstances [Tomms Client Services Manager] should be permitted to conclude a deal with a care home that was supplied by Lloyds but which was planning on switching to Boots:

*'As LP [Lloyds] are going to lose this home and possibly the group associated to Boots, my view is I should allow [Tomms Client Services Manager] to sign this up. Can you comment - if possible by return so that [Tomms Client Services Manager] does not lose the deal please?'*

- 6.86 [Quantum Managing Director] gave his permission to sign this home up to [Tomms Managing Director] by an email<sup>209</sup> dated 9 August 2011, which reads:

*'Yeah - go ahead (very carefully).'*

- 6.87 Soon after this email was sent, a further email<sup>210</sup> was sent from [Tomms Managing Director] to [Tomms Client Services Manager] and [Tomms Client Services Manager], indicating that [Tomms Client Services Manager] could proceed with signing up the home.

- 6.88 In his interview with OFT officials, [Quantum Managing Director] confirmed that Tomms' staff might well attempt to sign up a Lloyds-supplied home if Lloyds was going to lose it to a competitor:<sup>211</sup>

*'They [Lloyds] were going to lose it to [C]: 'Tomms might as well go for that because you are losing it anyway' as opposed to us actively approaching their home and taking it directly from Lloyds that was never looking to leave them at that point. So I suspect that's what he was looking for a distinction on.'*

### ***Circumstances where Lloyds-supplied care homes approached Tomms***

- 6.89 It is not clear whether Lloyds also had an expectation that Tomms would not offer to supply a Lloyds-supplied care home which approached Tomms directly. On 16

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<sup>207</sup> OFT Document Reference 0327.

<sup>208</sup> OFT Document Reference 0134.

<sup>209</sup> OFT Document Reference 0159.

<sup>210</sup> OFT Document Reference 0326.

<sup>211</sup> [Quantum Managing Director] interview transcript, OFT Document Reference 0433, page 55.

September 2011, [Quantum Managing Director] sent an email<sup>212</sup> to [Lloyds Head of Sales Managed Domiciliary Care] and [Lloyds Development Manager] and said:

*'With regard Tomms impacting Lloyds, as I mentioned yesterday, I have no doubt that they [Tomms] are not actively targeting Lloyds customers.'*

- 6.90 Email evidence from [Tomms Managing Director]<sup>213</sup> appears to indicate that certain care homes may have been motivated to leave Lloyds for Tomms because they were not happy with the service provided by Lloyds:

*'We can discuss properly when we meet but the only LP [Lloyds Pharmacy] care homes the team see are those who respond to general sales pitches & are unhappy with LO [sic].<sup>214</sup> I take the view that, in those circumstances, rather we have the business than LP lose it to [C]!'*

- 6.91 This was also supported by [Quantum Managing Director]'s witness evidence. [Quantum Managing Director] indicated that certain care homes may have been motivated to leave Lloyds for Tomms in order to use Biodose.<sup>215</sup>

*'I think, again, we touched on this earlier. I think he's [[Tomms Managing Director]] trying to draw the distinction that there's a difference between us actively targeting Lloyds and a Lloyds' care home coming to us and saying they're unhappy with the service or they want to come to Biodose. Remember at that time – still now, actually – Lloyds doesn't have Biodose. So there are a number of advantages as to why a care home would use Biodose rather than another system, and they may want to move across.'*

- 6.92 In his interview, [Tomms Managing Director] appears to indicate that regardless of the agreement, the extent to which Tomms' staff stopped short of signing up a Lloyds-supplied care home was limited to a few occasions:<sup>216</sup>

*'I'm not sure, but I think on every occasion we [Tomms' sales staff] continued and did the customer, we didn't not do it. There may have been one in the Leeds area...but basically we didn't refuse anybody.'*

- 6.93 However, taking the evidence in the round, the OFT finds that Quantum took steps to ensure that Tomms did not actively target Lloyds-supplied care homes. The OFT finds that [Tomms Managing Director]'s witness evidence does not undermine this finding, simply demonstrating that where care homes approached Tomms on their own initiative, Tomms did not refuse to supply them.

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<sup>212</sup> OFT Document Reference 0045.

<sup>213</sup> OFT Document Reference 0291.

<sup>214</sup> When interviewed, [Tomms Managing Director] clarified this was a typo and that by "LO" he actually meant "LP": [Tomms Managing Director] interview transcript, OFT Document Reference 0435, page 115.

<sup>215</sup> [Quantum Managing Director] interview transcript, OFT Document Reference 0433, pages 65 and 66.

<sup>216</sup> [Tomms Managing Director] interview transcript, OFT Document Reference 0435, page 14.

<sup>71</sup> See OFT Document Reference 0314, 0317 and 0308.

- 6.94 In addition, the surrounding evidence shows that considerable effort was taken to avoid approaching Lloyds-supplied care homes meaning that homes that might have been potential customers may not have been approached at all.<sup>217</sup>
- 6.95 In any event, even if Quantum did not fully abide by the terms of an agreement which was manifestly anti-competitive (such as the one the OFT finds existed), this does not relieve Quantum of responsibility for an infringement.

***Lloyds targeting of Tomms-supplied care homes***

- 6.96 Based on contemporaneous documentary evidence, the OFT finds that, from November 2011 at the latest, Lloyds also agreed that it would not actively target Tomms-supplied care homes. In addition, the OFT also finds that certain relevant staff at Lloyds believed that there was an arrangement in place whereby Lloyds would not actively target Tomms-supplied care homes.
- 6.97 Two email chains demonstrate that Tomms staff believed that Lloyds should also not target Tomms-supplied care homes.
- 6.98 First, on 25 July 2011 [Tomms Managing Director] emailed [Tomms Client Services Manager]<sup>218</sup> and stated that he felt Lloyds should also be expected not to approach Tomms supplied care homes:

*'It would be fair to expect Lloyds not to approach Tomms client as reciprocal gesture - leave this with me.'*

- 6.99 Second, in early November 2011 a Tomms-supplied care home ([C]) was approached and taken over by Lloyds. [Tomms Managing Director] escalated this to [Quantum Managing Director] in an email<sup>219</sup> and asked:

*'Can you pass our complaint to Lloyds please - just for a change!'*

- 6.100 Following that email, [Quantum Managing Director] subsequently notified [Lloyds Head of Sales Managed Domiciliary Care] by email on 3 November 2011<sup>220</sup> and asked if Lloyds' staff had been instructed to avoid Tomms-supplied care homes:

*'...I have been told that Lloyds have taken a home from Tomms ([C]) by offering quite a number of free add-ons. Have your sales staff been instructed to avoid homes supplied by Tomms?'*

- 6.101 The OFT finds that this email shows that [Quantum Managing Director] believed that Lloyds staff should not target Tomms-supplied care homes.

