

Competition Act 1998

Decision of the Office of Fair Trading

No. CA98/04/2006

Agreement to fix prices and share the market for aluminium double glazing spacer bars

28 June 2006

SUMMARY

The Office of Fair Trading (the 'OFT') has concluded that a number of suppliers of aluminium double glazing spacer bars, as listed in paragraph 2 of the Decision (each a 'Party', together 'the Parties') have been parties to an agreement and/or concerted practice that infringes the prohibition imposed by section 2(1) ('the Chapter I prohibition') of the Competition Act 1998 ('the Act'). The Chapter I prohibition provides that agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the United Kingdom¹ ('the UK') and which have as their object or effect the prevention, restriction or distortion of competition within the UK are prohibited.

The Parties have infringed the Chapter I prohibition by participating in an agreement and/or concerted practice during November/December 2002 in the market for the supply of aluminium double glazing spacer bars (aluminium 'Spacer Bars') in the UK, comprising the following sub-agreements and/or concerted practices:

- (a) customer allocation/market sharing in relation to certain 'target' customers ('Target Customers') of UKae Limited ('UKae') for aluminium Spacer Bars;
- (b) fixing a target price in relation to those Target Customers, for the most popular sizes of aluminium Spacer Bars; and

¹ Section 2(7) of the Act provides that the United Kingdom means, in relation to an agreement or concerted practice that operates or is intended to operate only in part of the United Kingdom, that part.

- (c) a non-compete arrangement, which included the fixing of a minimum price, in relation to non 'target' customers ('Other Customers'), for the most popular sizes of aluminium Spacer Bars.

The OFT considers that agreements and concerted practices between undertakings that directly or indirectly fix prices or share markets are among the most serious infringements of the Act². In this case, the infringement consisted of both price fixing and customer allocation/market sharing. The ultimate aim and result of such a strategy is a reduction in competition, resulting in higher prices and less choice, to the detriment of customers and ultimately consumers. Financial penalties are therefore being imposed on all of the Parties, subject to the operation of the OFT's policy to give lenient treatment to undertakings coming forward with information in cartel activity cases and fully co-operating with the OFT's investigation. Ulmke Metals Limited and Thermosteel Group Limited have been granted leniency under this arrangement and have had their penalties reduced as a result.

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] or by italic text in square brackets, for example *[more than 5 per cent]*.

² 'OFT's guidance as to the appropriate amount of a penalty' (OFT423, December 2004), paragraph 2.4.

TABLE OF CONTENTS

PART I THE FACTS	7
A. The Relevant Undertakings	7
(1) The Parties	7
EWS (Manufacturing) Limited	7
Ulmke Metals Limited	9
Double Quick Supplyline Limited	10
Thermoseal Group Limited.....	11
(2) UKae	11
B. The production and distribution of aluminium Spacer Bars in the UK	12
Method of construction	13
Assembly properties	13
Finish	13
Manufacturing process	14
Distribution	15
C. The relationship between the Relevant Undertakings as regards the production and distribution of aluminium Spacer Bars in the UK	15
D. The OFT's investigation	18
Leniency	20
Rule 14 Notice	20
Supplementary Statement of Objections	20
E. The infringement	21
Background to and preparation for the Meeting between the Parties	22
Background to the Meeting between the Parties on 20 November 2002.....	22
Preparation for the Meeting between the Parties on 20 November 2002	23
Lists of UKae accounts.....	26
Bilateral Pre-meetings	26
EWS and Ulmke.....	27
EWS and DQS	28
The Meeting	29
Undertakings and individuals present at the Meeting.....	29
Initial discussion	30
Multi-lateral discussion of customer lists and exclusive allocation of Target Customers.....	31
Multi-lateral discussion of prices to be charged to Target Customers	33
Discussion in relation to Other Customers	35
Bilateral Post-meeting between EWS and Thermoseal	36
EWS' internal note of the Meeting	36
Correspondence following the Meeting	38
Subsequent conduct	41
General comments on the predatory intent of the Meeting	42
PART II LEGAL AND ECONOMIC ASSESSMENT	44
A. Introduction	44
B. Application of Article 81 – effect on interstate trade	44
C. The Chapter I prohibition	44
D. Undertakings	45
E. The relevant market	45
Introduction	45
The relevant product market.....	47
Method of construction	47
Assembly properties	48
Finish	49

Conclusion – aluminium Spacer Bars form the narrowest possible product market definition	49
Potential substitutes (1) – metal Spacer Bars	49
Potential substitutes (2) – non-metal Spacer Bars	50
Conclusion on the relevant product market	51
The relevant geographic market	52
Conclusion on the relevant geographic market.....	53
Market shares	53
Market shares at the production level	54
Market shares at the distribution level	54
F. Relevant case law in relation to agreements and/or concerted practices	54
Agreement 'and/or' concerted practice	54
Single infringement where acts are in pursuit of a common plan.....	56
Agreements	57
Concerted practices	58
G. Evidence of infringement.....	59
General comments on the evidence and standard of proof	59
Analysis of the significance of the evidence for each part of the overall infringement..	60
(1) Customer allocation/market sharing	60
Customer allocation/market sharing – supporting evidence	61
Customer allocation/market sharing – contrary evidence and arguments of the Parties	64
(a) DQS' assertion that it did not bring a list of UKae customers to the Meeting	64
(b) Degree of intention to participate.....	67
(c) DQS' suggestion that it did not participate in the customer/market sharing discussions and that it was not allocated UKae customers to target.....	68
(d) Exclusivity of customers	69
(e) Passive sales	70
(f) Individual lists of customers sent to the distributors	71
(g) Degree of implementation	72
(h) The suggestion that the targets would have been targeted anyway, had the meeting not taken place.....	73
Potential impact of market sharing on inter brand competition	73
Customer allocation/market sharing - conclusion	74
(2) Price fixing in relation to UKae Target Customers	74
Price fixing in relation to UKae Target Customers – supporting evidence	74
Price fixing in relation to UKae Target Customers – contrary evidence and arguments of the Parties	77
(a) Minimum, maximum and 'target' prices	77
(b) Arguments regarding the significance of the 5 to 10 per cent range.....	82
(c) Thermoseal's lack of recollection of discussion of specific prices	83
(d) Thermoseal's lack of recollection of the EWS offer at the meeting to reduce input prices	84
(e) EWS' allegation that the Ulmke witnesses do not recall the conclusion of an agreement in respect of target prices	85
(f) EWS' assertion that its internal memo was an instruction to a salesperson and not a description of items agreed at the meeting	85
(g) Degree of implementation	87
Potential impact of price fixing on inter brand competition.....	87
Price fixing in relation to UKae Target Customers – conclusion	87
(3) Price fixing and non-compete arrangement in relation to Other Customers	88
Price fixing and non-compete arrangement in relation to Other Customers – supporting evidence	88
Price fixing and non-compete arrangement in relation to Other Customers – contrary evidence and arguments of the Parties.....	89
(a) EWS' lack of recollection of this part of the discussion.....	90
(b) Degree of intention to participate.....	90

(c) EWS' assertion that its internal memo was an instruction to a salesperson and not a description of items agreed at the Meeting	91
(d) Degree of implementation	92
Potential impact of price fixing and non-compete arrangement on inter brand competition.....	92
Price fixing and non-compete arrangement in relation to Other Customers – conclusion ..	92
General comments on the credibility of the witness statements	93
Ulmke witness statements – Mr Riley and Mr Hollingsworth's first statements.....	93
Ulmke witness statements – Mr Riley's second statement.....	95
Ulmke witness statements – Mr Hollingsworth's second statement	97
Thermoseal witness statement – Gwain Paterson's statement	98
The OFT's conclusion on the overall infringement.....	103
H. Further arguments of the Parties	103
(1) Evidence of intent	103
(2) Purpose of the Meeting	107
(3) The relevance of the 'tacit acceptance' test in <i>Bayer</i>	109
(4) The finding of a concerted practice	111
(a) Evidence of practical co-operation	112
(b) Presumption of implementation on the market.....	114
(c) Reciprocity	117
(d) Typical elements of a concerted practice.....	118
(5) Application of the Competition Act exclusion for vertical agreements and the EC block exemption for categories of vertical agreements and concerted practices .	123
(a) Customer allocation/market sharing	125
(b) Price fixing in relation to UKae Target Customers	126
(c) Price fixing and non-compete arrangement in relation to Other Customers	127
I. Object or effect – prevention, restriction or distortion of competition	131
J. Appreciability	134
K. Effect on trade within the UK	135
L. Duration of the single infringement.....	135
M. Decision.....	136
Infringement of the Chapter I prohibition of the Competition Act 1998	136
PART III ENFORCEMENT	138
A. Directions	138
B. Financial penalties	138
Legal background.....	138
Immunity from penalties	139
Intentional/negligent infringement.....	140
Calculation of the Penalties – General points	141
Step 1 – starting point	141
Nature of infringement.....	142
Nature of the product	144
Structure of the market	144
Market shares of the undertakings involved and entry conditions	145
Effect on competitors and third parties, and damage to consumers.....	145
Conclusion	145
Step 2 – adjustment for duration	146
Step 3 - adjustment for other factors.....	146
Step 4 – adjustment for further aggravating and mitigating factors.....	147
Step 5 – adjustment to prevent maximum penalty being exceeded and to avoid double jeopardy	147

Penalty for EWS	148
Step 1 – Starting point	148
Step 2 – Adjustment for duration	148
Step 3 – Adjustment for other factors	148
Step 4 – Adjustment for further aggravating factors	148
Step 4 – Adjustment for further mitigating factors	149
Step 4 – Conclusion	149
Step 5 – Adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy	150
Penalty for Ulmke	150
Step 1 – Starting point	150
Step 2 – Adjustment for duration	150
Step 3 – Adjustment for other factors	151
Step 4 – Adjustment for further aggravating factors	151
Step 4 – Adjustment for further mitigating factors	151
Step 4 – Conclusion	151
Step 5 – Adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy	151
Leniency	152
Penalty for Thermoseal	152
Step 1 – Starting point	152
Step 2 – Adjustment for duration	152
Step 3 – Adjustment for other factors	153
Step 4 – Adjustment for further aggravating factors	153
Step 4 – Adjustment for further mitigating factors	153
Step 4 – Conclusion	153
Step 5 – Adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy	154
Leniency	154
Penalty for DQS	154
Step 1 – Starting point	154
Step 2 – Adjustment for duration	155
Step 3 – Adjustment for other factors	155
Step 4 – Adjustment for further aggravating factors	155
Step 4 – Adjustment for further mitigating factors	156
Step 4 – Conclusion	157
Step 5 – Adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy	157
Payment of penalty	157

PART I THE FACTS

1. In this part of the Decision, the Office of Fair Trading (the 'OFT') sets out the facts relating to this Decision, including descriptions of the product and the industry, the undertakings involved in the infringement and their relationships with each other, the key elements of the OFT's investigation, and the evidence for the infringement.
2. The OFT has concluded that the following undertakings (each a 'Party', together 'the Parties') have been parties to an agreement and/or concerted practice that infringes the prohibition imposed by section 2(1) ('the Chapter I prohibition') of the Competition Act 1998 ('the Act'):
 1. EWS (Manufacturing) Limited ('EWS');
 2. Ulmke Metals Limited ('Ulmke');
 3. Thermoseal Group Limited ('Thermoseal'); and
 4. Double Quick Supplyline Limited ('DQS').
3. In the case of EWS, Ulmke and DQS, this Decision is also addressed to their respective ultimate parent companies, namely The Laird Group plc ('Laird'); Standard Metallwerke Holding GmbH ('Standard Metallwerke') and Precision Concepts Limited respectively. As set out below, the OFT considers that in each case these parent companies form part of the same undertaking as their respective subsidiaries, and that they are equally liable for the participation of their respective subsidiaries in the infringement.

A. The Relevant Undertakings

4. In this section, the OFT provides a description of the five undertakings connected with the infringement (the 'Relevant Undertakings'), beginning with the four Parties to the infringement, and concluding with a description of the target of parts of the infringement, UKae Limited ('UKae') (the fifth Relevant Undertaking). A description of the relationships between the Relevant Undertakings follows in section I.C.

(1) The Parties

EWS (Manufacturing) Limited

5. EWS is a manufacturer and supplier of aluminium double glazing spacer bars (aluminium 'Spacer Bars'), steel spacer tube, and reinforcement sections for the PVCu window and insulated glass ('IG') industries. EWS states that it '*produces in excess of 100 million metres of roll formed products, exporting to 20 countries*'.³
6. At the time of the infringement, EWS sold aluminium Spacer Bars to IG unit manufacturers and/or retail double glazing suppliers both:
 - (a) directly; and

³ EWS' website www.ews-ltd.com, 18 April 2006.

- (b) as regards the majority of the aluminium Spacer Bars it manufactured, through a network of non-exclusive distributors, including two of the other Parties in this case, Ulmke and DQS.⁴
7. In addition, on occasions EWS sold a small quantity of the aluminium Spacer Bars it manufactured to each of UKae and Thermoseal. These sales are discussed in more detail in paragraphs 51 and 54 respectively, below.
 8. EWS is a wholly owned subsidiary of LSSD UK Limited⁵ trading as Laird Security Systems, the building products division of Laird. LSSD UK Limited – which is wholly owned by Laird – is engaged '*in the design, development, manufacture and distribution of innovative solutions to improve performance and enhance protection and security for the residential building and home improvement markets*'.⁶
 9. Since EWS is a wholly owned subsidiary of Laird, there is a rebuttable presumption that Laird exercises decisive influence over EWS' policy⁷. EWS has not provided any evidence to rebut this presumption. The OFT therefore considers that EWS forms part of the single economic entity ultimately controlled by Laird and that this single economic entity constitutes a single undertaking for the purposes of the Act.
 10. At the time of the infringement, Howard Worthington was Managing Director of EWS and in addition he was a Director for LSSD UK Limited. Jeff Penman was a Director and Company Secretary for EWS, and Company Secretary for LSSD UK Limited. Geoff Drabble was a Director for EWS, for LSSD UK Limited and for Laird. Mervyn Richards was a Sales Manager and a Director for EWS. Howard Worthington's PA/secretary was Jayne Moss.
 11. LSSD UK Limited was informed by EWS of progress on the infringement on 7 November 2002 (memorandum to Jeff Penman – see paragraph 78 below) and Laird was informed of progress on 21 November 2002 (memorandum to Geoff Drabble – see paragraph 127 below).
 12. This Decision is addressed to both EWS and Laird as the legal entities responsible, and therefore liable, for the conduct of the undertaking of which they form part. EWS and Laird are therefore made jointly and severally liable for payment of the financial penalty imposed in Part III.B of this Decision in respect of the undertaking's participation in the infringement.

⁴ EWS letter dated 28 January 2003, sent in response to OFT enquiries made under section 26 on 10 January 2003, section 1(i).

⁵ Previously EWS (Holdings) Limited until a change of name on 15 April 2005. For convenience, EWS (Holdings) Limited is referred to as LSSD UK Limited in this Decision.

⁶ LSSD UK Limited's website www.lssd.com, 18 April 2006.

⁷ Case 107/82 *AEG v Commission* [1983] ECR 3151, at paragraph 50; and Case 286/98 *P Stora Kopparbergs* [2000] ECR I-9925, at paragraphs 22 to 29.

Ulmke Metals Limited

13. Ulmke is a distributor of *'precision non-ferrous tubes ... Ulmke supply aluminium tube, precision copper tubes and precision brass tubes'*⁸ manufactured by its parent company, Standard Metallwerke GmbH in Germany. One of the end uses of these tubes is, according to Chris Hollingsworth's and Martin Riley's first statements⁹, *'a drawn aluminium tubular spacer for incorporating in a glass sealed unit for use in double-glazing applications'* (i.e. aluminium Spacer Bars). Other products distributed by Ulmke include sealant, desiccants, and insulation and glazing accessories.
14. At the time of the infringement, Ulmke distributed to retail double glazing suppliers and/or IG unit manufacturers, aluminium Spacer Bars manufactured by EWS, as well as aluminium Spacer Bars manufactured by one of EWS' competitors, Profilglass. The proportion of Ulmke's total sales of Spacer Bars manufactured by EWS in 2002 was approximately 70 per cent¹⁰.
15. Ulmke purchased Lowton Glass and Glazing Supplies Ltd from EWS in December 2000.
16. Ulmke's joint Managing Directors at the time of the infringement were Martin Riley and Chris Hollingsworth.
17. Ulmke is a wholly owned subsidiary of Standard Metallwerke and, as such, forms part of the single economic entity ultimately controlled by Standard Metallwerke. This single economic entity constitutes a single undertaking for the purposes of the Act.
18. This Decision is addressed to both Ulmke and Standard Metallwerke as the legal entities responsible, and therefore liable, for the conduct of the undertaking of which they form part. Ulmke and Standard Metallwerke are therefore made jointly and severally liable for payment of the financial penalty imposed in Part III.B of this Decision in respect of the undertaking's participation in the infringement.
19. In its representations on the supplementary Statement of Objections ('Supplementary Statement') (its 'Supplementary Representations')¹¹, Ulmke has asked the OFT to reconsider its conclusion that Standard Metallwerke should be regarded as being liable for the infringement. In support of its argument Ulmke has stated that its parent company, Standard Metallwerke, had no involvement in or prior knowledge of the infringement¹² and that *'all of the strategic, tactical and*

⁸ Ulmke's website www.ulmke.com, 18 April 2006.

⁹ Chris Hollingsworth's and Martin Riley's first statements, 20 December 2002, paragraph 3.

¹⁰ Reply from Ulmke dated 23 May 2005, sent in response to OFT informal enquiries dated 23 May 2005.

¹¹ Note that although this nomenclature ('Supplementary Representations') has been utilised throughout this Decision for reasons of clarity and consistency, Ulmke did not make any Original Representations, i.e. representations on the original Rule 14 Notice.

¹² Ulmke representations dated 21 December 2005, paragraph 6.

*operational decisions to do with aluminium spacer bars are left to the management of Ulmke*¹³.