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<sup>218</sup> OFT Document Reference 0131.

<sup>219</sup> OFT Document Reference 0109.

<sup>220</sup> OFT Document Reference 0064.



6.102 In his witness testimony, before he was shown this specific email, [Quantum Managing Director] said:<sup>221</sup>

*'I don't recall passing that [an email<sup>222</sup> received from Tomms complaining that Lloyds had taken a Tomms home] onto – up to Lloyds. I may have mentioned it, but certainly I was not putting any pressure on Lloyds to not continue targeting what they wanted to target. You know, they were a [C] customer so, you know, I'm very – in my mind it was a one-way – one-way agreement in that sense'.*

6.103 Upon being shown this specific email, he explained to the OFT that :<sup>223</sup>

*'It's more me trying to balance things up a little bit and just, again, at this point I'd been having noise for quite a while – half a year – from Lloyds in relation to this issue and it was just a case of, you know, 'let's be fair guys; hold on', 'you're [Lloyds] constantly complaining to me; here's a little one back across the bows' if you like.'*

6.104 In his witness evidence, [Quantum Managing Director] stated that Lloyds' position as Quantum's [C] customer coupled with Quantum's weak bargaining power meant that Quantum was poorly placed to insist that Lloyds did not target Tomms-supplied care homes. However, he also stated that, at some stage, he started "...to get comfortable that our main relationship [with Lloyds] wasn't under immediate threat..."<sup>224</sup>

6.105 He acknowledged that at this point in time, he was 'asking them to lay off our care homes.'<sup>225</sup> He explained his actions towards Lloyds at this point on the following basis:<sup>226</sup>

*'...Listen, you've been complaining to me for four/five months' and 'You can't have your cake and eat it'. I suppose is probably where I was coming from. And this one is, 'Listen, guys, if we're not going to approach yours you shouldn't be approaching ours'.*

6.106 In general, [Quantum Managing Director] explained that:<sup>227</sup>

*'I wasn't particularly concerned about Lloyds approaching our homes, for a number of reasons. Firstly, because I think this is the first time it's been shown that it happened, so it wasn't happening very often. And, secondly, they didn't have Biodose, so we could offer something that they couldn't. So it would be relatively challenging for Lloyds to take our homes off us without offering*

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<sup>221</sup> [Quantum Managing Director] interview transcript, OFT Document Reference 0433, page 33.

<sup>222</sup> OFT Document Reference 0109. The OFT is proposing to find that this is the email to which [Quantum Managing Director] is referring to in his witness testimony and subsequently OFT Document Reference 0064 demonstrates that [Quantum Managing Director] actually passed on the complaint to [Lloyds Head of Sales Managed Domiciliary Care] at Lloyds, as both emails (0109 and 0064) refer to the same care home: [C].

<sup>223</sup> [Quantum Managing Director] interview transcript, OFT Document Reference 0433, page 89.

<sup>224</sup> [Quantum Managing Director] interview transcript, OFT Document Reference 0433, page 90.

<sup>225</sup> [Quantum Managing Director] interview transcript, OFT Document Reference 0433, page 92

<sup>226</sup> [Quantum Managing Director] interview transcript, OFT Document Reference 0433, page 92 and 93.

<sup>227</sup> [Quantum Managing Director] interview transcript, OFT Document Reference 0433, page 93.

*something different; and their different thing was a different system which isn't and wasn't as good as Biodose. So it wasn't really a concern for me.'*

6.107 The OFT finds that [Quantum Managing Director]'s comments as set out above are consistent with a finding of fact that before November 2011, Lloyds had not previously been actively targeting Tomms-supplied care homes, or if it had been, that it had not had much success doing so possibly because of the fact they did not offer the Biodose system.

6.108 Before replying to [Quantum Managing Director]'s email of 3 November, [Lloyds Head of Sales Managed Domiciliary Care] forwarded [Quantum Managing Director]'s email to [Lloyds Director of Healthcare Services] and explained the following:<sup>228</sup>

*'I have been led to believe that this was not a proactive approach by us, and that notice had been served. I am investigating this just to check our side that we are working professionally which I am sure in this case we are...However, I am double checking before i call [Quantum Managing Director].'*

6.109 After that internal email exchange, [Lloyds Head of Sales Managed Domiciliary Care] responded by email<sup>229</sup> to [Quantum Managing Director] and said the following:

*'...i am aware and believe the approach was a direct one to LP [Lloyds] and nor [sic] an approach by us. Will fill you in tomorrow.'*

6.110 Later that evening, [Lloyds Head of Sales Managed Domiciliary Care] responded definitively by email<sup>230</sup> saying:

*'...I have investigated this again with the relevant BAM who assures me that this was NOT a direct approach from us, and that nothing but the standard offer is going to be put in place- i.e. no "extras for free" and has advised me that no approaches are being made to Tomms business.'*

6.111 [Lloyds Head of Sales Managed Domiciliary Care]'s response demonstrates that she is keen to reassure [Quantum Managing Director] that Lloyds had not actively targeted the care home in question and that "no approaches" were being made to Tomms' business suggesting that there was an expectation that Lloyds would also not target Tomms' business. Accordingly, this email exchange is evidence that, at least from 3 November 2011, Quantum and Lloyds manifested a joint intention that Lloyds would not actively target Tomms-supplied care homes. [Quantum Managing Director]'s witness testimony is consistent with this view.

6.112 The OFT's finding that there was an agreement in place by which Lloyds would not target Tomms-supplied care homes is reinforced by witness evidence provided by Lloyds staff. In her witness testimony, [Lloyds Director of Transformation and

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<sup>228</sup> OFT Document Reference 0066.

<sup>229</sup> OFT Document Reference 0064.

<sup>230</sup> OFT Document Reference 0111.

Business Performance]<sup>231</sup> also indicated that she considered the arrangement was reciprocal by confirming that there was ‘...an acceptance, if you like, that the two would try and not go after each other’s business whilst this negotiation was in place...’

- 6.113 In addition, in his witness testimony and as mentioned in paragraph 6.37 above, [Lloyds Regional Operations Manager] stated that he felt that the relationship between Quantum and Lloyds indicated reciprocity:<sup>232</sup>

*‘To me, the only relationship I was aware of was the fact that if they wouldn’t approach our business, we wouldn’t approach theirs. So, I assume, she’s [[Lloyds Head of Sales Managed Domiciliary Care]] referring to that relationship.’*

- 6.114 Although the OFT did not ask [Lloyds Director of Transformation and Business Performance] or [Lloyds Regional Operations Manager] over what time period they believed Lloyds had also agreed not to target Tomms-supplied care homes, their testimonies suggest that this element of the infringement was in place before November 2011. However, there is currently no further evidence to corroborate this and therefore the OFT is not making a finding that this part of the agreement was in operation before November 2011.

- 6.115 [Tomms Managing Director] stated that he was not aware that there was any reciprocity:

*‘Yes, I’m quite happy to stand by what I’ve said in there. They do obviously expect them [Lloyds] not to [target Tomms homes], but I have no knowledge of them being – Lloyds actually being instructed not to.’<sup>233</sup>*

*‘No reciprocity from my point of view...It was nothing to do with, “Well they [Lloyds] won’t touch you if you don’t touch them.” That was never suggested at any stage.’<sup>234</sup>*

- 6.116 In spite of this, the OFT finds that taken as a whole, the evidence set out above demonstrates that from 3 November 2011 (at the latest) Lloyds and Quantum agreed that Lloyds would not actively target Tomms-supplied care homes.
- 6.117 Regardless of the above, it is not necessary to demonstrate that the parties also agreed that Lloyds would not actively target Tomms-supplied care homes in order to find an infringement of the Chapter I prohibition.

### ***Termination of the agreement***

- 6.118 In early November 2011, [Lloyds Director of Procurement] approached [Lloyds Company Secretary], who was then Lloyds’ Company Secretary and outlined that Lloyds and Quantum had entered into an arrangement that required some legal

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<sup>231</sup> [Lloyds Director of Transformation and Business Performance] interview transcript, OFT Document Reference 0428, page 35.

<sup>232</sup> [Lloyds Regional Operations Manager] interview transcript, OFT Document Reference 0429, page 33.

<sup>233</sup> [Tomms Managing Director] interview transcript, OFT Document Reference 0435, page 93

<sup>234</sup> [Tomms Managing Director] interview transcript, OFT Document Reference 0435, page 61 & 62.

advice. Following this, [Lloyds Company Secretary], with Lloyds' Board approval, conducted an internal investigation which involved a number of interviews with relevant Lloyds' personnel including [Lloyds Director of Procurement], [Lloyds Head of Sales Managed Domiciliary Care] and [Lloyds Director of Healthcare Services].

- 6.119 On the evening of 10 November 2011 [Lloyds Director of Healthcare Services] had a call with [Quantum Managing Director] in which she informed him that Lloyds and Tomms *were "clearly competitors"* and that they *"should behave as such"*. The contents of this call were summarised in an email<sup>235</sup> and sent to a number of Lloyds' personnel:

*'As agreed [Lloyds Company Secretary] I have made a telephone call to [Quantum Managing Director] who rang me back at 20.37. I informed him that we believe there is a degree of confusion regarding the working relationship between our 2 organisations and that I am informing him that he may have similar issues that need addressing in that we are clearly competitors and that we should behave as such...'*

- 6.120 In the same email [Lloyds Director of Healthcare Services] stated that after her call with [Quantum Managing Director] he was *"very comfortable with this"*.

- 6.121 This position was reiterated in an email<sup>236</sup> sent by [Lloyds Director of Healthcare Services] to a number of Lloyds' staff, including [Lloyds Director of Procurement] and [Lloyds Head of Sales Managed Domiciliary Care]:

*'The 2 companies [Lloyds and Tomms] have not formed a formal partnership or entered into a Joint Venture relationship so we remain competitors in this market and should behave as such.'*

- 6.122 On the same evening, [Quantum Managing Director] emailed [Tomms Managing Director] and [Tomms Managing Director from November 2011] to say that *"...Lloyds should continue to be viewed and treated as a competitor."*<sup>237</sup> According to [Tomms Managing Director]'s witness testimony he felt that such a statement was not consistent with [Quantum Managing Director]'s previous statements regarding the relationship with Lloyds:<sup>238</sup>

*'Yes, I always thought this was a really weird statement for him [[Quantum Managing Director]] to make, and you wonder why he would make such a statement to say that he had to be treated as a competitor. Somebody must have flagged it to him, 'Oi, you can't do this', hence your [OFT] investigation, but whether that was a forerunner of that, I really have no idea...Because that contradicts all his other emails to me.'*

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<sup>235</sup> OFT Document Reference 0078.

<sup>236</sup> OFT Document Reference 0077.

<sup>237</sup> OFT Document Reference 0160.

<sup>238</sup> [Tomms Managing Director] interview transcript, OFT Document Reference 0435, page 139.

6.123 [Quantum Managing Director]'s email was followed by an email<sup>239</sup> from [Tomms Managing Director from November 2011] which acknowledged this:

*'Received and understood... will deliver the message to the appropriate team members.'*

6.124 A further email<sup>240</sup> sent by [Tomms Managing Director from November 2011] dated 22 December 2011 reiterated this position.

6.125 It is the OFT's conclusion that these emails and the subsequent Lloyds' investigation signalled the end of the agreement and that the termination was instigated by Lloyds.