20. However, since Ulmke is a wholly owned subsidiary of Standard Metallwerke, there is a rebuttable presumption that Standard Metallwerke exercises decisive influence over Ulmke's policy¹⁴. The OFT does not consider that the assertions in Ulmke's reply to the Supplementary Statement are sufficient to rebut this presumption.
21. Notwithstanding this, as the OFT stated in its e-mail to Ulmke of 24 October 2005, the OFT is '*not aware of any limitation of Ulmke's disclosure that may have concealed any evidence of Standard Metallwerke either having knowledge of, or being involved in, the infringement*'¹⁵. As noted in paragraph 608 below, Ulmke was granted 100 per cent immunity from financial penalties under the OFT's leniency programme provided it complied with the conditions set out in paragraph 3.9 of 'OFT's guidance as to the appropriate amount of a penalty' (the 'Guidance')¹⁶. The OFT considers that these conditions have been fully complied with, in respect of both Ulmke and Standard Metallwerke, and the OFT therefore regards this 100 per cent immunity from financial penalties as extending to Standard Metallwerke.

Double Quick Supplyline Limited

22. DQS is a distributor of aluminium Spacer Bars to retail double glazing suppliers and/or IG unit manufacturers. At the time of the infringement, DQS distributed aluminium Spacer Bars manufactured by EWS, as well as aluminium Spacer Bars manufactured by one of EWS' competitors, Alu-pro. The proportion of DQS' total sales of Spacer Bars manufactured by EWS in 2002 was approximately 76 per cent¹⁷.
23. DQS is wholly owned by its parent company, Plastic Building Materials Limited ('PBM'). PBM distributes a wide range of building and roofline products. PBM is a subsidiary of Saint Gerard Holdings plc, which has a majority (80%) shareholding in PBM. The remaining 20% of PBM's shares are held by Heywood Williams Group plc. DQS, PBM and Saint Gerard Holdings plc together form part of a single economic entity ultimately controlled by Precision Concepts Limited.
24. This single economic entity can be regarded as a single undertaking for the purposes of the Act. Whilst the OFT notes DQS' comments on this issue in its representations on the Supplementary Statement (its 'Supplementary

¹³ *Ibid*, paragraph 4.

¹⁴ Case 107/82 *AEG v Commission* [1983] ECR 3151, at paragraph 50; and Case 286/98 P *Stora Kopparbergs* [2000] ECR I-9925, at paragraphs 22 to 29.

¹⁵ E-mail from OFT to Ulmke dated 24 October 2005.

¹⁶ '*OFT's guidance as to the appropriate amount of a penalty*' (OFT423, December 2004), paragraph 3.9.

¹⁷ Reply from DQS dated 3 June 2005, sent in response to OFT informal enquiries dated 23 May 2005.

Representations')¹⁸, this conclusion is not affected by the fact that Heywood Williams Group plc has a minority shareholding in PBM.

25. At the time of the infringement, Charles Alan Garnet ('Jim') Sander was a Director for DQS, PBM, Saint Gerard Holdings plc and Precision Concepts Limited. Jim Sander was also Chairman of PBM. Mark Mitchell was a Sales Manager for DQS and was also a Director for DQS and for PBM. John Hesketh was a DQS Sales Manager.
26. Furthermore, Jim Sander, a Director of both DQS and Precision Concepts Limited, was directly involved in the infringement. Jim Sander attended the meeting on 20 November 2002, and Howard Worthington of EWS sent a letter to Jim Sander on 21 November 2002 confirming the actions agreed at the meeting (see paragraph 136 below).
27. As such, although DQS is not a wholly owned subsidiary of Precision Concepts Limited, Precision Concepts Limited has a controlling interest in the company.
28. This Decision is addressed to both DQS and Precision Concepts Limited as the legal entities responsible, and therefore liable, for the conduct of the undertaking of which they form part. DQS and Precision Concepts Limited are therefore made jointly and severally liable for payment of the financial penalty imposed in Part III.B of this Decision in respect of the undertaking's participation in the infringement.

Thermoseal Group Limited

29. Thermoseal is a distributor of *'double glazing components for the insulated glass industry', including 'decorative glass bevels, lead, colourfilm ... desiccant ... sealants ... [and] a variety of spacer bar and georgian profiles for use in sealed units for conservatories, windows and doors'*.¹⁹
30. Thermoseal is a distributor of aluminium Spacer Bars manufactured by Profilglass to retail double glazing suppliers and/or IG unit manufacturers. Thermoseal made some 'one-off' purchases of aluminium Spacer Bars from EWS in August/September 2002 as a result of supply problems with Profilglass, but was not an established EWS distributor²⁰. This is discussed in more detail in paragraph 54 below.
31. Thermoseal's Managing Director and Company Secretary at the time of the infringement was Gwain Paterson. Mark Hickox was a Sales Manager and a Director.

(2) UKae

32. UKae is both a manufacturer and a distributor of aluminium Spacer Bars. UKae's total turnover was £13.7 million for the year ending 31 December 2002. At the

¹⁸ DQS representations dated 22 December 2005, paragraphs 4.1 to 4.10.

¹⁹ Thermoseal's website www.thermosealgroup.com, 18 April 2006.

²⁰ Reply from Thermoseal dated 14 June 2005, sent in response to OFT informal enquiries dated 23 May 2005, Appendix 1.

time of the infringement, UKae distributed to retail double glazing suppliers and/or IG unit manufacturers, both its own aluminium Spacer Bars and those manufactured by one of its competitors at the manufacturing level, Profilglass²¹.

33. With limited exceptions²², UKae distributes its own aluminium Spacer Bars directly to retail double glazing suppliers and/or IG unit manufacturers, rather than through distributors.

B. The production and distribution of aluminium Spacer Bars in the UK

34. In this section, the OFT briefly describes the aluminium Spacer Bars industry, including the methods by which aluminium Spacer Bars are manufactured and distributed.
35. The UK market for aluminium windows and doors and related products was estimated to be worth some £268.5 million in 2002.²³
36. The Parties are involved in the manufacture, distribution and sale of aluminium Spacer Bars, used in the production of IG units, to retail double glazing suppliers and/or IG unit manufacturers. The Parties supply IG unit manufacturers with a range of components necessary to produce IG units, including Spacer Bars, sealant, desiccant and window accessories.
37. Spacer Bars are used to separate the panes of glass in a double-glazing system (windows and doors). They are held to the edges of the panes of the window or door using a sealant and are filled with a desiccant which absorbs any moisture that forms between the panes of glass. Although they are an essential component of modern double glazing systems, they account for only (at most) 3-4 per cent of the cost (compared with glass which represents about 70 per cent of total cost).²⁴
38. Spacer Bars can be manufactured from a range of metals other than aluminium, including tin plated steel, galvanised steel and stainless steel, all of which have lower heat conductivity than aluminium and therefore improve the insulating properties of hermetically sealed windows. They can also be manufactured from non-metal materials such as foam, plastic and butyl. However, it is estimated by EWS that approximately 90 per cent of Spacer Bars supplied in the UK are made from aluminium²⁵. EWS estimates that the total UK market for metal Spacer Bars

²¹ Garry Ealing's statement, 20 October 2003, paragraphs 7, 9 and 11.

²² UKae supplies small quantities of painted face aluminium Spacer Bars to EWS for resale – see paragraph 51 below – and all of its other aluminium Spacer Bars are sold in the main directly to customers and not via a distribution network – see Garry Ealing's statement, 20 October 2003, paragraph 8. Also see EWS Original Representations dated 6 October 2004, paragraph 7.12: *'EWS understands that UKae does not currently supply third party distributors with its own manufactured product and uses all of its own production to supply its own customer accounts directly'*.

²³ Keynote 2002 Market Report on Windows and Doors, ISBN 1-84168-431-7.

²⁴ Chris Hollingsworth's and Martin Riley's first statements, 20 December 2002, paragraph 12.

²⁵ EWS letter dated 19 September 2003, sent in response to OFT enquiries made under section 26 on 29 August 2003, section 4.4.

(including aluminium) amounts to a value between £14 million and £16 million²⁶. Aluminium Spacer Bars are sold in a range of widths, the most popular being 15.5mm and 19.5mm²⁷.

39. Aluminium Spacer Bars can be categorised in a number of different ways – by reference to their method of construction (face welded or induction rear welded), their assembly properties (corner key or bending quality), or their finish (mill finished, anodised, coloured). The following paragraphs set out these categories in more detail, in view of their potential relevance to market definition.

Method of construction

40. There are two principal methods of constructing aluminium Spacer Bars. These are (1) face welded Spacer Bars ('Face Spacer Bars') and (2) induction rear welded Spacer Bars ('Induction Spacer Bars'). The OFT understands that Induction Spacer Bars are generally of a higher build quality and their market share is growing, while sales of Face Spacer Bars are relatively static or slowly declining. Both are mostly interchangeable in terms of application to particular window units and methods of window construction, although Induction Spacer Bars are generally more resilient when used with bending machines in the construction of a double glazed window²⁸.

Assembly properties

41. Aluminium Spacer Bars, whether face or rear welded, can also be either standard ('Corner Key') or bendable ('Bending Quality'). Spacer Bars are sold to IG unit manufacturers and/or double glazing suppliers (see below) for assembly with other components (glass, desiccant etc) in order to construct a double glazed window or door. The assembly property dictates the work that the retail double glazing supplier and/or IG unit manufacturer will need to carry out in order to construct the window or door.
42. Corner Key Spacer Bars are used for manual assembly of the Spacer Bar frames, carried out by cutting the Spacer Bar to the required lengths and inserting plastic keys at each corner to produce a frame. Bending Quality Spacer Bars are used for automatic assembly of the Spacer Bar frames, carried out by a machine which bends the Spacer Bar at 90 degree angles to form a frame²⁹.

Finish

43. There are three different finishes for both Bending Quality and Corner Key Spacer Bars: mill finished, clear anodised, and coloured (e.g. bronze, gold, white or

²⁶ *Ibid*, section 6.

²⁷ Reply from Thermoseal dated 24 March 2004, sent in response to OFT informal enquiries dated 5 March 2004, paragraph 1.

²⁸ Garry Ealing's statement, 20 October 2003, paragraph 6.

²⁹ Reply from Thermoseal dated 24 March 2004, sent in response to OFT informal enquiries dated 5 March 2004, paragraph 1.

black)³⁰. The UK market generally prefers anodised Spacer Bars as they do not show fingerprints and sealant allegedly bonds better to them³¹.

Manufacturing process

44. The manufacturing process for aluminium Spacer Bars does not require significant investment in complex machinery³². There are three main stages to the process, coil slitting, cold roll forming and welding:

- (a) Coil slitting – A coil slitting machine is used to produce aluminium coil from broad rolls of anodised aluminium or other suitable metal. Coil slitting machines can be used to produce a range of different metal products as well as aluminium Spacer Bars. In addition, serviceable coil slitting machines can be purchased second hand, or alternatively, it is possible to out-source this part of the manufacturing process.
- (b) Cold roll forming – A cold roll forming machine is used to form the Spacer Bar tube sections. Cold roll forming machines have a wide range of industrial uses and can be used to manufacture such diverse products as partitioning, runners for sliding doors, metal sheath ducting for electrical wiring, and drawer sliders. Second hand machines can be purchased from specialist dealers.
- (c) Welding of the Spacer Bar tube sections – It is possible to use either a laser welding machine to produce Face Spacer Bars, or an induction welding machine to produce high frequency Induction Spacer Bars. Again, each machine has a variety of manufacturing uses, and second hand ones are available³³.

45. Manufacturing of aluminium Spacer Bars in the UK is highly concentrated, with the only two UK producers of Face Spacer Bars being EWS and UKae³⁴. As set out in section I.E below, UKae is the target of two aspects of the agreement and/or concerted practice which is the subject of this Decision. Until recently there were only two principal suppliers of Induction Spacer Bars to the UK market, Profilglass and Alu-pro³⁵. However, UKae has now also started to produce Induction Spacer Bars³⁶.

³⁰ *Ibid.*

³¹ Gwain Paterson's statement, 19 September 2003, paragraph 9.

³² EWS letter dated 19 September 2003, sent in response to OFT enquiries made under section 26 on 10 January 2003, section 7.1.

³³ *Ibid.*, sections 7.1 to 7.3.

³⁴ *Ibid.*, section 19.1.

³⁵ Both of these companies are based in Italy.

³⁶ Garry Ealing's statement, 20 October 2003, paragraph 7.

Distribution

46. As noted in paragraph 6 above, EWS (and, to a much smaller extent, UKae) sells aluminium Spacer Bars to IG unit manufacturers and/or retail double glazing suppliers not only directly but also through a network of non-exclusive distributors.
47. In most cases, the IG unit manufacturer and the retail double glazing supplier are the same entity, purchasing the Spacer Bars and combining them with other IG unit components such as glass and desiccant to form a double glazed window/door, then selling the window/door to a retail consumer. However, in some cases the IG unit manufacturer and the retailer are at different levels of the production process, with the IG unit manufacturer making the window/door from the components and selling it to the retail double glazing supplier which then sells it to the retail consumer.
48. Keynote's 2002 report on this sector³⁷ notes that the UK windows and doors market comprises various different types of company, including:
- large vertically-integrated companies, which manufacture most of their own profiles and components, and carry out their own installations;
 - trade fabricators, which manufacture windows and doors that are sold to installation companies ('IG unit manufacturers');
 - fabricators/installers, which manufacture and install windows (combining the work of 'IG unit manufacturers' and 'retail double glazing suppliers');
 - installers, which sell and install windows made by other suppliers ('retail double glazing suppliers'); and
 - specialist component suppliers, which supply the numerous components used in windows and doors fabrication and installation,
- and that some company groups are involved in more than one of these activities.

C. The relationship between the Relevant Undertakings as regards the production and distribution of aluminium Spacer Bars in the UK

49. In section I.A, the OFT provided a description of the Relevant Undertakings connected with the infringement. In this section, the OFT sets out the relationship between the Relevant Undertakings.
50. As noted in paragraph 45 above, EWS and UKae are competing manufacturers of aluminium Spacer Bars. At the next level down in the supply chain, EWS, Ulmke, Thermoseal, DQS and UKae are all competing distributors of aluminium Spacer Bars.
51. In addition, EWS and UKae have on occasions purchased aluminium Spacer Bars from each other. This tends to occur in the following sets of circumstances³⁸:
- (a) EWS and UKae have different specialities and strengths resulting from the different types of machinery they have purchased. For example:

³⁷ Keynote 2002 Market Report on Windows and Doors, ISBN 1-84168-431-7.

³⁸ Garry Ealing's statement, 20 October 2003, paragraphs 16 to 25.

- EWS can supply colour anodised metal strip to UKae at a relatively low price because EWS' cutting plant allows it to cut wide coils of anodised metal;
 - EWS' cutting plant also enables it to cut large coils of sheet aluminium into required strip sizes; and
 - UKae can supply painted Face Spacer Bars to EWS at a relatively low price because UKae's in-house paint shop enables it to paint strip aluminium – hence UKae sometimes purchases Face Spacer Bars from EWS while EWS sometimes purchases painted Face Spacer Bars from UKae.
- (b) UKae may purchase Face Spacer Bars from EWS where EWS has spare capacity and/or stock and UKae has customer requirements that exceed its stock and production capacity.
- (c) EWS and UKae forward purchase aluminium (by means of binding fixed price contracts spanning periods of up to 12 months) in order to hedge against increases in the price of aluminium on the London Metal Exchange ('LME'). If EWS, for example, forward purchases aluminium and the prices on the LME fall, it may be cheaper for it to purchase finished Spacer Bars from UKae than to manufacture its own Spacer Bars out of the pre-purchased aluminium.
52. At the time of the infringement, there were vertical relationships in place between EWS and both Ulmke and DQS who operated as distributors of EWS aluminium Spacer Bars. However, these relationships were non-exclusive. Approximately one quarter of DQS' sales of aluminium Spacer Bars in 2002 were manufactured by EWS' competitor, Alu-pro. Similarly, around a third of Ulmke's sales of aluminium Spacer Bars were manufactured by Profilglass. EWS confirmed in its representations on the original Rule 14 Notice ('Original Representations') that *'EWS does not require its distributors to enter into exclusive supply agreements...'*³⁹ and that *'EWS does not maintain exclusive relationships with any of its distributors who remain free to source spacer bar from other manufacturers...'*⁴⁰.
53. In the distribution of aluminium Spacer Bars, Ulmke and DQS were active competitors of one another, and indeed of EWS, including in relation to non-EWS aluminium Spacer Bars. In fact, although EWS tended to target larger customers⁴¹ while DQS⁴² (and Thermoseal⁴³) tended to target smaller customers, it is clear that EWS did on occasions win customers from its distributors. For example, during the three year period to October 2004, EWS won accounts from both Thermoseal and Ulmke⁴⁴.

³⁹ EWS representations dated 6 October 2004, paragraph 7.20.

⁴⁰ *Ibid*, paragraph 7.25.

⁴¹ *Ibid*, paragraphs 7.16 to 7.17.

⁴² Attachment to DQS representations dated September 2004, John Hesketh's statement, paragraph 30.

⁴³ Gwain Paterson's statement, 19 September 2003, paragraphs 10 to 11.

⁴⁴ EWS representations dated 6 October 2004, paragraph 7.41.

54. By contrast, Thermoseal was not an established distributor of EWS aluminium Spacer Bars at the time of the infringement. In August and September 2002, Thermoseal bought approximately [...] [C] to [...] [C] worth of aluminium Spacer Bars from EWS as a result of supply problems with Profilglass⁴⁵. These were in effect 'one-off' orders and represented only a minimal proportion of its annual aluminium Spacer Bar requirements (3 per cent)^{46,47}. EWS has confirmed that at the time of the infringement, Thermoseal did not have an established distribution relationship with EWS. This was made clear both in EWS' Original Representations to the OFT:

*'Thermoseal is not a distributor of EWS's spacer bar and nor was it at the time of the EWS Distributors' Conference held on 20 November 2002'*⁴⁸;

and during EWS' oral representations in support of those written representations:

*'The other point to bear in mind is that Thermoseal was not an existing distributor, so it had no existing place in the market as regards the sale of EWS product.'*⁴⁹.

55. The supply/sale relationships between the Relevant Undertakings at the time of the infringement can therefore be illustrated as in the following diagram. Note the broken line between Thermoseal and EWS, which reflects the fact that Thermoseal was not an established distributor of EWS aluminium Spacer Bars at the time of the infringement.