## **C Legal Assessment**

### **Introduction to Legal Assessment of the infringement**

6.126 From the evidence presented in section B above, the OFT draws the following conclusions concerning its legal assessment of the conduct of the Parties. Note that references to specific paragraph numbers are included in this section for ease of reference to the primary sources of evidence, but the conclusions are reached in light of the totality of the evidence.

6.127 In assessing the evidence in this case, the OFT has applied the requisite standard of proof as described in paragraphs 5.60 to 5.64 of the Legal Background section of this Decision. The OFT is satisfied that the evidence set out in this Decision is sufficient to discharge the burden of proof.

### **Agreement and/or concerted practice**

6.128 The OFT finds that during the relevant period, Lloyds and Quantum agreed that Quantum's subsidiary Tomms would not actively target care homes already supplied with prescription medicines by Lloyds (Lloyds-supplied care homes). The OFT also finds that from 3 November 2011 (at the latest) until 10 November 2011 Lloyds and Quantum agreed that Lloyds would not actively target care homes already supplied with prescription medicines by Tomms (Tomms-supplied care homes).

### ***Classification of the infringement as an agreement and/or concerted practice***

6.129 The OFT makes the following findings of fact in relation to the relevant period:

- Quantum and Lloyds reached an understanding by which, at the very least, Tomms would not actively target Lloyds-supplied care homes;
- Lloyds complained to Quantum on a number of occasions (both in emails and most likely orally) when its care homes were being targeted by and/or switched to Tomms;

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<sup>239</sup> OFT Document Reference 0293.

<sup>240</sup> OFT Document Reference 0268.

- These complaints indicate that Lloyds expected Quantum to take action to ensure that Tomms would comply with this arrangement;
- Quantum instructed Tomms to not target Lloyds-supplied care homes and issued clear instructions (via email and most likely orally) to Tomms not to target and sign up Lloyds-supplied care homes. Some of these instructions were forwarded by Quantum to Lloyds to demonstrate that it had so instructed Tomms;
- Tomms clearly understood these instructions and demonstrated a willingness to comply with them;
- On a number of occasions Tomms followed these instructions by not targeting and avoiding signing up Lloyds-supplied care homes;
- On 3 November 2011, Quantum complained to Lloyds about Lloyds' targeting of a Tomms-supplied care home, and received an assurance from Lloyds that Tomms-supplied care homes were not being actively targeted by Lloyds;
- On 10 November 2011, the arrangements set out above were brought to an end on the initiative of Lloyds; and
- Neither Quantum nor Lloyds took any steps to distance itself from these arrangements before 10 November 2011.

6.130 On the basis of these findings of fact, the OFT finds a concurrence of wills between Lloyds and Quantum, as well as a joint intention, that Tomms would not actively target Lloyds-supplied care homes during the relevant period. The OFT therefore finds that there was an agreement between Quantum and Lloyds to this effect throughout the relevant period.

6.131 The OFT also finds that from 3 November 2011 (at the latest) until the end of the relevant period, there was a concurrence of wills, as well as a joint intention, between Lloyds and Quantum, that Lloyds would not actively target Tomms-supplied care homes. The OFT therefore finds that there was an agreement between Quantum and Lloyds to this effect from (at the latest) 3 November 2011, until the end of the relevant period.

6.132 In the alternative, the OFT considers that the shared understanding constituted at the very least a concerted practice.

6.133 By communicating to Lloyds its intention that Tomms would not target Lloyds-supplied care homes, Quantum disclosed information to Lloyds about its future commercial strategy. By complaining about occasions when its care homes appeared to have been targeted by Tomms, Lloyds demonstrated that it had adapted its conduct on the market on the basis of that communication. At the least, until the end of the relevant period, Lloyds did nothing to distance itself from the Quantum's communication. By engaging in such activity, the Parties knowingly substituted the risks of competition for practical cooperation between them. This removed uncertainty as to both parties' future conduct on the market, with the result that competition between them was restricted (or had the potential to be restricted).

6.134 Similarly, Lloyds later gave Quantum reassurances that Lloyds was not actively targeting Tomms-supplied care homes. Quantum did nothing to distance itself

from those assurances. On the same basis as above, this removed uncertainty as to both parties' future conduct on the market, with the result that competition between them was restricted (or had the potential to be restricted).

- 6.135 It is not necessary for the OFT to arrive at a definite conclusion as to the characterisation of the Parties' conduct as either an agreement or a concerted practice in order to demonstrate an infringement of the Chapter I prohibition.<sup>241</sup> In addition there is no need to demonstrate that the parties also agreed that Lloyds would not actively target Tomms-supplied care homes in order to establish the existence of an infringement.

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

#### ***Object***

- 6.136 The applicable aspects of the law are set out at paragraphs 5.38 to 5.45 above.
- 6.137 The OFT finds that during the relevant period, Lloyds and Quantum agreed that Tomms would not actively target care homes already supplied with prescription medicines by Lloyds (Lloyds-supplied care homes). The OFT also finds that from 3 November 2011 (at the latest) until 10 November 2011 Lloyds and Quantum agreed that Lloyds would not actively target care homes already supplied with prescription medicines by Tomms (Tomms-supplied care homes).
- 6.138 The OFT considers that this conduct amounts to a form of market sharing agreement. Market sharing agreements are regarded as being one of the most serious restrictions of competition. They have been found to be *object restrictions* by the European and domestic Courts, and both the European Commission and the OFT consider them to be object restrictions.
- 6.139 The main objective aim of the agreement between Quantum and Lloyds was to shelter each other's care homes from competition. Taking account of the market context in which the agreement operated, the OFT finds that its necessary consequence was a restriction of competition between Quantum and Lloyds.
- 6.140 Therefore, the OFT finds that, between 31 May 2011 and 10 November 2011, Lloyds and Quantum entered into a market sharing agreement which had the object of restricting competition in the market for the supply of prescription medicines to care homes thereby infringing the Chapter I prohibition.

#### ***Effect***

- 6.141 Having found that the infringement constitutes an infringement by object under the Chapter I prohibition, the OFT is not required to demonstrate an anti-competitive effect.<sup>242</sup>
- 6.142 In addition the OFT further finds that the conduct described in section B above comprises a single overall infringement. It is clear that all parties shared the common objective that each party would not actively target each other's supplied

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<sup>241</sup> See paragraphs 5.20 to 5.22 (Legal Background).