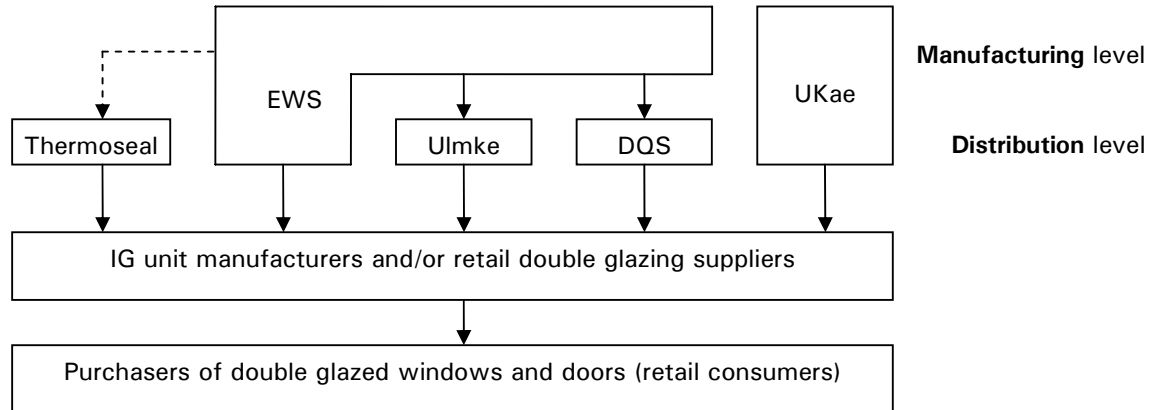
⁴⁵ See Gwain Paterson's statement, 19 September 2003, paragraph 8 and Reply from Thermoseal dated 14 June 2005, sent in response to OFT informal enquiries dated 23 May 2005, Appendix 1.

⁴⁶ Thermoseal representations dated 1 October 2004, paragraphs 2 and 23.

⁴⁷ Thermoseal purchased further quantities of aluminium Spacer Bars from EWS in 2003; however the amounts involved were negligible totalling less than one-tenth of the quantity purchased in 2002, i.e. less than 0.5 per cent of Thermoseal's total annual requirements. See reply from Thermoseal dated 14 June 2005, sent in response to OFT informal enquiries dated 23 May 2005, Appendix 1. Thermoseal confirms in its Supplementary Representations that it *'now distributes only a very small amount of EWS' aluminium spacer bar'* (Thermoseal representations dated 20 December 2005, paragraph 14).

⁴⁸ EWS representations dated 6 October 2004, paragraph 7.22.

⁴⁹ EWS oral representations dated 14 October 2004, page 29 of transcript.



56. Given the Parties' position as competitors at the distribution level, the relationship between the Parties is properly treated as horizontal. In particular, both the non-exclusive nature of the relationship between EWS and its distributors Ulmke and DQS and the absence of an established distribution relationship between EWS and Thermoseal mean that any co-operation between the Parties had the potential adversely to affect not only intra brand competition in relation to EWS-manufactured aluminium Spacer Bars, but also inter brand competition between EWS-manufactured aluminium Spacer Bars and aluminium Spacer Bars produced by its competitors, Profilglass and Alu-pro.

D. The OFT's investigation

57. A written complaint from a retail double glazing supplier was received by the OFT in March 2002, alleging price fixing by manufacturers and distributors in the 'aluminium spacer bar market for double-glazing'⁵⁰.

58. In April 2002 the OFT decided that there were reasonable grounds for suspecting that a group of manufacturers and distributors had colluded to fix the prices of aluminium Spacer Bars, thereby infringing the Chapter I prohibition. The OFT then began a formal investigation under the Act.⁵¹ The OFT obtained warrants from the High Court to enter and search the premises of the following undertakings under section 28 of the Act:⁵²

- EWS;
- Ulmke;
- Thermoseal; and

⁵⁰ Letter dated 1 March 2002, from an anonymous complainant.

⁵¹ Under section 25(a) of the Act, as it then applied, the OFT could conduct a formal investigation under the Act if there were reasonable grounds for suspecting that the Chapter I prohibition had been infringed. The relevant provisions following the amendment of the Act by The Competition Act 1998 and Other Enactments (Amendment) Regulations 2004 (SI 2004/1261) are now contained in sections 25(1), (2) and (6) of the Act.

⁵² A warrant issued under section 28 of the Act authorises the OFT to enter and search the premises specified in the warrant. The provisions of that section have since been amended by The Competition Act 1998 and Other Enactments (Amendment) Regulations 2004 (SI 2004/1261) and now apply only to business premises. Domestic premises are now covered by section 28A of the Act.

- UKae.
59. The warrants were issued on 28 November 2002. Unannounced inspections were carried out at these premises by OFT officials on 5 December 2002. At the premises of the Parties, documents were found suggesting that the Parties were involved in agreements and/or concerted practices to fix prices and share the market for the supply of aluminium Spacer Bars⁵³.
60. The OFT also inspected the premises of UKae on this date. The OFT did not, however, find any evidence of involvement by UKae in the agreement and/or concerted practice which is the subject of this Decision.
61. In addition, under section 27 of the Act⁵⁴, OFT officials made an unannounced site visit to the premises of DQS on 12 March 2003. Copies of documents were taken from all the sites visited. Witness statements and general information were also provided by two of the Parties (Ulmke and Thermoseal) in support of applications for leniency under the OFT's leniency policy⁵⁵.
62. Notices requiring information under section 26 of the Act were issued as follows⁵⁶:

Party	Date s26 letter sent	Date of response
EWS	10 January 2003	28 January 2003
Thermoseal	10 January 2003	30 January 2003
DQS	15 April 2003	2 May 2003
DQS	29 August 2003	16 September 2003
EWS	29 August 2003	19 September 2003

63. Further informal requests for information were made to the Parties as follows:

Party	Date of enquiries	Date of response
Thermoseal	5 August 2003	18 August 2003
Ulmke	8 August 2003	3 September 2003
Thermoseal	5 March 2004	24 March 2004
Ulmke	5 March 2004	19 March 2004

⁵³ The OFT's original investigation related to allegations which the OFT subsequently decided not to pursue due to a lack of available evidence. The unannounced inspections on 5 December 2002 (which related to 'suspected price fixing and/or market sharing agreements and/or concerted practices in relation to the supply of aluminium spacer bars in the United Kingdom') did, however, uncover evidence of the infringement that is the subject of this Decision.

⁵⁴ Section 27 of the Act empowers the OFT to, among other things, enter premises without a warrant, with or without notice, and require the production of documents. As a result of amendments introduced by The Competition Act 1998 and Other Enactments (Amendment) Regulations 2004 (SI 2004/1261) the provisions of section 27 now apply only to business premises.

⁵⁵ The OFT's then applicable leniency policy was contained in Part 3 of 'Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty' (OFT423, March 2000). This has since been replaced by 'OFT's guidance as to the appropriate amount of a penalty' (OFT423, December 2004).

⁵⁶ Section 26 of the Act empowers the OFT, for the purposes of an investigation under section 25 of the Act, to require any person to produce to it a specified document, or to provide it with specified information, which it considers relates to any matter relevant to the investigation.

Thermoseal	23 May 2005	14 June 2005
Ulmke	23 May 2005	23 May 2005
DQS	23 May 2005	3 June 2005
Thermoseal	3 May 2006	12 May 2006
DQS	3 May 2006	15 May 2006
EWS	3 May 2006	15 May 2006
Ulmke	3 May 2006	24 May 2006

Leniency

64. Total immunity from financial penalties was conditionally granted to Ulmke on 18 December 2002 under the OFT's leniency policy, as set out in the Guidance⁵⁷. On 26 August 2003, a reduction in the level of financial penalty of 40 per cent was conditionally granted to Thermoseal in accordance with paragraph 3.8 of the then applicable edition of the Guidance (paragraph 3.12 of the current edition).

Rule 14 Notice

65. On 7 July 2004, the OFT issued a Notice ('the Original Notice') to the Parties under rule 14(1) of the then applicable procedural rules⁵⁸. With the exception of internal documents and any other documents to the extent that they contained confidential information, the Parties were given an opportunity to inspect the documents on the OFT's case file. The Parties were also given the opportunity to make written and oral representations on the information in the Original Notice. In response to the Original Notice, the OFT received the following representations.

Party	Date of representations	Written/oral
Thermoseal	1 October 2004	Written
DQS	1 October 2004	Written
EWS	6 October 2004	Written
EWS	14 October 2004	Oral

Supplementary Statement of Objections

66. In the light of the Parties' replies to the Original Notice, the OFT issued a supplementary Statement of Objections (the 'Supplementary Statement') on 6 October 2005 under rules 4 and 5 of the OFT's revised procedural rules⁵⁹. The Supplementary Statement, which replaced the Original Notice, took into account the Parties' representations on the Original Notice and set out the facts on which the OFT now relied, the matters to which it now took objection, its proposed

⁵⁷ The OFT's leniency policy was at that time contained in Part 3 of '*Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty*' (OFT423, March 2000), which has since been replaced by '*OFT's guidance as to the appropriate amount of a penalty*' (OFT423, December 2004).

⁵⁸ Competition Act 1998 (Director's Rules) Order 2000, SI 2000/293 [now revoked].

⁵⁹ On 17 November 2004, the Competition Act 1998 (Director's rules) Order 2000 SI 2000/293 was replaced by the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 SI 2004/2751 ('the OFT's Revised Rules'). This was to take account of changes brought about by the entry into application of EC Regulation 1/2003, referred to as the Modernisation Regulation, and the enactment of the Enterprise Act 2002. The OFT's competition law guidelines and penalties guidance were revised at the same time. The revised procedural rules, guidelines and penalties guidance are available at www.offt.gov.uk.

action and its reasons for the proposed action. With the exception of internal documents and any other documents to the extent that they contained confidential information, the Parties were given an opportunity to inspect the documents on the OFT's case file. The Parties were also given the opportunity to make written and oral representations on the information in the Supplementary Statement. In response to the Supplementary Statement, the OFT received the following representations.

Party	Date of representations	Written/oral
Ulmke	21 December 2005	Written
Thermoseal	20 December 2005	Written
EWS	22 December 2005	Written
DQS	22 December 2005	Written
DQS	9 January 2006	Oral

67. Most of the OFT's findings in the Supplementary Statement were not contested by the majority of the Parties in their representations. Those areas that were disputed are discussed in Parts II and III of this Decision.

E. The infringement

68. This section sets out the evidence for the infringement, beginning with the background to and preparation for the meeting of the parties on 20 November 2002 (the 'Meeting'), followed by a description of events at the Meeting, and concluding with correspondence following the Meeting and subsequent conduct. The relevant economic and legal framework is set out in Part II, along with an analysis of the significance of the evidence and the inferences that the OFT draws from it.

69. The OFT has decided that the Parties have infringed the Chapter I prohibition by participating in an agreement and/or concerted practice during November/December 2002 in the market for the supply of aluminium Spacer Bars in the UK comprising:

- (a) customer allocation/market sharing in relation to certain 'target' customers ('Target Customers') of UKae for aluminium Spacer Bars;
- (b) fixing a target price in relation to those Target Customers, for the most popular sizes of aluminium Spacer Bars; and
- (c) a non-compete arrangement, which included the fixing of a minimum price, in relation to non 'target' customers ('Other Customers'), for the most popular sizes of aluminium Spacer Bars.

70. Each of the collusive activities specified individually above also constituted a horizontal sub-agreement and/or concerted practice relating to the Parties' respective businesses as suppliers to IG unit manufacturers and/or retail double glazing suppliers, and could therefore equally be viewed as an individual infringing agreement and/or an individual infringing concerted practice. The stated purpose of those elements of the overall infringement that relate to Target Customers was the elimination of a competitor (UKae).

Background to and preparation for the Meeting between the Parties

Background to the Meeting between the Parties on 20 November 2002

71. The background to the infringement appears to have been a recognition by the Parties during the early autumn of 2002 that UKae had been charging particularly low prices for Spacer Bars during the preceding few months. The evidence set out in the following paragraphs (72 to 76) demonstrates clearly that all four undertakings were concerned about competition from UKae and the prices that UKae was charging.

72. Firstly, an e-mail dated 9 October 2002 from Mark Mitchell of DQS to Howard Worthington of EWS, copied to John Hesketh of DQS, demonstrated **DQS'** concerns about UKae's prices. It asked Worthington to give Mitchell or Hesketh a call:

'to discuss prices...we are getting hammered every day by UKae etc and are struggling to compete'⁶⁰.

73. Secondly, in his statement for **Thermoseal**, Gwain Paterson states that:

'Throughout most of 2002 UKae had been offering extremely low prices.....we had a delivery destined for UKae that was accidentally sent to our depot....we could tell that UKae were selling below cost'⁶¹.

74. A number of extracts from Thermoseal internal sales reports, which describe points discussed during visits to customers, support Gwain Paterson's claim that UKae was often beating its competitors on prices:

- 15 April 2002 – *'UKae have quoted very low prices...spacer bar...'*
- 14 May 2002 – *'We had lost the spacer...business to UKae...I have requoted but not as low as these.'*
- 11 October 2002 – *'UKae have once again beaten us on back welded bar, (very worrying)...'*
- 6 November 2002 – *'Using UKae now don't know why will come back if prices are right. likes our bar...'*
- 20 November 2002 – *'Need to do something on 19.5 as UKae have offered another Mad Deal...'⁶².*

75. Thirdly, in his statement for **Ulmke**, Martin Riley states that in a phone call with Howard Worthington of EWS in early November 2002:

'HW (Howard Worthington) and myself talked at length about the market in general, although I did not make any notes during or after the call. We also discussed UKae's financial difficulties as their accounts for 2001 had recently

⁶⁰ Documents taken from EWS during OFT's section 28 visit on 5 December 2002 and from DQS during OFT's section 27 visit on 12 March 2003. Inspection references: PJS/02 and EL/1.

⁶¹ Gwain Paterson's statement, 19 September 2003, paragraph 13.

⁶² Documents attached to letter dated 3 January 2003 from Thermoseal's legal representatives, in response to verbal request from OFT during its section 28 visit on 5 December 2002.

been published. I mentioned that UKae were still offering very low prices that would be unprofitable for us and that if this tactic was to continue it would cause Ulmke some serious problems. HW confirmed that he was hearing similar comments from DQS and Thermoseal...⁶³.

76. In its Original Representations, **EWS** accepted that:

*'The various approaches from individual key distributors all seeking to improve the competitiveness of their prices for EWS spacer bar **in relation to UKae** were **the reason for arranging the Distributors' Conference**',*

and that:

*'**EWS arranged to meet its distributors together**'*

(emphasis added)⁶⁴.

Preparation for the Meeting between the Parties on 20 November 2002

77. As a result of the concerns described in the previous section, the four companies planned to meet to discuss the issue. The Meeting was orchestrated by Howard Worthington of EWS and, as shown in the following paragraphs, each of the Parties was aware of the attendance of the others and the subject of the Meeting.

78. On 7 November 2002, Howard Worthington of EWS sent an internal memorandum to Jeff Penman of LSSD UK Limited, EWS' parent company outlining his plans to arrange a multi-lateral meeting between EWS, DQS, Ulmke and Thermoseal, and setting this against the background of UKae's potential financial difficulties. In that memorandum, Mr Worthington described his intentions as follows:

'I am not sure if you are aware that UKae manufacture their own laser-welded spacer tube to the tune, we believe, of about [...] [C] year. In addition to this, they purchase approx. [...] [C] metres of high frequency welded spacer tube from [...] [C]. However, the mainstay of their business, particularly [...] [C].

Some months ago, you may be aware, UKae purchased [...] [C] high frequency welding lines from [...] [C]. [...] [C] had previously been owned by [...] [C] (the large aluminium seam-welded tube manufacturer) and, before that, by [...] [C]. Neither [...] [C] nor [...] [C], who have enormous expertise in aluminium, could make [...] [C] profitable, so what on earth makes UKae think they can succeed is beyond me!

However, this move has infuriated [...] [C], who have no desire to see UKae become potentially strong (I don't think there's any chance of this), so [...] [C] have increased their selling prices to UKae by [...] [C]% and, by Christmas, will have severed the relationship entirely. This could put UKae in an extraordinarily difficult position, where not only do they lose [...] [C] metres of spacer tube

⁶³ Martin Riley's second statement in support of Ulmke's application for leniency, 29 August 2003, paragraph 13.

⁶⁴ EWS representations dated 6 October 2004, paragraph 8.1.

business (because, in my opinion, they won't be able to make their own by Christmas), but also all of the other bits and pieces that go with it (including Georgian tube, colourfilm, lead, desiccant and sealant).

In the meantime, UKae have been putting very low prices for spacer tube into the marketplace and have been disrupting the customer base for DQS, Ulmke and also Thermoseal. As a result, I am proposing to launch a coalition raid, bringing strengths from DQS, Ulmke, Thermoseal and EWS to bear at a time of disruption for UKae, thus maximising their discomfort.

The intended result is the elimination of UKae, however, it is possible they could weather the storm but we will cause them whatever disruption we can. This will not happen until either December, or more likely January 2003.

We are thus in a position where we need to reduce, or eliminate our financial exposure to UKae and this could perhaps best be done by [...] [C].

We have taken an order to supply a heap of colour anodised slit coils for the first quarter and, if we [...] [C], it could help the overall process⁶⁵.

79. At around this time, Howard Worthington had a telephone conversation with Martin Riley of Ulmke, the first part of which is described by Mr Riley in paragraph 75 above. Mr Riley continues:

'HW went on to suggest that if everyone was unhappy with UKae's tactics then perhaps we all should get together to discuss the issue. My first comment was to suggest that it would be highly unlikely that we could all sit together to discuss a common problem given all the years of intense competition. It was at this stage that HW told me that he had known Gwain Patterson (sic), MD of Thermoseal, for many years and felt he would be approachable. HW also explained that he had been regularly in contact with John Hesketh of DQS and felt confident he would attend such a meeting. I was particularly wary by now as it was clear to me HW was convinced that a meeting between the affected parties was a good idea. He wanted me to confirm whether or not I would attend if he could arrange such a meeting. I reluctantly agreed, hoping that he would be unsuccessful in organising such a meeting and at the same time trying to maintain my credibility as the new MD of Ulmke Metals Ltd.

We discussed dates and provisionally agreed to 19 November 2002 subject to confirmation by the other parties. A few days later HW's PA contacted me to confirm that the meeting was to take place at The Quality Hotel & Suites Walsall on Junction 10 of the M6 on 20 November at 11am⁶⁶.

80. Mr Riley's statement is corroborated by Chris Hollingsworth of Ulmke, who states that:

⁶⁵ Attachment 3 to EWS letter dated 28 January 2003, sent in response to OFT enquiries made under section 26 on 10 January 2003.

⁶⁶ Martin Riley's second statement, 29 August 2003, paragraphs 14 to 15.

*'this meeting was arranged while I was on holiday in late October/early November. When I returned to work Martin (Riley) told me that the meeting of distributors had been arranged by EWS to discuss the "UKae situation"...*⁶⁷.

81. Mr Worthington had a similar conversation with Gwain Paterson of Thermoseal, described by Mr Paterson as follows:

*'About a week to ten days before the meeting on 20 November 2002, Howard telephoned me and invited me to a meeting with EWS's other distributors to discuss the low prices being charged by UKae and how we could fight back against them. He told me that DQS and Ulmke would be coming to the meeting*⁶⁸.

82. It seems that Mr Worthington also made contact with DQS regarding the proposed Meeting on 20 November 2002. Firstly, an extract from Jayne Moss (Howard Worthington's secretary)'s shorthand notebook dating from early November 2002 refers to the availability of Gwain Paterson of Thermoseal, Martin Riley of Ulmke and John Hesketh of DQS for a meeting. The suggested dates were 19 or 20 November 2002, either at the *'Friendly Hotel'*, or at EWS' own premises⁶⁹.

83. Secondly, an internal EWS email dated 14 November 2002 from Jayne Moss to Howard Worthington and Mervyn Richards titled *'20 November 2002'* confirming the time, date, venue and attendees for the Meeting reads:

'All is booked/confirmed with The Quality/Friendly Lodge Hotel (off J10 of the M6) for 11:00 in the Manor (Meeting) Room ... including definitely:

- *Jim Sander, Chairman, and John Hesketh, National IG Sales Manager @DQS*
- *Gwain Peterson, Group M.D., Thermoseal and*
- *Martin Riley, M.D., Ulmke Metals.*

*(have mailed confirmation and hotel leaflet, showing location, to each)*⁷⁰.

84. As a result of these contacts, at 11 a.m. on 20 November 2002 the Meeting took place at the Friendly Hotel, Wolverhampton Road West, Walsall. EWS has confirmed in its response to the OFT's section 26 enquiries that:

'The diary entry of 20 November 2002 at 11.00am ('11.00 Friendly'⁷¹), refers to a meeting held at the Friendly Hotel (part of the "Quality Hotels" chain), Wolverhampton Road West, Walsall, WS2 OBS. The meeting was attended by DQS and Ulmke who distributed EWS's spacer tube product together with

⁶⁷ Chris Hollingsworth's second statement, 15 August 2003, paragraph 8.

⁶⁸ Gwain Paterson's statement, 19 September 2003, paragraph 17.

⁶⁹ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: NB/17 page 18.

⁷⁰ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: PJS/018.

⁷¹ Documents taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection references: NB/16 and CS/13.

*Thermoseal who EWS hoped might be persuaded to distribute EWS spacer tube product*⁷².

Lists of UKae accounts

85. In his conversations with the other Parties prior to the Meeting, Howard Worthington of EWS asked each of them to bring to the Meeting a list of UKae accounts that could be targeted. Instructions were given either directly or via his secretary, Jayne Moss, as demonstrated in the following paragraphs (86 to 88).

86. Firstly, the extract from Jayne Moss's shorthand notebook dating from early November 2002, referred to in paragraph 82 above, refers in addition to:

*'List of 20 o[r] so of UKae's a/cs., ie 6 BIG fr each, or as many as you like*⁷³.

87. Secondly, in his statement, Gwain Paterson of Thermoseal states that in the telephone call (referred to above in paragraph 81) from Howard Worthington of EWS inviting him to the Meeting,

*'Howard also outlined his strategy for fighting back, namely that each of the distributors would take five or six of UKae's customers and try to win that business by offering lower prices. He asked me to bring to the meeting a list of potential customers of UKae that Thermoseal might be able to target. I asked Mark Hickox [a Thermoseal colleague] to draw a list up of some names of companies that Thermoseal would have liked to supply which we brought along to the meeting*⁷⁴.

88. Thirdly, in his second statement, Martin Riley of Ulmke states that at a bilateral pre-meeting on 19 November 2002 (see paragraphs 90 to 94 below), following a general discussion about UKae's financial position and its price cutting strategy, Howard Worthington of EWS:

*'asked that we should bring to the meeting the next day a list of UKae customers that we would be able to target*⁷⁵.

Bilateral Pre-meetings

89. Two bilateral pre-meetings took place prior to the Meeting on 20 November 2002, one on 19 November between EWS and Ulmke, and the other at 9.30 a.m. on 20 November between EWS and DQS. These are confirmed by diary entries for Howard Worthington referring to meetings on 19 and 20 November 2002⁷⁶. See for example the following entries:

⁷² Letter dated 28 January 2003, sent in response to OFT enquiries made under section 26 on 10 January 2003, point 2.

⁷³ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: NB/17 page 18.

⁷⁴ Gwain Paterson's statement, 19 September 2003, paragraph 17.

⁷⁵ Martin Riley's second statement, 29 August 2003, paragraph 21.

- 19 November – '*Ulmke Chris [Hollingsworth] and Martin [Riley] at EWS 10.30 – 11.00*'; and
- 20 November – '*9.30 at Hotel DQS H[oward] J W[orthington] and M[ervyn] P R[ichards] with John Hesketh and Jim Sander*'.

EWS and Ulmke

90. For the EWS/Ulmke bilateral pre-meeting on 19 November 2002, Martin Riley of Ulmke states that a few days after the telephone call referred to in paragraphs 75 and 79 above, Howard Worthington of EWS contacted him by telephone to ask:

'whether or not our meeting, pencilled in for the 19 November, was still on. He was quite aware of the meeting the day after with ourselves DQS and Thermoseal, but felt it would be good to still meet with myself and CEH [Chris Hollingsworth of Ulmke] on 19 November...'⁷⁷.

91. Chris Hollingsworth of Ulmke describes the content of this meeting as follows:

'I recall that on 19 November, the day before the distributor's meeting, Martin and myself met with Howard at EWS. Howard had suggested that it might be a good idea to get together in advance of the meeting proper. At this meeting on 19 November, we discussed in general terms the situation with UKae and, in particular, UKae's apparently difficult financial position. It had appeared from UKae's 2001 financial report that the company was short of cash. Howard suggested that we should bring to the meeting the next day a list of UKae customers that we would be able to target'⁷⁸.

92. Martin Riley of Ulmke recalls that:

'[At the meeting between EWS and Ulmke on 19 November] HW had asked his accountant to analyse [UKae's] published accounts and produce a brief report. HW had information on the mortgages and shareholders of UKae and comments about the likely requirements of their bank in terms of monthly and quarterly reporting. The general conclusion between us was that UKae was having serious cash-flow problems and that their recent decision to invest in yet more manufacturing capacity, in the form of induction welding lines, might be too much for their apparently limited technical capability. HW told us that he had asked someone at Laird to write to one of the Directors of UKae, I think it was the Financial Director put in place by UKae's bank, to express an interest in buying UKae. I understood that the reasoning for this was to put a marker down for Laird in case UKae did in fact have serious financial difficulties and the bank decided to consider selling UKae'⁷⁹.

⁷⁶ Documents taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection references: NB/16 and CS/13.

⁷⁷ Martin Riley's second statement, 29 August 2003, paragraph 15.

⁷⁸ Chris Hollingsworth's second statement, 15 August 2003, paragraph 8. See also Martin Riley's second statement, paragraphs 16 to 21.

⁷⁹ Martin Riley's second statement, 29 August 2003, paragraphs 16 and 17.

93. EWS confirmed in its response to the OFT's section 26 enquiries, that:

'A separate meeting had also been held with another of EWS's existing distributors, Ulmke, the previous day on 19 January 2003' (sic)⁸⁰.

The OFT is satisfied that the words *'previous day'* in this context should be taken to mean 19 November 2002, given that the remainder of this paragraph in the EWS letter discusses the meetings on 20 November 2002.

94. In its Original Representations, EWS also accepted that it asked Ulmke to bring a target list of UKae accounts to the Meeting:

'At the 19 November 2004 (sic) meeting with Ulmke, Mr Worthington of EWS suggested to Ulmke that they compile a list of those customers currently supplied by UKae whose business they thought they might have a good chance of winning'⁸¹ (emphasis added).

EWS and DQS

95. For the EWS/DQS bilateral pre-meeting at 9.30 a.m. on 20 November 2002, an internal EWS e-mail dated 29 October 2002 from Jayne Moss to Howard Worthington and Mervyn Richards was headed *'2.30 Wed 20 Nov @ DQS'* and confirmed:

'have found a slot to suit all (HJW/MPR/Mark Mitchell/John Hesketh) for meeting @ DQS Middleton'⁸².

96. A further internal EWS e-mail dated 19 November 2002 from Jayne Moss to Mervyn Richards, copied to Louise Carlson, was headed *'Note for WED 20 NOV – f URGENT'* and stated:

'LOU, I know Merv's out (most of?) today, as/when you speak to him cld you confirm that the meeting with DGS (sic) is now at The Quality/Friendly Lodge HOTEL @ 09:30 - Jim Sander, Chairman and John Hesketh, Nat'l IG Sales Manager, with HJW/MPR, WED 20 NOV'⁸³.

97. EWS confirmed in its response to the OFT's section 26 enquiries, that on 20 November 2002:

⁸⁰ Letter dated 28 January 2003 in response to OFT enquiries made under section 26 on 10 January 2003, point 2.

⁸¹ EWS representations dated 6 October 2004, paragraph 8.3.

⁸² Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: PJS/05.

⁸³ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: PJS/019.

'First, at 9.30 am, Howard Worthington and Mervyn Richards of EWS met with John Hesketh (National Insulating Glass Products Sales Manager, DQS) and Jim Sander (Chairman, DQS)'⁸⁴.

98. This is further supported by an entry ('E.W.S VISIT') for the morning of 20 November 2002 in a diary found on the premises of DQS⁸⁵.

The Meeting

Undertakings and individuals present at the Meeting

99. The Meeting was attended by the following individuals from EWS, DQS, Ulmke and Thermoseal:

- Howard Worthington and Mervyn Richards (EWS);
- Jim Sander and John Hesketh (DQS);
- Martin Riley and Chris Hollingsworth (Ulmke); and
- Gwain Paterson and Mark Hickox (Thermoseal).

100. This list of attendees is independently corroborated from a number of sources, discussed in the following paragraphs (101 to 103).

101. In his first statement⁸⁶, Chris Hollingsworth of Ulmke states that in addition to himself and Martin Riley of Ulmke, the Meeting:

'was attended by Howard Worthington, the Managing Director of EWS and Mervyn Richards, Sales Director of EWS. Other attendees were Gwain Patterson (sic), Managing Director and Mark Hickox, Sales Director of Thermoseal, Jim Sander, Chairman and John Hesketh, Sales Manager of DQS'⁸⁷.

102. In his statement, Gwain Paterson of Thermoseal states that in addition to himself and Mark Hickox of Thermoseal, the other attendees at the Meeting were:

'Howard Worthington EWS – Managing Director; Mervyn Richards EWS – Sales Director; Jim Sander DQS – Managing Director; John Hesketh DQS – Sales Director; Chris Hollingsworth Ulmke – Managing Director; Martin Reilly (sic) Ulmke – Sales Director'⁸⁸.

⁸⁴ Letter dated 28 January 2003 in response to OFT enquiries made under section 26 on 10 January 2003, point 2.

⁸⁵ Document taken from DQS during OFT's section 27 visit on 12 March 2003. Inspection reference: JT/11a.

⁸⁶ Note the OFT's general comments on the first statements provided by Chris Hollingsworth and Martin Riley, at paragraphs 344 to 350 below.

⁸⁷ Chris Hollingsworth's and Martin Riley's first statements, 20 December 2002, paragraph 18.

⁸⁸ Gwain Paterson's statement, 19 September 2003, paragraph 18.

103. EWS confirmed in its response to the OFT's section 26 enquiries that the attendees at the Meeting were:

'Howard Worthington (EWS), Mervyn Richards (EWS), Jim Sander (DQS), John Hesketh (DQS), Chris Hollingsworth (Ulmke), Martin Riley (Ulmke), Gwain Paterson (sic) (Thermoseal Supplies/Services Limited) and Mark Hickox (Thermoseal Supplies/Services Limited)'⁸⁹.

Initial discussion

104. At the opening of the Meeting, Howard Worthington again outlined his plan to target UKae and UKae's precarious financial situation. Gwain Paterson of Thermoseal states that:

'The conversation at the meeting revolved around how the distributors present could stop UKae from destroying the market. Howard chaired the meeting and initially there was discussion about the financial strength of UKae which I was not particularly interested in. Howard then outlined his strategy for fighting back against UKae in that we should all take five or six of UKae's customers and try to win that business from them by offering lower prices'⁹⁰.

105. Chris Hollingsworth of Ulmke recalls in his first statement:

'At the meeting...the main focus was on UKae. In particular, we discussed the impact of the very aggressive pricing policies being pursued by UKae for new business. We also discussed what we could do to target UKae's customers along with the need to fight back against their low pricing policy in order to regain customers. We also discussed the desirability of putting UKae out of business as a competitor...Those present at the meeting intended that by collectively targeting UKae's customers, we would, at the very least, take away some of their business in order to compensate us for our low margins. We discussed the possibility (and had the objective) that by winning customers away from UKae we might be able to put them in liquidation or receivership given their apparent weak financial position'⁹¹.

106. In his second statement, Mr Hollingsworth states that:

'The clear aim of all those present at the meeting was to remove as quickly as possible a large number of UKae's customers with the intention of further destabilising their cash flow'⁹².

⁸⁹ Letter dated 28 January 2003 in response to OFT enquiries made under section 26 on 10 January 2003, point 2.

⁹⁰ Gwain Paterson's statement, 19 September 2003, paragraph 19.

⁹¹ Chris Hollingsworth's and Martin Riley's first statements, 20 December 2002, paragraphs 20 and 23.

⁹² Chris Hollingsworth's second statement, 15 August 2003, paragraph 9.

Multi-lateral discussion of customer lists and exclusive allocation of Target Customers

107. EWS, Ulmke and Thermosteel then read out lists of existing UKae customers that they proposed to target. These lists had been prepared in advance at the suggestion of Howard Worthington of EWS (see paragraphs 85 to 88 above). John Hesketh of DQS, a former UKae employee, read out the names of potential targets from a print out of UKae customers.
108. The proposed lists of Target Customers were discussed by all present. There was concern that some UKae customers were existing customers of one or more of the Parties and the Parties sought to ensure that customers allocated as 'targets' were solely UKae customers. It was agreed that Target Customers would be allocated on an exclusive basis so that the Parties would not compete with one another for the business of these customers. Ultimately, target lists were agreed for each of the Parties and recorded by EWS. Chris Hollingsworth of Ulmke summarises this part of the Meeting in his first statement as follows:

*'We discussed which of UKae's customers each of us should target and the 10 UKae companies that Ulmke was to target were subsequently listed in a letter dated 21 November 2002 from Howard Worthington to me (document reference SAS16). Some of these targets were already customers, or have been customers latterly of Ulmke, although not necessarily previously for aluminium spacer bars. Each of the other distributors present at the meeting offered up lists of their current UKae customers to target. They were then discussed amongst the attendees because some of us already provided products to UKae customers other than spacer bar. Each of the attendees selected some of the UKae customers and I presume that these were subsequently confirmed in writing in the same way as happened with Ulmke's targets. There was a general acceptance from those present not to target each other's existing UKae customers in order to avoid "friendly fire"'*⁹³.

109. Chris Hollingsworth of Ulmke summarises this part of the Meeting again in his second statement, as follows:

*'... each of the four companies present took it in turns to read out the names of the UKae's customers that they would be targeting. Martin and myself mentioned about eight names of potential targets for Ulmke. John Hesketh of DQS, formerly of UKae, had brought along and proceeded to read aloud from a printed list of UKae's customers from two years' previously. This list contained a lot of out of date information as some of the customers mentioned on it were now supplied by others at the meeting, including Ulmke. The list of customers that DQS were to target, therefore, had to be narrowed down. At the end of the discussion each of the companies had a list of UKae's customers to target. It was agreed that we should not target the customers selected by any of the other companies at the meeting. The clear aim of all those present at the meeting was to remove as quickly as possible a large number of UKae's customers with the intention of further destabilising their cashflow'*⁹⁴.

⁹³ Chris Hollingsworth's first statement, 20 December 2002, paragraph 21.

⁹⁴ Chris Hollingsworth's second statement, 15 August 2003, paragraph 9.

110. Martin Riley of Ulmke recalls, at somewhat greater length:

'When the lists of current UKae target customers were offered up in turn by those present, it was a particularly awkward part of the meeting. HW commenced by verbally listing major prospects that EWS was currently targeting. Thermoseal had a prepared list of targets on A4 paper that Mark Hickcox (sic) referred to when he suggested targets. There was a small amount of conversation around each target to establish if in fact it was a UKae customer. At this point it became clear that not every suggested target was solely a UKae customer as there were many joint customers who seemed to be dual sourcing.

I remember that somebody, possibly Mark Hickcox, suggested that John Hesketh (as he was the former UKae Sales Director) ought to use his list. John Hesketh did in fact have, what appeared to be, an extensive list of UKae customers printed out on computer listing paper. I assumed this was something he had had in his possession when he left UKae several months earlier. John Hesketh went through the print out and proposed only a few names from it as potential targets for Thermoseal and us. Mark Hickcox suggested that John Hesketh appeared to be only selecting a few targets from the list for us and keeping the rest for himself. This comment generated quite a bit of light-hearted conversation.

Eventually HW summarised the targets (he was taking notes) and stated that Ulmke had nothing on their list and asked me to name some targets. CEH and myself had decided, prior to the meeting, not to prepare a formal list and so instead we had a mental list of about 6 targets, which I then offered to the meeting. Our list was added to by means of discussion and in the end there were approximately 10 targets on our list⁹⁵.

111. Gwain Paterson of Thermoseal states:

'[Howard Worthington] listed the accounts that EWS would target and each of the other companies at the meeting, including Thermoseal, then took it in turn to name their list of potential targets. I recall that John Hesketh of DQS had a large print out of UKae's customers, presumably one that he took with him when he left UKae. I also recall that this print out was a bit out of date. Before the meeting I had hoped to poach the names of some UKae customers from John Hesketh but the names that he read out were already commonly known in the market as being UKae accounts. There was a general discussion among those present about who might be best placed to target certain customers and eventually all the companies present, including EWS, had an agreed set of customers that they would exclusively target as part of a concerted effort to knock UKae out of the market...