<sup>242</sup> See paragraphs 5.39 and 5.40 (Legal Background section).

care homes; that all parties took steps to achieve the common objective; and that each party was aware of the other participant's conduct.

### **Appreciability**

- 6.143 As set out in paragraphs 5.46 and 5.47 of the Legal Background section, the OFT considers that agreements which do not affect trade between Member States, but which do have an anti-competitive object will constitute an appreciable restriction on competition in the United Kingdom.
- 6.144 The OFT has also had regard to the European Commission's approach as set out in the *De minimis* Notice.<sup>243</sup> The OFT considers that restrictions of competition such as market sharing, which the European Commission categorises as hardcore restrictions, will have an appreciable impact on competition, irrespective of the parties' market shares. Further, the OFT notes that the parties' combined market shares in this case are likely to have exceeded 10 per cent of the relevant market during the relevant period.

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

- 6.145 As set out in paragraphs 5.51 to 5.54 of the Legal Background section, this requirement is a purely jurisdictional test to demarcate the boundary line between the application of EU competition law and national competition law and should not be read as importing a requirement that the effect on trade within the UK should be appreciable.
- 6.146 The infringement restricted competition, or at least had the potential to do so, and operated in a part of the UK. The Parties' conduct is therefore considered by the OFT to have affected trade within the UK or to have been capable of doing so.
- 6.147 The requirement of an effect on trade within the UK is therefore satisfied in respect of this infringement.

### **Effect on trade between Member States**

- 6.148 As set out in paragraphs 5.55 to 5.58 of the Legal Background section, agreements and/or concerted practices which cover only part of an EU Member State are not likely to appreciably affect trade between EU Member States, unless they have the effect of hindering competitors from other EU Member States from gaining access to part of the EU Member State, which constitutes a substantial part of the internal market. Agreements and/or concerted practices which are local in nature are by their nature unlikely to have this effect.
- 6.149 The infringement was not cross-border in nature, but rather took place in limited areas within the UK. Within the relevant product market the parties make no (or no material) sales to customers in other Member States and the evidence currently available to the OFT does not suggest that the infringement had the effect of hindering competitors from other Member States from gaining access to part of the UK. The operation of the agreement and/or concerted practice seemed to have

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<sup>243</sup> *De minimis* Notice (fn54).



been regional and/or local in scope. On this basis, the OFT considers that it has no grounds for action under Article 101.<sup>244</sup>

### **Duration**

- 6.150 Duration is important insofar as it is a relevant factor for determining any financial penalty that the OFT decides to impose following a finding of infringement.
- 6.151 On the basis of the evidence set out and analysed in section B above, the OFT finds that the infringement was in place by 31 May 2011 and ended on 10 November 2011.

### **Exclusion or exemption**

#### ***Exclusion***

- 6.152 The applicable aspects of the law are set out at paragraph 5.65 of the Legal Background section.
- 6.153 The OFT considers that none of the exclusions from the Chapter I prohibition provided for by section 3 or under section 50 of the Act applies in respect of the infringement. Accordingly, the OFT finds that the infringement does not benefit from an exclusion from the Chapter I prohibition.

#### ***Exemption***

- 6.154 The applicable aspects of the law are set out at paragraphs 5.66 to 5.67 of the Legal Background section.
- 6.155 There is no block exemption order under section 6 of the Act or any order pursuant to section 11 of the Act pursuant to which the infringement would have been exempt from the Chapter I prohibition. Nor is there any applicable EC Council or Commission Regulation by virtue of which the infringement would have been exempt from Article 101(1) TFEU and would have benefited from a parallel exemption from the Chapter I prohibition under section 10 of the Act.
- 6.156 Additionally, the OFT does not consider that the infringement would have met the requirements for an individual exemption under section 9 of the Act. In particular, the OFT considers that infringement could not have contributed to improving production or distribution of good or promoting technical or economic progress, and that there were no resulting benefits of which consumers received a fair share. To the contrary, the infringement was aimed at subverting the competitive process rather than improving it.

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<sup>244</sup> While the OFT finds no grounds for action under Article 101 against the parties, this does not mean that the OFT will make a non-infringement decision. In Case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele 2 Polska, now Netia SA w Warszawie* [2011] ECR I-3055, the CJ issued a judgment which clarified that, given the risk of undermining the uniform application of Articles 101 and 102, only the Commission is empowered to make a finding that there has been no breach and that national competition agencies can only decide that there are no grounds for action on their part.

6.157 Accordingly, the OFT finds that the infringement was not exempted from the Chapter I prohibition.

## SECTION 7 THE OFT'S ACTION

- 7.1 This Section sets out the action which the OFT is taking and its reasons for taking that action.

### **A Decision**

- 7.2 The OFT finds that the undertakings Celesio Group and Hamsard Group have infringed the Chapter I prohibition of the Act.
- 7.3 The OFT finds that during the relevant period Lloyds, Quantum and Quantum's subsidiary Tomms participated in a market sharing agreement and/or concerted practice that had as its object the appreciable prevention, restriction or distortion of competition in relation to the supply of prescription medicines to care homes (the infringement).

### **B Directions**

- 7.4 Section 32(1) of the Act provides that if the OFT has made a decision that an agreement and/or concerted practice infringes the Chapter I prohibition or Article 101, 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. The OFT does not have any evidence to suggest that the infringement is still ongoing and therefore it does not propose to issue directions in this case.

### **C Financial penalties**

#### ***General points***

- 7.5 Section 36(1) of the Act provides that on making a decision that an agreement and/or concerted practice has infringed the Chapter I prohibition or Article 101, the OFT may require an undertaking which is a party to the agreement to pay a penalty in respect of the infringement. In accordance with section 38(8) of the Act, the OFT must have regard to the guidance on penalties being in force at the time when setting the amount of the penalty. The guidance currently in force is the OFT's Guidance as to the appropriate amount of a penalty (September 2012).<sup>245</sup>
- 7.6 As set out in Section 3 (The OFT's Investigation), Lloyds applied for immunity. As the relevant conditions as set out in the immunity agreement between the OFT and Celesio Group have been met, the penalty which the OFT would otherwise have imposed on Celesio Group has been reduced by 100 per cent. Consequently, the OFT has not calculated the level of any financial penalty that would have applied if immunity had not been granted. Celesio Group is therefore excluded from any further consideration of penalty level under this section.
- 7.7 Provided the penalties it imposes in a particular case are within the range of penalties permitted by section 36(8) of the Act and the Competition Act 1998

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<sup>245</sup> *Penalty Guidance* (fn3).