To the best of my recollection the following names were on Thermoseal's list: CET, Custom Glass (formerly Thermoseal's [...] [C] customer), AG Glass, Techniglass Georgian, Vitraseal, Midland Glass, K Seal, BAC, Safestyle and Claytons.

Again to the best of my recollection, the other distributors agreed to target the following accounts:

⁹⁵ Martin Riley's second statement, 29 August 2003, paragraphs 23 to 25.

- EWS – Solaglass, Anglian, Darby and Bowater (i.e. the larger customers);
- DQS – Abacus Agents and NBW;
- Ulmke – I cannot recall the accounts which it agreed to target but I do recall that it did name a few possible targets⁹⁶.

112. In its Original Representations to the OFT, EWS accepted that it, along with the three other Parties, read out the names of the UKae accounts it thought it was in the best position to target:

'At the Distributors' Conference, Mr Worthington read out the list of UKae's customer accounts that he thought EWS was in the best position to target. The other distributors read out the list (sic) of customers they were best placed to target'⁹⁷.

113. EWS also accepted in its Original Representations that the Parties discussed at the Meeting which of them would be best placed to target each of the UKae customers:

'Any "discussion" was limited to trying to identify whether the distributor concerned in fact had the best customer relationship with the account concerned or whether, in fact, another distributor would be better placed to win the business'⁹⁸.

114. EWS further accepted that, although it cannot remember a discussion or agreement on not targeting each other's allocated Target Customers, this would have been a logical corollary of the customer allocation strategy:

'EWS does not recall this being discussed or there being any agreement on this subject. It was the case that the promotional strategy was intended to run for only a month and would be more effective if the distributors, each of whom had a finite sales resource, focussed their efforts on the accounts with which they had the best customer relationships'⁹⁹.

Multi-lateral discussion of prices to be charged to Target Customers

115. Having agreed the lists of Target Customers, the Parties went on to discuss the prices to be charged to Target Customers. Chris Hollingsworth of Ulmke summarises this discussion in his first statement as follows:

'Those present at the meeting also discussed the prices at which we would seek to supply spacer bar to the UKae customers that were being targeted. These

⁹⁶ Gwain Paterson's statement, 19 September 2003, paragraphs 19 to 21.

⁹⁷ EWS representations dated 6 October 2004, paragraph 8.7.

⁹⁸ *Ibid*, paragraph 8.7.

⁹⁹ *Ibid*, paragraph 8.10.

“guide prices” were to be based on the average current prices being quoted by UKae for new business. Howard Worthington, the Managing Director of EWS, stated that these guide prices were based on the lowest prices at which EWS would be able to supply the products to us and which we could then use to compete more effectively with UKae. I understood these guide prices to be the target prices at which we would attempt to sell spacer bars to the UKae customers being targeted. However, it was generally agreed at the meeting that merely matching UKae's prices in the market would not be enough to win business from them and it would be necessary to undercut them by a further 5-10%... So that the distributors present at the meeting could offer these low prices to attract the target UKae customers, EWS agreed to reduce the prices it was charging the distributors for aluminium tube...¹⁰⁰.

116. In his second statement, Chris Hollingsworth again summarises this discussion, as follows:

'As outlined in paragraph 22 of my first statement, there was also a discussion at the meeting on the prices at which we should seek to sell spacer bars to the UKae's customers that had been targeted. We discussed the prices for the two most popular sizes of spacer bar, 15.5mm and 19.5mm. It was thought by all those present at the meeting that prices would need to be considerably lower than UKae's existing average prices to win business from them and that this would involve undercutting UKae's prices by 5%- 10%. I recall that it was agreed that, on this basis, the target selling price for 19.5mm would need to be around [...] [C] p and for 15.5mm it would need to be around [...] [C] p. Howard said that he would calculate the prices at which EWS would sell to its distributors to help them achieve these selling prices in order to take business from UKae¹⁰¹.

117. In his second statement, Martin Riley of Ulmke clarifies his earlier statement as follows:

'In my first statement I referred to a discussion among those present at the meeting on 20 November 2002 about “guide prices” that would need to be charged to win business from UKae. I recall that it was generally agreed by those present that this would mean undercutting UKae by 5%-10% and, on the basis of the average current prices being quoted by UKae at that time, it was discussed that target selling price for 19.5mm spacer would need to be around [...] [C] p. I do not remember the specific target price for 15.5mm spacer. HW told the meeting that he would calculate the prices at which EWS would sell to its distributors to help them achieve these selling prices in order to take business from UKae¹⁰².

118. The recollection of Gwain Paterson in relation to this discussion is less clear, but he broadly corroborates the accounts of the two Ulmke witnesses:

¹⁰⁰ Chris Hollingsworth's and Martin Riley's first statements, 20 December 2002, paragraphs 22 and 24.

¹⁰¹ Chris Hollingsworth's second statement, 15 August 2003, paragraph 10.

¹⁰² Martin Riley's second statement, 29 August 2003, paragraph 26.

*'There was a general discussion that in order to win business from UKae we would need to offer lower prices than they were currently offering and I recall that it was suggested that prices would need to be in the region of 5%-10% lower than UKae's current prices in order to have a chance of winning customers away from them. I do not recall any specific target prices being discussed although Howard did suggest at one point that we all target UKae by selling to its accounts at cost. If any specific selling prices were mentioned in this context, I would not have paid much attention to them as they would have been too low for Thermoseal'*¹⁰³.

Discussion in relation to Other Customers

119. Following the discussions in relation to Target Customers, the Parties went on to discuss their behaviour in relation to customers not on their target lists ('Other Customers'). There was a general discussion to the effect that the Parties should not compete directly with one another on price in relation to Other Customers. In addition, Gwain Paterson of Thermoseal proposed specific minimum prices for the most popular sizes of Spacer Bar, which were agreed.

120. Gwain Paterson describes the discussion in relation to Other Customers as follows:

*'... there was also a discussion about the pricing of spacers more generally in the market which went beyond the agreement to target UKae's customers. This was in response to a suggestion by myself and Mark that those present should not compete with each other on price when in direct competition for a customer. This suggestion was well received and a discussion followed about the level of prices below which we should not compete. It was eventually agreed by those present, including EWS, that there would be minimum selling prices for the two most popular sizes of spacer bar below which they would not quote in respect of customers held by the other distributors. The two most popular sizes of spacer bar are 19.5mm anodised (sometimes referred to as 20mm) and 15.5mm anodised (sometimes referred to as 16mm) and to the best of my recollection the minimum selling price for 19.5mm anodised was [...] [C] or [...] [C] pence metre and for 15.5mm it was [...] [C] pence per metre...'*¹⁰⁴.

121. Both Chris Hollingsworth and Martin Riley of Ulmke agree that a proposal as described by Gwain Paterson was raised and discussed at the Meeting, although their recollection of the discussion differs somewhat from that of Mr Paterson. In his first statement, Mr Hollingsworth states:

*'There was even a suggestion from Thermoseal that if any of the attendees came across each other in the market that we should not quote as aggressively as in the past. No one reacted to this suggestion and there was certainly no further discussion (or intention on Ulmke's part) to implement it'*¹⁰⁵.

122. In his second statement, Mr Hollingsworth states:

¹⁰³ Gwain Paterson's statement, 19 September 2003, paragraph 22.

¹⁰⁴ *Ibid*, paragraph 24.

¹⁰⁵ Chris Hollingsworth's and Martin Riley's first statements, 20 December 2002, paragraph 21.

'At paragraph 21 of my first statement, I refer to a suggestion made by Thermoseal at the meeting that if any of attendees came across each other in the market that we should not quote as aggressively against each other as we had done in the past. I do recall the discussion reference competition against each other but cannot remember if prices were mentioned below which we should [not] quote when in a head to head situation with other companies at the meeting'¹⁰⁶.

123. Mr Riley describes these events as follows:

'In my first statement I also referred to a suggestion made by Thermoseal at the meeting on 20 November 2002 that if any of the attendees came across each other in the market place that we should not quote as aggressively against each other as we had done in the past. I recall that there was a discussion about this proposal and during the course of this discussion it was suggested, again by Thermoseal, that minimum selling prices for the 19.5mm should be [...] [C] p. I cannot remember the specific price mentioned for 15.5mm spacer. No-one at the meeting voiced any direct agreement or disagreement with this particular suggestion from Thermoseal although, for my part, I had no intention of agreeing to such an arrangement ...'¹⁰⁷.

124. The issues raised by the words (i) *'No-one at the meeting voiced any direct agreement or disagreement with this particular suggestion'* and (ii) *'for my part, I had no intention of agreeing to such an arrangement'* are discussed at paragraphs 412 to 417 and 387 to 402 respectively, below.

Bilateral Post-meeting between EWS and Thermoseal

125. Immediately after the Meeting, EWS and Thermoseal discussed the prices EWS was charging Thermoseal for aluminium Spacer Bars, at the hotel bar. Gwain Paterson of Thermoseal states that at this post-meeting:

'myself and Mark [Hickox] did manage to discuss with Howard [Worthington] the prices EWS were charging to Thermoseal. We explained to Howard that we would need lower prices in order to be able to win business from UKae...Howard agreed to reduce our prices and on 22 November 2002 he wrote...to confirm what Thermoseal's new prices would be'¹⁰⁸.

EWS' internal note of the Meeting

126. In an internal memorandum dated 21 November 2002 from Howard Worthington to Mervyn Richards, EWS minuted the outcome of the Meeting. The memorandum reads as follows:

'Following our meeting with distributors yesterday, just a brief note to confirm the salient points:

¹⁰⁶ Chris Hollingsworth's second statement, 15 August 2003, paragraph 11.

¹⁰⁷ Martin Riley's second statement, 29 August 2003, paragraph 27.

¹⁰⁸ Gwain Paterson's statement, 19 September 2003, paragraph 23.

Firstly, we will be reducing our selling price to DQS for:

- 19.5 satin anodized spacer tube to [...] [C] p-a-metre and
- 15.5 [...] [C] p-a-metre with effect from December 1st., when all contract support will cease.

As far as Ulmke Metals are concerned, I have agreed initially that we will support their prices to their main targets by [...] [C] p per metre with effect from whenever they get them!

The agreed target price for 19.5 mm is [...] [C] p-a-metre and for 15.5 mm [...] [C] p-a-metre, with minimum selling prices elsewhere to be [...] [C] and [...] [C] respectively.

Target lists are as follows:

for EWS	for our Distributors Ulmke Metals	D.Q.S.	Thermoseal
Anglian	Ravensby	Abacus	C.E.T
Solaglass	Clayton	Principality	Custom Glass
Darby	Midland Glass	N.B.W.	Welcome Windows
Windowstyle	South Wales Bonding	Clayton	(if EWS fail)
Abbseal	Stevenage Glass	System 3 Georgian	Vitraseal
Welcome Windows	Titanic	C.S. Glaziers	Oakland Glass
Jeld Wen	Essex Sealed Units	(along with Ulmke)	Classic
A & B Glass	C.S. Glaziers	Sovereign	Hanson
	Speed Frame	Avonside	Techniglass Georgian
	Nulite	Ford Glass	Hill Leigh
			Corby Windows
			Omega
			Advance Tempered

I really can't stress how important it is to hit these guys hard before Christmas.

It will obviously be beneficial to the cause if, when we are approaching our list of targets, we could join in with Ulmke on the action for Georgian¹⁰⁹.

127. In a separate internal EWS memorandum dated 21 November 2002 to Geoff Drabble, Mr Worthington stated:

'With particular interest in UKae, I would just like to advise you that we have set the wheels in motion with a concerted four-man attack on designated targets and with pricing issues established. The latest non-official information on UKae is that the equipment they bought from [...] [C] is causing them serious difficulties.

¹⁰⁹ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: SMB/1 (pages 1 & 2).

*I wonder if you would be kind enough ... to register an interest in UKae's business so that, in the event that it comes to fall, it (would be / won't be) sold (off) to the management for 3s6d!*¹¹⁰.

Correspondence following the Meeting

128. Following the Meeting, EWS sent letters to Ulmke, DQS and Thermoseal confirming the lists of Target Customers and, in the cases of DQS and Ulmke, confirming price reductions being offered by EWS to its distributors in order to support target prices to those customers. These letters also confirmed the date for a proposed further meeting on 15 January 2003.

129. EWS accepted in its Original Representations that after the Meeting, it sent to each of the distributors a list of the UKae customers it had been agreed at the meeting that they would target:

*'...following the meeting, EWS...circulated to each distributor the list that related to it'*¹¹¹.

130. In his second statement, Martin Riley of Ulmke states that:

*'Ulmke's targets that had been agreed at the meeting on 20 November 2002 were subsequently confirmed to us in writing by HW in a letter of 21 November 2002, referred to as SAS16. In SAS16, HW refers to reducing Ulmke's current prices by [...] [C] p per metre on both 15.5mm and 19.5mm spacer bars on the "target" accounts. This was so that Ulmke could effectively undercut UKae when targeting the accounts. The prices that Ulmke were receiving from EWS prior to the meeting on 20 November 2002 were [...] [C] per metre for 19.5mm LPD clear anodised and [...] [C] per metre for 15.5mm LPD clear anodised'*¹¹².

131. On 21 November 2002 Howard Worthington of EWS wrote to Chris Hollingsworth and Martin Riley of Ulmke as follows:

*'Thanks for coming over for the EWS Distributors' Conference yesterday. Following our various conversations and meetings, I would just like to confirm that EWS will discount Ulmke Metals' current prices by [...] [C] p per metre on 15.5mm and 19.5 satin anodized tube [i.e. Spacer Bars] for all of your target accounts, namely: Ravensby, Clayton, Midland Glass, South Wales Bonding, Stevenage Glass, Titanic, Essex Sealed Units, C.S. Glaziers, Speed Frame, Nulite. These can be added to at the next meeting on the 15th January 2003, same time, same place'*¹¹³.

¹¹⁰ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: EW/47 and Attachment 28 to EWS letter dated 28 January 2003, sent in response to OFT enquiries made under section 26 on 10 January 2003.

¹¹¹ EWS representations dated 6 October 2004, paragraph 8.11.

¹¹² Martin Riley's second statement, 29 August 2003, paragraph 29.

¹¹³ Document taken from Ulmke during OFT's section 28 visit on 5 December 2002. Inspection reference: SAS/16.

132. The OFT notes that both the list of Target Customers and the price discount set out in the letter referred to in the above paragraph, are consistent with the list of Target Customers and the price discount to Ulmke set out in the EWS internal memorandum referred to in paragraph 126 above.

133. In his first statement, Chris Hollingsworth of Ulmke states that

'It was agreed between the participants at the meeting on 20 November (as recorded in SAS16) that the progress of the proposal would be reviewed at a further meeting to be held on 15 January 2003. As part of that review process it had been envisaged that we might add additional target customers to the list'¹¹⁴.

134. On 21 November 2002, Mr Worthington also wrote three letters to DQS. In a letter to Mark Mitchell of DQS, Mr Worthington stated:

'Following our meeting yesterday with Jim Sander, John Hesketh and myself, just a brief note to confirm that, from 1st December, we will be reducing the price of our 19.5mm satin anodized tube [Spacer Bars] to [...] [C] p-a-metre and the 15.5mm satin anodized to [...] [C] p-a-metre'¹¹⁵.

135. In a letter to John Hesketh of DQS, Mr Worthington stated:

'With reference to the Distributors' Meeting yesterday, I have written separately to Mark to confirm the price reductions with effect from the 1st December...you will recall we will be meeting again on 15th January 2003, same time (11:00), same place, and it really would do your corner a great deal of justice if you did some homework and came up with a second list of where we should all attack'¹¹⁶.

136. Finally, in a letter to Jim Sander of DQS, Mr Worthington stated:

'Thank you for popping down for the EWS Distributors' Conference yesterday; it was good to see you again and a welcome opportunity, I believe, for you to meet a few other reprobates in the industry!...just a brief note to confirm (and I will send a separate letter to Mark so he is aware) that will (sic) be reducing the selling price for our 19.5 mm anodized spacer tube to [...] [C] p per metre and the 15.5 mm anodized spacer tube to [...] [C] p from December 1st¹¹⁷.

137. The OFT notes that the revised selling prices for both 19.5mm and 15.5mm aluminium Spacer Bars set out in the letters referred to in paragraphs 134 and 136 above, are consistent with the revised selling prices for 19.5mm and 15.5mm aluminium Spacer Bars set out in the EWS internal memorandum referred to in paragraph 126 above.

¹¹⁴ Chris Hollingsworth's and Martin Riley's first statements, 20 December 2002, paragraph 28.

¹¹⁵ Document taken from DQS during OFT's section 27 visit on 12 March 2003. Inspection reference: EL/3.

¹¹⁶ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: SMB/1 page 6.

¹¹⁷ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: SMB/1 page 7.

138. On 22 November 2002, Mr Worthington wrote to Gwain Paterson of Thermoseal as follows:

'Thank you very much indeed to you and Mark [Hickox] for coming along to the Distributors' conference earlier in the week. I believe, generally speaking, the meeting went fairly well and that we can now focus on our targets.

I have been spending most of the day thinking about the pricing of our spacer tube to Thermoseal and it seems to me to be a very tricky political situation. I suppose, with Profilglass' moves in the marketplace, the 19.5mm anodized tube to some British distributors could be very close to [...] [C] p-a-metre in the New Year.

I was reliably informed this morning that one British spacer tube manufacturer is having very serious problems with their new high-frequency welding lines and, therefore, I think our campaign is well-timed.

Having poured (sic) over the problem of pricing for ever and a day, I have come to the conclusion that the best we can do realistically at the moment, and to be able to maintain the pricing for all of 2003, is to reduce our 15.5 mm anodized price to [...] [C] p-a-metre (from [...] [C] p) and the 19.5 mm to [...] [C] -a-metre (from [...] [C] p) and we will be sending out a new price schedule in due course...look forward to seeing you again on the 15th January 2003, same time, same place¹¹⁸.

139. On 26 November 2002, Mr Worthington wrote again to Mark Mitchell of DQS, referring to the price reductions to DQS and how generous they were, to the extent that:

'...we would only break even should DQS be successful in selling an additional [...] [C] metres of spacer tube a year. This is how serious we are about the forthcoming battle!¹¹⁹.

140. In his second statement, Chris Hollingsworth of Ulmke states that he received a telephone call from Howard Worthington of EWS on 26 November 2002, notifying him of a further change to the prices at which EWS was prepared to sell aluminium Spacer Bars to Ulmke, in order to help it to win business from UKae. Mr Hollingsworth describes this conversation as follows:

'On 26 November 2002 I received a telephone call from Howard ... Howard told me that he had given some further thought to the target prices and that, as a result, he had decided to change the price at which EWS were prepared to sell the 19.5mm and 15.5mm sizes to Ulmke to [...] [C] p and [...] [C] p respectively. Howard said that these prices should help us win business from UKae. Howard confirmed the new prices in a letter of the same date, document SAS/17¹²⁰.

¹¹⁸ Document taken from Thermoseal during OFT's section 28 visit on 5 December 2002. Inspection reference: TC/1.

¹¹⁹ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: SMB/1 page 3.

¹²⁰ Chris Hollingsworth's second statement, 15 August 2003, paragraph 13.

141. Mr Worthington then confirmed the content of this telephone conversation in a letter to Mr Hollingsworth, sent on the same day (26 November 2002), in which Mr Worthington stated:

'Further to our conversation this afternoon, this is confirmation that EWS is willing to support Ulmke at the accounts detailed in last week's letter at prices of [...] [C] p and [...] [C] p per metre respectively. Please proceed with all haste and vigour!'¹²¹.

142. Finally, on 27 November 2002 Mr Worthington sent an internal e-mail to Mervyn Richards, in which he discussed the effects on EWS of the price discounts given to Ulmke and DQS. The email concluded with a note that while it was important for the price to make a contribution to profit, the real task was *'to gain the business'*:

'...Furthermore, where we agreed to target their business at [...] [C] p and [...] [C] p-a-metre respectively, I have to say that it is more important to get the business, even if it is only at [...] [C] p and [...] [C] per metre. This would still give us a contribution, after costs, of [...] [C] per metre. Obviously the better the price that we can get, the happier we are, but our real task is to gain the business'¹²².

Subsequent conduct

143. Following the Meeting, Thermoseal was approached by [...] [C], a customer that was not on any of the Parties' lists of Target Customers (i.e. it was one of the Other Customers), seeking a quote for Spacer Bars. [...] [C] was also seeking a quote from EWS. Howard Worthington of EWS contacted Thermoseal to co-ordinate the bids to be made by the two companies to [...] [C] in order to ensure that the two companies did not compete for this business. Gwain Paterson sets out these events as follows:

'Following the meeting on 20 November, one customer, [...] [C], asked for quotes for black aluminium spacer bar from a number of distributors, including Thermoseal and EWS. Howard telephoned Mark in late November/early December 2002 to ask if that customer 'belonged' to Thermoseal and if so what price EWS should quote as they did not want to undercut Thermoseal. We had already decided to quote a low price anyway, however EWS did not want to upset us as we were buying EWS products. Mark e-mailed EWS to confirm it was a Thermoseal customer although we cannot now find a copy of that e-mail'¹²³.

144. There was also contact between Thermoseal and EWS in relation to one of EWS' Target Customers, [...] [C]. In an e-mail dated 29 November 2002 from Mervyn Richards of EWS to Mark Hickox of Thermoseal, EWS provided Thermoseal with a contact at [...] [C] with a view to enabling Thermoseal to win sales of Georgian

¹²¹ Document taken from Ulmke during OFT's section 28 visit on 5 December 2002. Inspection reference: SAS/17.

¹²² Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: SMB/2.

¹²³ Gwain Paterson's statement, 19 September 2003, paragraph 25.

Spacer Bars, a type of aluminium Spacer Bar not sold by EWS¹²⁴, at the expense of UKae, [...] [C]' existing supplier¹²⁵. The e-mail reads as follows:

*'Dear Mark, Thanks for your e-mail. Your contact at [...] [C] would be [...] [C]. His telephone number and address details are as follows:- [...] [C] (Direct Line) Please tread carefully as I know he is particularly keen to tie up the spacer tube contract and then move on to the georgian at a later date. He buys georgian 100% from UKae. Kind regards, Merv'*¹²⁶.

General comments on the predatory intent of the Meeting

145. EWS stated in its Original Representations that:

*'Mr Worthington's boasts of the damage he would inflict upon his successful competitor (which whilst completely unsupported have inexplicably been adopted by the OFT as fact) may be regarded as mere assertion and sales puff in contrast to the certain and pro-competitive outcome, namely lower prices to the market place'*¹²⁷.

146. Predatory aspirations are not necessary for the establishment of the infringement in this case, but the OFT does consider that they form a relevant part of the contextual background. The Parties' predatory aspirations are demonstrated in a number of evidential sources¹²⁸ and the clear aim of those present at the Meeting was to compound UKae's existing financial problems and ultimately to remove UKae from the market, as described in the witness statements from both Ulmke¹²⁹

¹²⁴ Reply from Thermoseal dated 14 June 2005, sent in response to OFT enquiries dated 23 May 2005, paragraph 3.

¹²⁵ Thermoseal considers that the purpose of this EWS e-mail was to inform Thermoseal *'about a possible sales lead for Georgian Bar'* – see letter from Thermoseal dated 14 June 2005, sent in response to OFT enquiries dated 23 May 2005, paragraph 5(a).

¹²⁶ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: PJS/021.

¹²⁷ EWS representations dated 6 October 2004, paragraph 14.12.

¹²⁸ The Parties intended to engage in a concerted effort to target UKae's customers (see paragraphs 107 to 114 above), to undercut UKae's prices (see paragraphs 115 to 118 above), and thereby to effect a reduction in UKae's turnover with the ultimate aim of driving UKae from the market (see footnotes 129 to 131 below). Moreover, the Parties hoped that by eliminating UKae they would subsequently be able to increase prices to what they regarded as being more reasonable levels (see, for example, *'the main focus was on UKae[,] [i]n particular ... the impact of the very aggressive pricing policies being pursued by UKae for new business'* (Chris Hollingsworth's and Martin Riley's first statements, 20 December 2002, paragraph 20) and *'The conversation at the meeting revolved around how the distributors present could stop UKae from destroying the market'* (Gwain Paterson's statement, 19 September 2003, paragraph 19)).

¹²⁹ *'The clear aim of all those present at the meeting was to remove as quickly as possible a large number of UKae's customers with the intention of further destabilising their cashflow'* (Chris Hollingsworth's second statement, 15 August 2003, paragraph 9) and *'We also discussed the desirability of putting UKae out of business as a competitor... Those present at the meeting intended that by collectively targeting UKae's customers, we would, at the very least, take away some of their business in order to compensate us for our low margins. We discussed the possibility (and had the objective) that by winning customers away from UKae we might be able to put them in liquidation or receivership given their apparent weak financial position'* (Chris Hollingsworth's and Martin Riley's first statements, 20 December 2002, paragraphs 20 and 23).

and Thermoseal¹³⁰ and corroborated in the contemporaneous correspondence from EWS¹³¹, rather than to deliver short term benefits for consumers.

147. EWS clearly considered that UKae was, according to EWS memoranda sent at the time of the infringement, *'at a time of disruption'*¹³², having *'serious difficulties'*¹³³, and *'having very serious problems'*¹³⁴. As described more fully above (see paragraphs 91 and 92), Howard Worthington had arranged for research to be conducted into UKae's published accounts and had concluded that UKae had *'serious cash-flow problems'*¹³⁵ and that these were compounded by a recent decision to invest in additional manufacturing capacity. Mr Worthington clearly considered at that time that as a consequence his competitor was financially vulnerable rather than *'successful'*¹³⁶, and as a result he wrote to his superiors asking them to register an interest in UKae's business in case it should need to be sold.

¹³⁰ *'[I]nitially there was discussion about the financial strength of UKAE...Howard then outlined his strategy for fighting back against UKae in that we should all take five or six of UKae's customers and try to win that business from them by offering lower prices...There was a general discussion among those present about who might be best placed to target certain customers and eventually all the companies present, including EWS, had an agreed set of customers that they would exclusively target as part of a concerted effort to knock UKae out of the market'* (Gwain Paterson's statement, 19 September 2003, paragraph 19).

¹³¹ *'UKae have been putting very low prices for spacer tube into the marketplace and have been disrupting the customer base for DQS, Ulmke and also Thermoseal. As a result, I am proposing to launch a coalition raid, bringing strengths from DQS, Ulmke, Thermoseal and EWS to bear at a time of disruption for UKae, thus maximising their discomfort. The intended result is the elimination of UKae...We are thus in a position where we need to reduce, or eliminate our financial exposure to UKae...We have taken an order to supply a heap of colour anodised slit coils for the first quarter and, if we [...] [C], it could help the overall process'* (Attachment 3 to EWS letter dated 28 January 2003, sent in response to OFT enquiries made under section 26 on 10 January 2003); *'With particular interest in UKae, I would just like to advise you that we have set the wheels in motion with a concerted four-man attack on designated targets and with pricing issues established...the equipment they bought from [...] [C] is causing them serious difficulties. I wonder if you would be kind enough ... to register an interest in UKae's business so that, in the event that it comes to fall, it (would be / won't be) sold (off) to the management for 3s6d!'* (Document taken from EWS during OFT's section 28 visit on 5 December 2002; Inspection reference: EW/47 and Attachment 28 to EWS letter dated 28 January 2003, sent in response to OFT enquiries made under section 26 on 10 January 2003); and *'I was reliably informed this morning that one British spacer tube manufacturer is having very serious problems with their new high-frequency welding lines and, therefore, I think our campaign is well-timed'* (Document taken from Thermoseal during OFT's section 28 visit on 5 December 2002. Inspection reference: TC/1).

¹³² Attachment 3 to EWS letter dated 28 January 2003, sent in response to OFT enquiries made under section 26 on 10 January 2003.

¹³³ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: EW/47 and Attachment 28 to EWS letter dated 28 January 2003, sent in response to OFT enquiries made under section 26 on 10 January 2003.

¹³⁴ Document taken from Thermoseal during OFT's section 28 visit on 5 December 2002. Inspection reference: TC/1.

¹³⁵ Martin Riley's second statement, 29 August 2003, paragraph 16.

¹³⁶ EWS representations dated 6 October 2004, paragraph 14.12. The OFT notes that in his letter to LSSD UK Limited (Attachment 3 to EWS letter dated 28 January 2003, sent in response to OFT enquiries made under section 26 on 10 January 2003), Howard Worthington stated that he did not think there was *'any chance'* of UKae becoming *'potentially strong'*.

PART II LEGAL AND ECONOMIC ASSESSMENT

A. Introduction

148. In this section, the OFT sets out the economic and legal framework against which it has considered the evidence in this case, and analyses the significance of the evidence set out above in Part I E, and the inferences which the OFT draws from that evidence.

149. Section 60(1) of the Act sets out the principle that, so far as it is possible (having regard to any relevant differences between the provisions concerned), questions arising in relation to competition within the UK are dealt with in a manner which is consistent with the treatment of corresponding questions arising in European Community law in relation to competition within the Community. In particular, under section 60(2) of the Act, the OFT must act (so far as it is compatible with the provisions of the Act) with a view to securing that there is no inconsistency with the principles laid down by the EC Treaty and the European Court and any relevant decision of the European Court¹³⁷. Under section 60(3) of the Act, the OFT must, in addition, have regard to any relevant decision or statement of the European Commission.

B. Application of Article 81 – effect on interstate trade

150. Following the entry into application of Council Regulation (EC) No 1/2003¹³⁸ on 1 May 2004, the OFT is required when applying national competition law to agreements or concerted practices between undertakings which may affect trade between Member States also to apply Article 81¹³⁹. Since the infringing agreement and/or concerted practice was terminated before 1 May 2004, however (see paragraphs 524 to 527 below), the OFT does not consider it is under a duty to apply Article 81 to the particular circumstances of this case. Accordingly, the OFT has not considered whether trade between Member States may have been appreciably affected, and this Decision relates solely to whether the Chapter I prohibition of the Competition Act has been infringed.

C. The Chapter I prohibition

151. The Chapter I prohibition provides that 'agreements between undertakings, decisions by associations of undertakings or concerted practices which may (a) affect trade within the United Kingdom¹⁴⁰ and (b) which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom are prohibited', unless they are exempt in accordance with the provisions of Part I of the Act. The prohibition applies in particular to agreements, decisions

¹³⁷ Court of Justice of the European Communities, including the Court of First Instance.

¹³⁸ OJ L 1, page 1.

¹³⁹ Article 3, Regulation 1/2003.

¹⁴⁰ 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. The Chapter I prohibition applies equally where the agreement or concerted practice operates or is intended to operate only in a part of the UK.

or concerted practices which directly or indirectly fix purchase or selling prices or which share markets or sources of supply¹⁴¹.

152. In order to find an infringement of the Chapter I prohibition, the OFT must establish that the Parties entered into an agreement and/or engaged in a concerted practice that may affect trade within the UK and which had as its object or effect the appreciable prevention, restriction or distortion of competition¹⁴².

D. Undertakings

153. The word 'undertaking' is not defined in the Act or the EC Treaty. It is a wide term that the European Court of Justice ('the ECJ') has held to include 'any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.'¹⁴³

154. The concept of an 'undertaking' is used to designate an economic unit. As such it is distinct from that of legal personality and may consist of several persons, natural or legal¹⁴⁴. In particular, a subsidiary which has no real freedom to determine its conduct on the market and which does not enjoy economic independence, will form part of the same undertaking as its parent company even though each has its own legal personality¹⁴⁵.

155. The OFT considers that each of the Parties referred to in paragraph 2 above constitutes an undertaking for the purposes of the Act.

E. The relevant market

Introduction

156. In order to establish an infringement of the Chapter I prohibition, it is only necessary to define the market where it is impossible without such a definition to determine whether the agreement and/or concerted practice is liable to affect trade in the UK and has as its object or effect the prevention, restriction or distortion of competition¹⁴⁶. No such obligation arises in this case since it involves

¹⁴¹ Section 2(2) of the Act.

¹⁴² Case 5/69 *Völk v Vervaecke* [1969] ECR 295; see also: Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) OJ C368, 22.12.01, p.13; and '*Agreements and concerted practices*' (OFT401, December 2004), paragraphs 2.15 to 2.21.

¹⁴³ Case C-41/90 *Höfner and Elser v Macroton* [1991] ECR I-1979, at paragraph 21.

¹⁴⁴ Case 170/83 *Hydrotherm* [1984] ECR 2999, at paragraph 11.

¹⁴⁵ Case T-103/95 *Viho Europe BV v Commission* [1995] ECR II-17, paragraph 51; confirmed on appeal in Case C-73/95P *Viho Europe BV v Commission* [1996] ECR I-5457, at paragraph 16. See also '*Agreements and concerted practices*' (OFT401, December 2004), paragraph 2.6 and '*Enforcement*' (OFT407, December 2004), paragraph 5.41.

¹⁴⁶ T-62/98 *Volkswagen AG v Commission* [2000] ECR II-2707, paragraph 230. This principle has also more recently been applied by the CAT in Cases 1014 and 1015/1/1/03 *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, Judgment on Penalty, where it was held that '[i]n Chapter I cases, unlike Chapter II cases, determination of the relevant market is neither intrinsic to, nor normally

an overall agreement and/or concerted practice that had as its object the prevention, restriction or distortion of competition by way of price fixing and market sharing in the form of customer allocation. Nevertheless, market definition is the first step in the process of assessing penalties¹⁴⁷.

157. Consistent with the case law of the European Court, the Commission's Notice on the definition of the relevant market for the purposes of Community competition law¹⁴⁸ provides that the relevant market within which to assess a given competition issue is established by the combination of the relevant product and geographic markets. A relevant product market is defined as comprising:

'all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use...'

158. The relevant geographic market is defined as comprising:

'the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas'.

159. Market definition establishes the closest substitutes within the relevant geographic area to the product that is the focus of the investigation. These products are usually the most immediate competitive constraints on the behaviour of the undertaking(s) supplying the product in question¹⁴⁹.

160. For the reasons set out below, the OFT considers that the relevant product market for the purpose of determining relevant turnover when calculating penalties in this case is the supply of aluminium Spacer Bars. The OFT also considers that the relevant geographical market for the purposes of this case is the UK. None of the Parties has disputed the OFT's definition of the market in their representations – indeed, Thermoseal¹⁵⁰ and DQS¹⁵¹ have expressly endorsed it in both their representations on the Original Notice ('Original Representations') and their

necessary for, a finding of infringement' (paragraph 176), and that *'it follows that in Chapter I cases involving price-fixing it would be inappropriate for the OFT to be required to establish the relevant market with the same rigour as would be expected in a case involving the Chapter II prohibition. In a case such as the present, definition of the relevant product market is not intrinsic to the determination of liability ... it would be disproportionate to require the OFT to devote resources to a detailed market analysis, where the only issue is the penalty'* (paragraph 178).

¹⁴⁷ See 'OFT's guidance as to the appropriate amount of a penalty' (OFT423, December 2004), paragraph 2.7.

¹⁴⁸ OJ C 372/5 3.12.1997. See also 'Market Definition' (OFT403, December 2004), paragraph 1.2.

¹⁴⁹ See 'Market Definition' (OFT403, December 2004), paragraph 2.5.

¹⁵⁰ Thermoseal representations dated 1 October 2004, paragraph 7 and Thermoseal representations dated 20 December 2005, paragraph 5.

¹⁵¹ DQS representations dated September 2004, paragraph 3.2 and DQS representations dated 22 December 2005, paragraph 3.2.

representations on the Supplementary Statement ('Supplementary Representations').

The relevant product market

161. The focus of this investigation is the supply of aluminium Spacer Bars to retail double glazing suppliers and IG unit manufacturers. As described in paragraph 37 above, Spacer Bars are used to separate the panes of glass in a double-glazing system. They are held to the edges of the panes of the window or door using a sealant, and are filled with a desiccant which absorbs any moisture that forms between the panes of glass.
162. In order to arrive at a market definition in this case, the OFT has carried out a substitution analysis which begins by looking at the narrowest potential market definition and then examines potential switching behaviour by customers and suppliers, in order to decide whether a group of closely related products constitute substitutes which should therefore be included within the market.
163. As discussed in paragraphs 39 to 43 above, aluminium Spacer Bars can be categorised in a number of different ways – by reference to their method of construction (face welded or induction rear welded), their assembly properties (Corner Key or Bending Quality), or their finish (mill finished, anodised, coloured). The OFT's market definition begins by examining the extent to which there is substitution between the different types of aluminium Spacer Bars.