(Determination of Turnover for Penalties) Order 2000<sup>246</sup> and the OFT has had regard to its Penalty Guidance under section 38 of the Act, the OFT has a margin of appreciation when determining the appropriate amount of a penalty under the Act.<sup>247</sup> The OFT is not bound by its decisions in relation to the calculation of financial penalties in previous cases.<sup>248</sup> Rather, as set out in the Penalty Guidance,<sup>249</sup> the OFT makes its assessment on a case-by-case basis<sup>250</sup> having regard to all relevant circumstances and the objectives of its policy on financial penalties.

### **Statutory cap on penalties**

- 7.8 No penalty which has been fixed by the OFT may exceed ten per cent of the worldwide turnover of the undertaking, calculated in accordance with the provisions of the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309) (the '2000 Order'), as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259) (the '2004 Order').<sup>251</sup>

### **Small agreements**

- 7.9 Section 39(3) of the Act provides that a party to a 'small agreement' is immune from the effect of section 36(1).<sup>252</sup> The worldwide combined turnovers of both Parties involved in the infringement exceeds £20 million. Accordingly, the parties will not benefit from immunity from penalty under section 39(3).

### **Intention/negligence**

- 7.10 The OFT may impose a penalty on an undertaking which has infringed the Chapter I prohibition only if it is satisfied that the infringement has been committed intentionally or negligently,<sup>253</sup> although the OFT is not obliged to specify whether it considers the infringement to be intentional or merely negligent.<sup>254</sup>
- 7.11 The CAT has stated:

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<sup>246</sup> As amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004.

<sup>247</sup> *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13 ('*Argos Limited and Littlewoods Limited*', at [168] and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, at [102].

<sup>248</sup> See for example, *Eden Brown and Others v OFT* [2011] CAT 8 ('*Eden Brown*'), at [78].

<sup>249</sup> *Penalty Guidance* (fn3), paragraph 2.6.

<sup>250</sup> See for example, *Kier Group and Others v OFT* [2011] CAT 3, at [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* (fn248), at [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*'.

<sup>251</sup> Section 36(8) of the Act.

<sup>252</sup> 'Small agreement' is defined, pursuant to section 39(1) and the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262), as an agreement between undertakings, the combined applicable turnover of which, for the business year ending in the calendar year preceding the one during which the infringement occurred, does not exceed £20 million.

<sup>253</sup> Section 36(3) of the Act.

<sup>254</sup> *Napp* (fn135), at [453] to [455]. See also *Argos Limited and Littlewoods Limited* (fn247), at [221].

*[...] an infringement is committed intentionally for the purposes of the Act if the undertaking must have been aware that its conduct was of such a nature as to encourage a restriction or distortion of competition ... an infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition’.*<sup>255</sup>

7.12 This is consistent with the approach taken by the CJ, which has confirmed:

*‘that condition [of intentionality] is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty (see Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 IAZ International Belgium and Others v Commission [1983] ECR 3369, paragraph 45, and Nederlandsche Banden-Industrie-Michelin v Commission, paragraph 107)’.*<sup>256</sup>

7.13 In its response to the Statement, Hamsard stated that the infringement ‘...was committed negligently on the basis that Quantum and Tomms ought to have known their actions would result in a restriction of competition. However Quantum and Tomms did not (and there is no evidence to the contrary) commit the infringement intentionally...’

7.14 The OFT notes Hamsard’s representation but does not consider that there is clear evidence as to whether the infringement was committed negligently or intentionally.

7.15 However, the OFT considers that the very nature of the infringement means that the parties could not have been unaware that the agreement and/or concerted practice in which they were involved in was, or was likely to be, restrictive of competition. At the very least, the OFT considers the parties ought to have known that their actions would result in a restriction of competition.

7.16 In any case and as mentioned above, the OFT is not obliged to specify whether it considers the infringement to be intentional or merely negligent and therefore it finds that Quantum committed the infringement either intentionally and/or negligently.

### **Calculation of penalties**

7.17 In determining the appropriate amount of a penalty, the OFT will be guided by its policy objectives on financial penalties. The twin objectives of that policy are:<sup>257</sup>

- i. to impose penalties on infringing undertakings which reflect the seriousness of the infringement; and
- ii. to ensure that the threat of penalties will deter both the infringing undertakings and other undertakings that may be considering anti-competitive activities from engaging in them.

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<sup>255</sup> See *Napp* (fn135), at [452] to [458].

<sup>256</sup> Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555, paragraph 124.

<sup>257</sup> *Penalty Guidance* (fn3), paragraph 1.4.

- 7.18 For the purpose of the penalty calculation, the OFT considers that the relevant turnover or total turnover applicable is the turnover of the undertaking which comprises the relevant single economic entity as defined in paragraph 2.47 above in Section 2 (Company Profiles). The relevant economic entities are the Hamsard Group and Celesio Group undertakings.
- 7.19 The OFT has based its penalty calculations on the consolidated turnover of the ultimate parent company of the undertaking which committed the infringement. The consolidated turnover of the parent company includes the turnover of all wholly and majority-owned subsidiaries over which the parent company exercises control.