Method of construction

164. One way of determining the narrowest possible product market is to examine the method of construction of aluminium Spacer Bars. In this regard, the OFT has considered the degree of substitutability between Face Spacer Bars and Induction Spacer Bars.
165. On the demand side, although Spacer Bars of the latter type are of a higher build quality and are generally more resilient, the two are nevertheless mostly interchangeable in terms of application to particular window units and methods of window construction¹⁵². Their functionality from the point of view of IG unit manufacturers is similar, while end users perceive there to be little if any difference between them. The fact that the method of construction is a highly marginal issue for the end user is borne out by Chris Hollingsworth's first statement, in which he states '*IG components are also not noticed or taken into account by consumers of the final windows, as distinguishing factors when deciding which double-glazing to buy*'¹⁵³. Prices of Face Spacer Bars and Induction Spacer Bars are broadly similar at around £10 to £15 (depending on supplier and size of order) per 100 metres for 19.5mm aluminium¹⁵⁴, and it is therefore to be

¹⁵² Garry Ealing's statement, 20 October 2003, paragraph 6.

¹⁵³ Chris Hollingsworth's and Martin Riley's first statements, 20 December 2002, paragraph 12.

¹⁵⁴ Replies from Ulmke and UKae dated 19 March 2004, sent in response to OFT informal enquiries dated 5 March 2004.

expected that substitution from one to the other would take place over a relatively short period in response to a small but significant increase in price.

166. On the supply side, production involves generally the same processes and the same machinery, albeit with different welding equipment (see paragraph 44 (c) above). EWS has commented that *'it is not necessary to change the entire manufacturing line to switch between laser and induction welded product. To effect such a switch it is necessary only to exchange the laser welding equipment with an induction welding machine at the end of the manufacturing line'*¹⁵⁵. Most manufacturers would therefore find it relatively easy to switch production from one to the other within a relatively short period.
167. The OFT therefore considers that these two categories of Spacer Bars may be regarded as substitutes, and for the purpose of determining relevant turnover when calculating penalties in this case should be included within the same product market.

Assembly properties

168. A second way of distinguishing between different types of aluminium Spacer Bar with a view to determining the narrowest possible product market is to examine their assembly properties. In this regard, the OFT has considered the degree of substitutability between Corner Key Spacer Bars and Bending Quality Spacer Bars.
169. On the demand side, although Spacer Bars of the latter type can be assembled automatically by bending without the need to cut them and insert corner keys, the two are nevertheless mostly interchangeable in terms of application to particular window units and methods of window construction. Their functionality from the point of view of IG unit manufacturers is similar, while end users perceive there to be little if any difference between them. The fact that the assembly properties of Spacer Bars are not important to the end user is borne out by Chris Hollingsworth's first statement, as noted in paragraph 165 above. Prices of Corner Key Spacer Bars and Bending Quality Spacer Bars are broadly similar at around £10 to £15 (depending on supplier and size of order) per 100 metres for 19.5mm aluminium¹⁵⁶, and it is therefore to be expected that substitution from one to the other would take place over a relatively short period in response to a small but significant increase in price.
170. On the supply side, production involves essentially the same processes and the same machinery, and most manufacturers would find it relatively easy to switch production from one to the other within a relatively short period. The OFT therefore considers that these two categories of Spacer Bars may be regarded as substitutes, and for the purpose of determining relevant turnover when calculating penalties in this case should be included within the same product market.

¹⁵⁵ EWS letter dated 19 September 2003, sent in response to OFT enquiries made under section 26 on 29 August 2003, section 9.1.

¹⁵⁶ Replies from Ulmke and UKae dated 19 March 2004, sent in response to OFT informal enquiries dated 5 March 2004.

Finish

171. A third way of determining the narrowest possible product market is to examine the finish of aluminium Spacer Bars. In this regard, the OFT has considered the degree of substitutability between mill finished, clear anodised, and coloured Spacer Bars.
172. On the demand side, although as stated above in paragraph 43 the UK market generally prefers anodised Spacer Bars as they do not show fingerprints and sealant allegedly bonds better to them, the three are nevertheless mostly interchangeable in terms of application to particular window units and methods of window construction. Their functionality from the point of view of IG unit manufacturers is similar, while end users perceive there to be little difference between them. The fact that the finish is not important to the end user is borne out by Chris Hollingsworth's first statement, as noted in paragraph 165 above. Prices of mill finished, clear anodised, and coloured Spacer Bars are broadly similar at around £10 to £18 (depending on supplier and size of order) per 100 metres for 19.5mm aluminium¹⁵⁷, and it is therefore to be expected that substitution from one to the other would take place over a relatively short period in response to a small but significant increase in price.
173. On the supply side, production involves essentially the same processes and the same machinery, and most manufacturers would find it relatively easy to switch production from one to the other within a relatively short period. The OFT therefore considers that these three categories of Spacer Bars may be regarded as substitutes, and for the purpose of determining relevant turnover when calculating penalties in this case should be included within the same market.

Conclusion – aluminium Spacer Bars form the narrowest possible product market definition

174. From the above analysis, the OFT concludes that the narrowest possible product market for the purposes of determining relevant turnover when calculating the penalties in this case, is the supply of aluminium Spacer Bars (irrespective of their method of construction, assembly properties or finish).
175. The next stage in defining the product market is to examine other potential substitutes, which can be characterised as either metal or non-metal alternatives.

Potential substitutes (1) – metal Spacer Bars

176. Spacer Bars can be manufactured from a range of metals other than aluminium, including tin plated steel, galvanised steel and stainless steel, all of which have lower heat conductivity than aluminium and therefore improve the insulating properties of hermetically sealed windows.
177. On the demand side, these other metal products would perform the same basic function as aluminium Spacer Bars, and an end (retail) customer may therefore perceive there to be little difference between them. There are, however, some

¹⁵⁷ *Ibid.*

significant differences in price. For example, although galvanised steel Spacer Bars are generally priced at around £10 to £15 per 100 metres in common with aluminium Spacer Bars, stainless steel Spacer Bars are generally much more expensive, at around £40 to £45 per 100 metres.¹⁵⁸ In addition, the retail double glazing suppliers and IG unit manufacturers which purchase the products are likely to consider them as being very different, given key differences in product characteristics. For example, Thermoseal has commented that *'steel spacer bar...is prone to corrosion and very difficult to work with'*¹⁵⁹, which is probably one of the reasons for Spacer Bars in the UK being constructed primarily from aluminium (see paragraph 183 below). Given the above, switching behaviour from one product to the other following a small but significant increase in price is unlikely to be observed.

178. On the supply side, production involves essentially the same process and the same machinery as that required to produce aluminium Spacer Bars, albeit possibly with a change to the welding machinery. Indeed, EWS has informed the OFT that it uses the same production lines to produce tin plated steel Spacer Bars and aluminium Spacer Bars¹⁶⁰. It would therefore be comparatively easy for a supplier of aluminium Spacer Bars to switch to production of Spacer Bars using some other metals, and vice versa. However, given the likely absence of demand side substitution as discussed in the previous paragraph, the OFT considers that for the purpose of determining relevant turnover when calculating penalties in this case, aluminium Spacer Bars should not be regarded as being in the same market as Spacer Bars constructed from other metals.

Potential substitutes (2) – non-metal Spacer Bars

179. Spacer Bars can also be manufactured from non-metal materials such as foam, plastic and butyl. Some of these materials (such as compressed foam) carry out the functions of both Spacer Bars and desiccant, so that separate desiccant is not required. Others (such as butyl) carry out the function of a sealant in addition. EWS comments that *'butyl spacer bar...is supplied with both desiccant and a sealing agent pre-impregnated and a simple heat treatment is all that is required to produce a hermetically sealed unit'*.¹⁶¹

180. On the demand side, these non-metal products would perform the same basic function as aluminium Spacer Bars and an end (retail) customer may therefore perceive there to be little difference between them. However, there is a clear difference in price between the products. For example, while 19.5mm aluminium Spacer Bars can be purchased for around £10 to £15 per 100 metres, the equivalent size of non-metal Spacer Bars tend to cost in the region of £70 to £90

¹⁵⁸ *Ibid.*

¹⁵⁹ Replies from Thermoseal dated 24 March 2004, sent in response to OFT informal enquiries dated 5 March 2004, paragraph 1.4.

¹⁶⁰ EWS letter dated 19 September 2003, sent in response to OFT enquiries made under section 26 on 29 August 2003, section 4.3.

¹⁶¹ *Ibid.*, section 8.2.

per 100 metres¹⁶². Given the above, switching behaviour from one product to the other following a small but significant increase in price is unlikely to be observed.

181. On the supply side, the OFT does not consider that it would be feasible for a supplier of aluminium Spacer Bars to switch to production of non-metal Spacer Bars within a short timeframe. EWS has stated that different machinery and different production processes are required for the latter. Butyl Spacer Bars, for example, are pre-impregnated with desiccant and a sealing agent, and therefore need heat treatment to produce a hermetically sealed unit. Extrusion equipment is also likely to be required¹⁶³. Ulmke has similarly stated that manufacturing of non-metal Spacer Bars *'require(s) specialist production equipment if volume is to be produced and this prevents most sealed unit manufacturers switching easily/frequently from conventional spacer bar to one of these alternatives'*¹⁶⁴. The OFT therefore considers that for the purpose of determining relevant turnover when calculating penalties in this case, aluminium Spacer Bars should not be regarded as being in the same market as non-metal Spacer Bars.

Conclusion on the relevant product market

182. It is not necessary to arrive at a precise market definition in order to demonstrate an infringement of the Chapter I prohibition in a case of this kind (see paragraph 156 above). Market definition is relevant, however, to the calculation of penalties. The OFT has carried out an analysis of the degree of substitutability between the various different types of Spacer Bar and has concluded that the relevant product market for the purposes of determining relevant turnover when calculating penalties is the supply of aluminium Spacer Bars.

183. Market definition and the market shares of the parties may also be relevant to the appreciability of the infringement, discussed in paragraphs 518 to 521 below. As noted above, it has been estimated that 90 per cent¹⁶⁵ of Spacer Bars supplied in the UK are made from aluminium¹⁶⁶. This is corroborated by Thermoseal's statement that *'not much non-aluminium spacer bar is sold in the UK'*¹⁶⁷. Thus, even if Spacer Bars constructed either of metals other than aluminium or of non-metal materials do form part of the relevant market, this would not materially alter the Parties' share of the relevant market.

¹⁶² Replies from Ulmke and UKae dated 19 March 2004, sent in response to OFT informal enquiries dated 5 March 2004.

¹⁶³ EWS letter dated 19 September 2003, sent in response to OFT enquiries made under section 26 on 29 August 2003, section 9.2.

¹⁶⁴ Statement of Martin Riley attached to legal representatives' e-mail dated 3 September 2003, sent in response to OFT enquiries made on 8 August 2003, paragraph 4.

¹⁶⁵ 90 per cent by volume – equivalent to approximately 70-80 per cent by value.

¹⁶⁶ EWS letter dated 19 September 2003, sent in response to OFT enquiries made under section 26 on 29 August 2003, section 4.4.

¹⁶⁷ Replies from Thermoseal dated 24 March 2004, sent in response to OFT informal enquiries dated 5 March 2004, paragraph 1.4.

184. Notwithstanding the above, the OFT concludes from the analysis it has carried out that the relevant product market for the purpose of determining relevant turnover when calculating penalties in this case should be regarded as being the supply of aluminium Spacer Bars. As noted in paragraph 160 above, none of the Parties has disputed the OFT's definition of the relevant product market in their representations.

The relevant geographic market

185. As stated at paragraph 156 above, the OFT is not obliged to carry out a detailed market analysis in this case because it involves an overall agreement and/or concerted practice that had as its object the prevention, restriction or distortion of competition by way of price fixing and market sharing. Nevertheless, market definition is the first step in the process of assessing penalties.

186. As the Parties supply aluminium Spacer Bars to customers located throughout the UK, the OFT considers that for the purpose of determining relevant turnover when calculating penalties in this case, the market should be regarded as being at least national. On the demand side, if a customer in the UK wanted to change its supplier in response to a small but significant non-transitory increase in price, it could over a reasonably short period switch with relative ease to a different supplier located elsewhere within the UK. On the supply side, the OFT considers that it would be feasible for any UK based manufacturer to supply aluminium Spacer Bars to any customer within the UK, in response to a small but significant non-transitory increase in price.

187. The OFT therefore considers that there is good reason to conclude that the geographic market extends at least to the UK, and that this is the narrowest possible geographic market definition.

188. The OFT has considered whether the geographic market might extend beyond the UK. As noted above (see, for example, paragraphs 14, 22, 30 and 32), at the manufacturer level, aluminium Spacer Bars are currently also supplied to UK customers by two manufacturers located in Italy (i.e. Alu-pro and Profilglass), and there are other aluminium Spacer Bar manufacturers based elsewhere in the EC¹⁶⁸. However, the OFT notes that no aluminium Spacer Bars are supplied by these other EC manufacturers to the UK at present, and that the presence of imports in a territory will not always mean that the market is international¹⁶⁹.

189. Although it is possible that the market for aluminium Spacer Bars may extend beyond the UK, the OFT considers that there are a number of factors that suggest that at the moment the market is national. Such factors include: relatively high transport costs and relatively low profit margins¹⁷⁰; other logistical factors

¹⁶⁸ For example, Rolltech A/S in Denmark, and Erbslöh Aluminium GmbH and Helmut Lingemann GmbH & Co. in Germany.

¹⁶⁹ See *'Market Definition'* (OFT403, December 2004), paragraph 4.6.

¹⁷⁰ The value of a product in relation to transport costs is often an important factor in defining geographic markets – see *'Market Definition'* (OFT403, December 2004), paragraph 4.3 – and in the present case it is probable that although delivery costs are unlikely to be high (as compared with heavier goods such as cement), nevertheless they do have a substantial effect on prices and in particular profit margins, which are

(including planning of stock levels, and the costs involved in acquiring a UK-based distribution network to make entry viable); and differences in finished product standards. Consequently, the OFT does not consider that the aluminium Spacer Bar market extends beyond the UK in this case¹⁷¹.

190. The market is being defined in this case primarily in order to reach a conclusion on the relevant turnover for the purpose of calculating penalties. It is possible that widening the geographic market would have the effect of increasing the Parties' relevant turnover, and therefore the starting point for the purpose of calculating the penalty.

Conclusion on the relevant geographic market

191. From the above analysis, the OFT concludes that the relevant geographic market for the purposes of determining the relevant turnover when calculating penalties in this case is the UK. Therefore, for the purposes of this case, the OFT is proceeding on the basis that the relevant geographic market for the supply of aluminium Spacer Bars is the UK. As noted in paragraph 160 above, none of the Parties have disputed the OFT's definition of the relevant geographic market in their representations.

Market shares

192. The OFT has been unable to obtain any precise third party figures for the Relevant Undertakings' shares of the market for aluminium Spacer Bars. However, in response to a request under section 26 of the Competition Act, EWS has provided the OFT with an estimate of the Relevant Undertakings' shares of total sales of metal Spacer Bars (which includes sales of aluminium Spacer Bars), both at the production and at the distribution levels. These are summarised in paragraphs 194 to 196 below.

193. As noted in paragraph 183 above, it has been estimated that 90 per cent¹⁷² of Spacer Bars supplied in the UK are made from aluminium¹⁷³. This is corroborated by Thermoseal's statement that '*not much non-aluminium spacer bar is sold in the UK*'¹⁷⁴. Thus, even though EWS' estimate includes sales of all metal Spacer Bars,

relatively small and declining – see for example Chris Hollingsworth's and Martin Riley's first statements, 20 December 2002, paragraph 15 "*The result of these various economic factors has been a very severe decline in the prices and margins achieved by distributors of IG components...*" and EWS letter dated 19 September 2003, sent in response to OFT enquiries made under section 26 on 29 August 2003, section 19.11 "*the competitive pressures indicated above have exerted steady downward pressure on prices*".

¹⁷¹ The OFT notes that in recent merger cases (see, for example, Case M.3170 *Sapa / Remi Claeys Aluminium* [2003] and Case M.2404 *Elkem / Sapa* [2001]), the European Commission has reached the view that the geographic market for soft-alloy extrusion profiles (of which aluminium Spacer Bars is one particular type) may be EEA wide or that alternatively the UK may constitute a separate geographic market. However, the precise definition was left open in these cases since there were no competition concerns raised by the mergers under either definition.

¹⁷² 90 per cent by volume – equivalent to approximately 70-80 per cent by value.

¹⁷³ EWS letter dated 19 September 2003, sent in response to OFT enquiries made under section 26 on 29 August 2003, section 4.4.

this does not materially alter the OFT's analysis in this case, in terms of the Relevant Undertakings' shares of the relevant market.

Market shares at the production level

194. EWS estimates that at the production level, it has a share of the supply of metal Spacer Bars of approximately [...] [C] per cent, while UKae has a share of approximately [...] [C] per cent¹⁷⁵. Thus their combined market share at the production level is in the region of 50 per cent.

Market shares at the distribution level

195. EWS estimates that at the distribution level, it has a share of the supply of metal Spacer Bars of approximately [...] [C] per cent, and that the other Relevant Undertakings have shares as follows:

- UKae [...] [C] per cent¹⁷⁶
- Thermoseal [...] [C] per cent
- Ulmke [...] [C] per cent
- DQS [...] [C] per cent¹⁷⁷.

196. According to EWS' estimates, therefore, the estimated combined share of the distribution of metal Spacer Bars for all of the Parties is in the region of 60 per cent¹⁷⁸.

F. Relevant case law in relation to agreements and/or concerted practices

Agreement 'and/or' concerted practice

197. The ECJ has confirmed that it is not necessary, for the purposes of finding an infringement, to characterise conduct as exclusively an agreement or a concerted practice¹⁷⁹. The concepts of agreement and concerted practice are not mutually exclusive and there is no rigid dividing line between the two. 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'*¹⁸⁰.

¹⁷⁴ Replies from Thermoseal dated 24 March 2004, sent in response to OFT informal enquiries dated 5 March 2004, paragraph 1.4.

¹⁷⁵ EWS representations dated 6 October 2004, paragraph 7.9.

¹⁷⁶ Note that this figure includes sales of other brands of Spacer Bars, not manufactured by UKae.

¹⁷⁷ EWS representations dated 6 October 2004, paragraph 7.23.