***Step 1 – calculation of the starting point***

- 7.20 The starting point for determining the level of penalty for the infringement is calculated having regard to the seriousness of the infringement and the relevant turnover of the undertaking.<sup>258</sup> The ‘relevant turnover’ is the turnover of the undertaking in the market affected by the infringement in the last business year.<sup>259</sup> The ‘last business year’ is the undertaking’s business year preceding the date when the infringement ended.<sup>260</sup>
- 7.21 The starting point may not exceed 30 per cent of the undertaking’s relevant turnover.<sup>261</sup> The actual percentage which is applied to the relevant turnover depends upon the nature of the infringement. The more serious and widespread the infringement, the higher the likely percentage rate.<sup>262</sup> When making this assessment, the OFT will consider a number of factors, including the nature of the products or services, the structure of the market, the market shares of the undertakings involved in the infringement, entry conditions and the effect on competitors and third parties.<sup>263</sup>
- 7.22 The OFT notes the following factors in assessing the seriousness of the infringement described in this Decision:
- Cartel conduct, including market sharing, is regarded to be among the most serious infringements of the Chapter I prohibition and
  - The infringement will have given rise to an actual or potential restriction, distortion, and in some cases prevention, of competition between the Parties such that certain care homes may not have been provided with the choice of switching from one of the Parties to another.
- 7.23 On the other hand, the OFT notes that:

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<sup>258</sup> *Penalty Guidance* (fn3), paragraphs 2.3 to 2.6.

<sup>259</sup> *Penalty Guidance* (fn3), paragraph 2.7.

<sup>260</sup> *Penalty Guidance* (fn3), paragraph 2.7.

<sup>261</sup> *Penalty Guidance* (fn3), paragraph 2.5.

<sup>262</sup> *Penalty Guidance* (fn3), paragraph 2.6.

<sup>263</sup> *Penalty Guidance* (fn3), paragraph 2.6.

- The Parties were not the only undertakings operating in the market and the market was highly fragmented, with a large number of other competitors and
- The infringement appears to have occurred in a small part of the market, on a regional basis rather than nationwide.

7.24 The infringement is an infringement of the Chapter I prohibition ‘by object’ and can be regarded as being injurious to the proper functioning of normal competition.<sup>264</sup> The OFT considers that the infringement had the object to prevent, restrict or distort competition. In a case where there is an infringement by object, there is no need for the OFT to determine or quantify any actual anti-competitive effects of the conduct in question when assessing the seriousness of an infringement, and the absence of evidence of actual effects in relation to a particular infringement is not a mitigating factor in this respect.<sup>265</sup>

7.25 In view of the above factors, the OFT considers that the appropriate starting point for the infringement is 22 per cent.

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

7.26 The starting point under Step 1 may be adjusted to take into account the duration of the infringement.<sup>266</sup> For the infringement, the OFT has concluded that the duration was less than a year. In line with the Penalty Guidance, the OFT proposes to treat the duration of the infringement in this case as a full year.<sup>267</sup>

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

#### ***Aggravating factors***

7.27 The OFT may increase the penalty where there are other aggravating factors, or decrease it where there are mitigating factors.<sup>268</sup>

#### ***Involvement of directors or senior management***

7.28 The involvement of company directors or senior management in the infringement is an aggravating factor.<sup>269</sup> The OFT therefore intends to apply an increase to the penalty at Step 3 for the involvement of the directors and senior management

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<sup>264</sup> *Penalty Guidance* (fn3), paragraph 2.4

<sup>265</sup> *Francis/Barrett and Others v Office of Fair Trading* [2011] CAT 9 (*Francis/Barrett*), at [88].

<sup>266</sup> *Penalty Guidance* (fn3), paragraph 2.12.

<sup>267</sup> *Penalty Guidance* (fn3), paragraph 2.12 ‘Part years may be treated as full years for the purpose of calculating the number of years of the infringement. Where the total duration of an infringement is less than one year, the OFT will treat that duration as a full year for the purpose of calculating the number of years of the infringement.’

<sup>268</sup> *Penalty Guidance* (fn3), paragraph 2.13.

<sup>269</sup> *Penalty Guidance* (fn3), paragraph 2.14.

listed in the table below, for their part in the infringement. The OFT considers that an uplift of 15 per cent is appropriate in the circumstances of this case.

Party	Involvement of	Position held during the Relevant Period
Quantum	[Quantum Managing Director]	Managing Director
Tomms	[Tomms Managing Director]	Managing Director

### *Mitigating factors*

#### Compliance

- 7.29 The OFT considers that where a Party can demonstrate that it has taken adequate steps to achieve a clear and unambiguous commitment to achieving a competition law compliance culture throughout the organisation – together with appropriate competition law risk identification, risk assessment, risk mitigation and risk review – this may amount to a mitigating factor.<sup>270</sup> The OFT is of the view that a Party will need to show that it has taken adequate steps to achieve a clear and unambiguous commitment to competition law compliance throughout the organisation. This will include introducing or reviewing and changing compliance activities as appropriate in the light of the events that led to the investigation at hand.
- 7.30 Having considered evidence of Hamsard Group's compliance activities, at the time of issue of the Statement the OFT considered that a reduction of 5 per cent would be appropriate to reflect these activities. As part of its representations on the Statement, Hamsard Group provided further details of its compliance activities and the further steps it was taking to improve such activities in particular that:
- competition law compliance will be overseen and assessed regularly by a board member of Hamsard Group and will cover all organisations within Hamsard Group;
  - comprehensive competition law training provided by specialists is being undertaken by all relevant staff; and
  - all contracts with Quantum's trading partners and compliance policies will be reviewed.
- 7.31 Having reviewed the new material provided post issue of the Statement, the OFT considers it appropriate to increase the reduction to 10 per cent in respect of Hamsard Group's compliance activities.

### ***Step 4 – adjustment for specific deterrence and proportionality***

<sup>270</sup> *Penalty Guidance* (fn3), paragraph 2.15.



- 7.32 The penalty may be adjusted, after Step 3, to achieve the objective of ensuring that the threat of penalty will deter the infringing undertaking and other undertakings from engaging in anti-competitive practices or to ensure that a penalty is not disproportionate or excessive. Adjustment to the penalty at Step 4 may result in either an increase or a decrease in the financial penalty.
- 7.33 Increases to the penalty figure reached after steps 1 to 3 will generally be limited to situations in which an undertaking has a significant proportion of its turnover outside the relevant market or where the OFT has evidence that the infringing undertaking has made or is likely to make an economic benefit from the infringement that is above the level of the penalty reached after step 3.<sup>271</sup> Where relevant, the latter may include any gain which might accrue to the undertaking in other product or geographic markets as well as the relevant market under consideration.<sup>272</sup>
- 7.34 In addition, there are other exceptional cases in which such an approach may also be appropriate.<sup>273</sup>
- 7.35 When considering whether and in what amount an uplift is required, the OFT will take into account relevant indicators of the company's size and financial position, such as total turnover, profit, dividends and industry margins. In addition the OFT will consider whether in all the circumstances a penalty at the proposed level is necessary and proportionate in order both to sanction the particular undertaking for the specific infringement and to deter it and other companies from further breaches of that kind, again having regard to relevant indicators of size and financial position.
- 7.36 The OFT proposes to apply a specific deterrence uplift to the penalty of Hamsard Group. The OFT considers that a significant proportion of Hamsard Group's total turnover is achieved outside the relevant market, such that the penalty reached at the end of step 3 may not be a sufficient deterrent to Hamsard Group, having regard to its size and financial position. In considering the appropriate level of uplift for specific deterrence the OFT has considered the need to ensure it does not result in a penalty that is disproportionate or excessive having regard to the undertaking's size or financial position or the nature of the infringement. Taking these factors in the round, the OFT considers that an uplift of 30 per cent at Step 4 is appropriate.

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

- 7.37 The OFT may not fix a penalty for the infringement that exceeds ten per cent of the worldwide turnover of the undertaking in its last business year before the date of the OFT's final Decision, calculated in accordance with the provisions of the 2000 Order, as amended ('the section 36(8) turnover').<sup>274</sup> The section 36(8)

<sup>271</sup> *Penalty Guidance* (fn3), paragraph 2.17.

<sup>272</sup> *Penalty Guidance* (fn3), paragraph 2.17.

<sup>273</sup> *Penalty Guidance* (fn3), paragraph 2.18.

<sup>274</sup> Section 36(8) of the Act and the 2000 Order, as amended by the 2004 Order.

turnover is not restricted to a party's turnover in the relevant product market and relevant geographic market.

- 7.38 In addition, the OFT must, when setting the amount of a penalty for a particular agreement (or concerted practice), take into account any penalty or fine that has been imposed by the Commission or by a court or other body in another Member State in respect of the same agreement (or concerted practice).<sup>275</sup> Such adjustments are not necessary for assessing penalty in this case.

***Step 6 - application of reductions under the OFT's leniency programme and for settlement agreements***

- 7.39 The OFT may reduce the undertaking's penalty where the undertaking has a leniency agreement with the OFT in accordance with the OFT's published guidance on leniency, provided always that the undertaking meets the conditions of the leniency agreement.<sup>276</sup> The key criterion for determining the discount available will be the overall added value of the information, documents and evidence provided by the leniency applicant. This depends on the stage at which the undertaking comes forward, the information, documents and evidence already in the OFT's possession. The OFT also takes into account the overall level of cooperation provided.<sup>277</sup>
- 7.40 Lloyds applied to the OFT for leniency in January 2012; it was the first undertaking to do so and made its application prior to commencement of the present investigation by the OFT. Lloyds was accordingly granted a marker for Type A immunity and, as the relevant conditions set out in the immunity agreement between the OFT and Celesio Group have been met, the penalty which the OFT would otherwise impose on Celesio Group has been reduced by 100 per cent.
- 7.41 Quantum and Tomms jointly applied to the OFT for leniency in June 2013. They were not the first undertaking to do so and the OFT had already commenced its investigation. The OFT considers that the level of discount for the leniency programme is based on an assessment of the level of benefit Quantum's and Tomms' leniency application has brought to the OFT's investigation. As the OFT had considerable evidence prior to the application this is reflected in the level of discount given for leniency. They were accordingly granted a marker for Type C leniency and, as the relevant conditions set out in the leniency agreement between Hamsard Group and the OFT have been met, the penalty which the OFT would otherwise impose on them has been reduced by 25 per cent.
- 7.42 As part of the OFT's settlement agreement with Hamsard Group, the penalty which the OFT would otherwise impose on Hamsard Group after any discount for leniency has been reduced by 20 per cent, as the relevant conditions set out in the settlement agreement between Hamsard Group and the OFT have been met. The grant of a reduction by the OFT in these circumstances is discretionary.<sup>278</sup>

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<sup>275</sup> *Penalty Guidance* (fn3), paragraph 2.20.

<sup>276</sup> *Penalty Guidance* (fn3), paragraph 2.25.

<sup>277</sup> *Penalty Guidance* (fn3), paragraphs 3.18 and 3.19.

<sup>278</sup> *Penalty Guidance* (fn3), paragraph 3.20.

## Payment of penalty

- 7.43 The OFT therefore requires Hamsard Group to pay the penalty as set out in the table below.
- 7.44 The penalty will become due to the OFT in its entirety on 15 May 2014 and must be paid to the OFT as per the terms of the OFT's settlement agreement with Hamsard Group.<sup>279</sup> If the penalty is not paid and either an appeal against the imposition or amount of that penalty has not been made or such an appeal has been made and determined in the OFT's favour, the OFT may commence proceedings to recover the amount as a civil debt.

### *Hamsard Group's penalty calculation*

Relevant turnover (£) March 2010 – March 2011		[C]
Step	Adjustment	Penalty after each step
Step 1 – Starting Point	22 per cent	[C]
Step 2 – Adjustment for duration	1 year	[C]
Step 3 – Adjustment for aggravating and mitigating factors:		
(i) Aggravating factor: Director Involvement	15 per cent	[C]
(ii) Mitigating factor: Compliance program	10 per cent	[C]
Step 4 – Adjustment for specific deterrence and proportionality	30 per cent	[C]
Step 5 – Adjustment to prevent maximum penalty being exceeded and to avoid double jeopardy	No adjustment	[C]
Step 6 - Application of reductions under the OFT's leniency programme and for settlement agreements		
(i) Leniency discount	25 per cent	[C]
(ii) Settlement discount	20 per cent	[C]
FINAL AMOUNT		£370,226

<sup>279</sup> Details on how to pay will be set out in the letter accompanying this Decision.

Ann Pope on behalf of the Office of Fair Trading  
Senior Director  
Markets and Projects

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