¹⁷⁸ Note that this figure includes sales of other brands of Spacer Bars, not manufactured by EWS – since as described in paragraphs 14, 22 and 30 above Ulmke, DQS and Thermoseal distribute other manufacturers' Spacer Bars in addition to those manufactured by EWS.

¹⁷⁹ Case T -7/89 *Hercules Chemicals v European Commission* [1991] ECR II-1711, paragraph 264; Case T-1/89 *Rhone Poulenc v European Commission* [1991] ECR II-867, paragraph 127; Case T-305/94 *Limburgse Vinyl Maatschappij v European Commission* [1999] ECR II 931, paragraph 697.

¹⁸⁰ Case C-49/92P *European Commission v Anic Participazioni SpA* [1999] ECR I-4125, paragraph 131.

198. The ECJ further held in *Anic* that:

*'The list in Article [81(1)] is intended to apply to all collusion between undertakings, whatever form it takes. There is continuity between the cases listed. The only essential thing is the distinction between independent conduct, which is allowed, and collusion, which is not, regardless of any distinction between the types of collusion.'*¹⁸¹

199. This is particularly (but not exclusively) the case in complex infringements involving a series of measures by several undertakings over a period of time which manifests itself both in agreements and concerted practices with a common objective.

200. It is therefore not necessary for the OFT to come to a conclusion as to whether the behaviour of the Parties specifically constitutes an agreement or a concerted practice in order to demonstrate an infringement of the Chapter I prohibition in the present case.

201. In its Original Representations, EWS alleged that there is no judicial support for the OFT's statement in paragraph 197 above, that a general principle exists whereby the OFT is not required to reach a conclusion as to whether the behaviour of the Parties specifically constitutes an agreement or a concerted practice in order to demonstrate an infringement of the Chapter I prohibition. EWS stated that *'a proper examination of the case law reveals that such a principle is relevant only to complex cartels of long duration'*¹⁸². To support this assertion, EWS quoted from two cases which were complex and of long duration – *PVC II*¹⁸³, in which the European Court of First Instance (the 'CFI') held that, *'In the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely'* and *Citric acid*¹⁸⁴, in which the Commission stated that *'It is not necessary, particularly in the case of a **complex infringement of long duration**, that the Commission characterise it as exclusively one or other of these forms of illegal behaviour...'* (emphasis added by EWS)¹⁸⁵.

202. However, the OFT considers that EWS' interpretation of the case law on this issue is incorrect. The Commission's decision in *Citric acid* made it clear that the precise characterisation *'is not necessary, particularly in the case of a complex infringement of long duration'* (emphasis added). This does not mean that such a characterisation is necessary where the infringement is of short duration.

¹⁸¹ *Ibid*, paragraph 108.

¹⁸² EWS representations dated 6 October 2004, paragraph 3.15.

¹⁸³ Case T-305/94 *et seq Limburgse Vinyl Maatschappij v European Commission* [1999] ECR II 931.

¹⁸⁴ *Citric Acid Cartel* ([2002] OJ L239/18, 6 September 2002.

¹⁸⁵ EWS representations dated 6 October 2004, paragraph 3.16.

203. Indeed, the Competition Appeal Tribunal ('CAT') has confirmed in its judgments in both *Replica Kit*¹⁸⁶ and *Argos/Littlewoods*¹⁸⁷ that:

'It is trite law that it is not necessary for the OFT to characterise an infringement as either an agreement or a concerted practice: it is sufficient that the conduct in question amounts to one or the other.'

204. By this statement, the CAT makes it clear that it is indeed a general principle that such a characterisation is unnecessary.

205. Notwithstanding this general principle, the OFT is in addition able to demonstrate in the present case that the Parties' behaviour amounted both to an agreement and, at the very least, a concerted practice, as discussed below.

Single infringement where acts are in pursuit of a common plan

206. Where a group of undertakings pursues a common plan involving at the same time agreements or concerted practices it is not necessary to split up 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.

207. In *Anic*¹⁸⁸, the ECJ stated:

'When...the infringement involves anti-competitive agreements and concerted practices, the Commission must, in particular, show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk.'

208. Further, an undertaking that has taken part in an agreement or concerted practice through conduct of its own,

*'which was intended to bring about the infringement as a whole [will] also be responsible, throughout the entire period of its participation in that infringement, for conduct put into effect by other undertakings in the context of the same infringement'*¹⁸⁹.

209. Moreover, the fact that a party may come 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 a continuing single overall infringement¹⁹⁰.

¹⁸⁶ *JJB Sports PLC v Office of Fair Trading* [2004] CAT 17, paragraph 644.

¹⁸⁷ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, paragraph 665.

¹⁸⁸ Case C-49/92P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, paragraph 87.

¹⁸⁹ *Ibid*, paragraph 83.

¹⁹⁰ Case C-246/86 *Belasco v European Commission* [1989] ECR 2117 paragraphs 10-16.

Agreements

210. An agreement within the meaning of the Chapter I prohibition exists in circumstances where there is a concurrence of wills in that a group of undertakings adhere to a common plan that limits or is likely to limit their individual commercial freedom by determining lines of mutual action or abstention from action¹⁹¹. This is irrespective of the manner in which the parties' intention to behave on the market in accordance with the terms of that agreement is expressed¹⁹².
211. There is neither a requirement for the agreements to be legally binding or formal, nor for them to contain any enforcement mechanisms¹⁹³. An agreement may be express or implied from the conduct of the parties¹⁹⁴. As held by the CFI, for an agreement to exist, '*it is sufficient if the undertakings in question have expressed their joint intention to conduct themselves on the market in a specific way*'¹⁹⁵. An agreement may consist not only of an isolated act, but also of a series of acts or a course of conduct¹⁹⁶.
212. An 'agreement' does not have to be a formal written agreement to be covered by the Chapter I prohibition. The prohibition is intended to catch a wide range of agreements and concerted practices including oral agreements and gentleman's agreements as, by their nature, anti-competitive agreements are rarely written down¹⁹⁷.
213. A finding of an agreement (and/or a 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 agreement¹⁹⁸ – the parties may show varying degrees of

¹⁹¹ See the CFI decision (subsequently upheld by the ECJ) in Case T-41/96 *Bayer AG v European Commission* [2000] ECR II-3383, paragraph 69. See also the judgment of the CAT in *JJB Sports plc v OFT and Allsports Ltd v OFT* [2004] CAT 17 ('*Replica Kit*'), paragraphs 156 and 637.

¹⁹² Joined cases T-305/94 etc. *Limburgse Vinyl Maatschappij NV and others v European Commission* ('*PVC II*') [1999] ECR II-931, paragraph 715.

¹⁹³ *Soda-ash/Solvay*, CFK OJ [1991] L 152/16, [1994] 4 CMLR 645, paragraph 11; *PVC* [1994] OJ L 239/14, paragraph 30.

¹⁹⁴ Case 41/69 *ACF Chemiefarma v European Commission* [1970] ECR 661 at, for example, paragraphs 110-114; Case T-7/89 *Hercules Chemicals v European Commission* [1991] ECR II-1711 paragraphs 256-258.

¹⁹⁵ Case T-7/89 *Hercules v European Commission* [1991] ECR II-1711, paragraph 256; Case T-41/96 *Bayer AG v European Commission* [2000] ECR II-3383, paragraph 69. See also the *Replica Kit* judgment [2004] CAT 17, paragraph 156.

¹⁹⁶ Case C-49/92P *European Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 81.

¹⁹⁷ See '*Agreements and concerted practices*' (OFT401, December 2004), paragraph 2.7. See also the judgment of the ECJ regarding gentlemen's agreements in Case C-42/69 *ACF Chemiefarma NV v Commission* [1970] ECR 661 (in particular paragraphs 106-114). See also the European Commission's decision in, for example, *Citric Acid Cartel* ([2002] OJ L239/18, 6 September 2002), paragraph 137.

¹⁹⁸ Case C-49/92P *European Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 80; Case T-28/99 *Sigma Technologie di rivestimento v European Commission* [2002] ECR II-1845 paragraph 40.

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 which is manifestly anti-competitive does not relieve that party of responsibility for it¹⁹⁹.

Concerted practices

214. The Chapter I prohibition also applies in respect of concerted practices. A concerted practice does not require an actual agreement (whether express or implied) to have been reached. A concerted practice has been defined by the ECJ as:

'...a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition'²⁰⁰.

215. Economic operators are required to maintain independence. This requirement of independence strictly precludes:

'any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market'²⁰¹.

216. Whilst the concept of a concerted practice implies the existence of reciprocal contacts, the CFI has stated that:

'that condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it, or at the very least, accepts it'²⁰².

217. The concept of a concerted practice must be understood in light of the principle that each economic operator must determine independently the policy it intends to adopt on the market²⁰³. The ECJ has stated that there is a presumption (which it is for the parties to rebut) that an undertaking which remains active on the market has taken into account information exchanged with its competitors in determining its conduct on that market²⁰⁴.

¹⁹⁹ Case T-305/94 *et seq Limburgse Vinyl Maatschappij v European Commission* [1999] ECR II-931, paragraph 773; Case T-141/89 *Trefileurope v European Commission* [1995] ECR II-791, paragraphs 60 and 85. See also Case C-246/86 *Belasco v European Commission* [1989] ECR 2117, paragraphs 10-16, as discussed in paragraph 209 above.

²⁰⁰ Case 48/69 *ICI Ltd. v European Commission* [1972] ECR 1969, paragraph 64. See also the *Replica Kit* judgment [2004] CAT 17, paragraph 151.

²⁰¹ Joined Cases 40/73 *et seq Suiker Unie and others v European Commission* [1975] ECR 1663, paragraph 174.

²⁰² Cases T-25/95 etc. *Cimenteries CBR v Commission* [2000] ECR II-491 at paragraph 1849.

²⁰³ Case C-199/92 *P etc. Huls AG v. Commission* [1999] ECR I-4287.

²⁰⁴ Case C-199/92 *P etc. Huls AG v. Commission* [1999] ECR I-4287 at paragraph 161 *et seq*, and Case T-25/95 etc *Cimenteries CBR v. Commission* [2000] ECR-II 491, paragraph 1910.

G. Evidence of infringement

218. In Part I E above, the OFT set out the evidence for the infringement in the form of a description of events before, during and after the Meeting, drawn from witness statements and contemporaneous documentary evidence. In this section, the OFT demonstrates the significance of that evidence, and the inferences which the OFT draws from it.

General comments on the evidence and standard of proof

219. In considering the standard of proof required to establish the infringement outlined in this Decision, the OFT has taken note of the ruling by the CAT in the *Replica Kit* appeals²⁰⁵. In particular, at paragraph 204 of the judgment, the CAT comments as follows:

'It also follows that the reference by the Tribunal to "strong and compelling" evidence at [109] of Napp should not be interpreted as meaning that something akin to the criminal standard is applicable to these proceedings. The standard remains the civil standard. The evidence must however be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking concerned is entitled.'

220. In using the term 'strong and compelling' to describe its evidence in this Decision, the OFT has followed the same principle. The OFT considers that the evidence set out in this Decision is sufficient to overcome the presumption of innocence to which the Parties are entitled.

221. The main evidence on which this Decision is based comprises:

- copies of internal correspondence and diary entries from EWS and DQS leading up to the Meeting on 20 November 2002 at which the price fixing and market sharing strategies were agreed;
- copies of correspondence from EWS to the other three Parties, and internal EWS documents, following the Meeting on 20 November 2002, confirming the actions agreed at the Meeting;
- witness statements and general information in relation to the infringements provided by two of the Parties (Ulmke and Thermoseal) in support of applications for leniency (the credibility and corroborative value of the witness evidence is discussed at paragraphs 343 to 384 below);
- information and documents from the two remaining Parties provided in response to requests made under section 26 of the Act; and
- written representations on the Original Notice from EWS, Thermoseal, and DQS and oral representations on the Original Notice from EWS, containing

²⁰⁵ *JJB Sports Plc v Office of Fair Trading, Allsports Limited v Office of Fair Trading* [2004] CAT 17, paragraph 204.

further information, documents and witness statements in relation to the infringement.

Analysis of the significance of the evidence for each part of the overall infringement

222. The OFT has concluded on the basis of the evidence cited in this Decision that the Parties have infringed the Chapter I prohibition by participating in an agreement and/or concerted practice during November/December 2002 in the market for the supply of aluminium Spacer Bars in the UK comprising:

- (a) customer allocation/market sharing in relation to Target Customers of UKae for aluminium Spacer Bars;
- (b) fixing a target price in relation to those Target Customers, for the most popular sizes of aluminium Spacer Bars; and
- (c) a non-compete arrangement, which included the fixing of a minimum price, in relation to Other Customers, for the most popular sizes of aluminium Spacer Bars.

223. This section examines the evidence for and against each of the three parts of the overall infringement identified in paragraph 222 above, explaining why in the OFT's view there is strong and compelling evidence that each of these constituted a sub-agreement and/or concerted practice which infringed the Chapter I prohibition. The Parties' arguments regarding the credibility of the witness evidence and the reliance that may be placed on it are discussed at paragraphs 343 to 384 below.

224. The OFT notes that in its Supplementary Representations²⁰⁶, Thermoseal has confirmed that it accepts much of the primary evidence adduced by the OFT and that it admits participation in an infringement of the Chapter I prohibition²⁰⁷. Its Supplementary Representations are provided solely by way of plea in mitigation.

(1) Customer allocation/market sharing

225. The first element of the overall infringement is a horizontal customer allocation/market sharing agreement and/or concerted practice. At the Meeting on 20 November 2002, the Parties reached an understanding that they would allocate certain named customers of their competitor UKae between themselves on an exclusive basis.

226. In particular, the Parties:

- (i) planned a multi-lateral meeting at which they agreed to discuss the low prices UKae was charging and the actions they could take together in order to combat these – see paragraphs 77 to 84 above;

²⁰⁶ Thermoseal representations dated 20 December 2005, paragraph 3.

²⁰⁷ *Ibid*, paragraph 33.

- (ii) at the request of Howard Worthington of EWS, took to the Meeting lists of UKae accounts that could be targeted – see paragraphs 85 to 88 above;
- (iii) attended a multi-lateral meeting at which they discussed the low prices UKae had been charging, UKae's precarious financial situation, and how they could best exploit the latter in order to combat the former – see paragraphs 99 to 106 above;
- (iv) read out lists of existing UKae customers that they proposed to target – see paragraphs 107 to 112 above; and
- (v) discussed these UKae customers and agreed which customers each of the Parties should exclusively target – see paragraphs 108 to 114 above.

Customer allocation/market sharing – supporting evidence

227. The evidence of customer allocation/market sharing arises from the sources set out in the following table.

Issue	Evidence	Source document
Customer lists brought to Meeting	Howard Worthington of EWS asked his secretary to ensure that each of the distributors brought the names of at least 6 UKae accounts to the Meeting: <i>'List of 20 o[r] so of UKae's a/cs., ie 6 BIG fr each, or as many as you like'</i>	Document taken from EWS during OFT's s28 visit on 5 December 2002. Inspection reference: NB/17 page 18.
Customer lists brought to Meeting	Gwain Paterson of Thermoseal confirms that in a telephone call, <i>'[Howard Worthington of EWS] asked me to bring to the meeting a list of potential customers of UKae that Thermoseal might be able to target. I asked Mark Hickox [a Thermoseal colleague] to draw a list up of some names of companies that Thermoseal would have liked to supply which we brought along to the meeting.'</i>	Gwain Paterson's statement, 19 September 2003, paragraph 17.
Customer lists brought to Meeting	Martin Riley of Ulmke states that at the meeting on 19 November 2002, Howard Worthington of EWS [regarding the plan to attack UKae's customer base] <i>'asked that we should bring to the meeting the next day a list of UKae customers that we would be able to target.'</i>	Martin Riley's second statement, 29 August 2003, paragraph 21.
Customer lists brought to Meeting	Chris Hollingsworth of Ulmke states that at the meeting on 19 November 2002, <i>'Howard suggested that we should bring to the meeting the next day a list of UKae customers that we would be able to target.'</i>	Chris Hollingsworth's second statement, 15 August 2003, paragraph 8.
Customer lists read out at Meeting	Martin Riley of Ulmke states that at the Meeting on 20 November 2002, <i>'When the lists of current UKae target customers were offered up in turn by those present, it was a particularly awkward part of the meeting. HW commenced by verbally listing major prospects that EWS was currently targeting. Thermoseal had a prepared list of targets on A4 paper that Mark Hickcox (sic) referred to when he suggested targets. There was a small amount of conversation around each target to establish if in fact it was a UKae customer. At this point it became clear that not every suggested target was solely a UKae customer as there were many joint customers who seemed to be dual sourcing. I remember that somebody, possibly Mark Hickox, suggested that John Hesketh (as he was the former UKae Sales Director) ought to use his list. John Hesketh did in fact have,</i>	Martin Riley's second statement, 29 August 2003, paragraphs 23 to 25.

	<i>what appeared to be, an extensive list of UKae customers printed out on computer listing paper. I assumed this was something he had had in his possession when he left UKae several months earlier. John Hesketh went through the print out and proposed only a few names from it as potential targets for Thermoseal and us. Mark Hickox suggested that John Hesketh appeared to be only selecting a few targets from the list for us and keeping the rest for himself. This comment generated quite a bit of light-hearted conversation. Eventually HW summarised the targets (he was taking notes) and stated that Ulmke had nothing on their list and asked me to name some targets. CEH and myself had decided, prior to the meeting, not to prepare a formal list and so instead we had a mental list of about 6 targets, which I then offered to the meeting.'</i>	
Customer lists read out at Meeting	Chris Hollingsworth of Ulmke states that <i>'At the meeting on 20 November 2002, each of the four companies present took it in turns to read out the names of the UKae's customers that they would be targeting. Martin and myself mentioned about eight names of potential targets for Ulmke. John Hesketh of DQS, formerly of UKae, had brought along and proceeded to read aloud from a printed list of UKae's customers from two years previously. This list contained a lot of out of date information as some of the customers mentioned on it were now supplied by others at the meeting, including Ulmke. The list of customers that DQS were to target, therefore, had to be narrowed down.'</i>	Chris Hollingsworth's second statement, 15 August 2003, paragraph 9.
Customer lists read out at Meeting	<i>'At the Distributors' Conference, Mr Worthington read out the list of UKae's customer accounts that he thought EWS was in the best position to target. The other distributors read out the list [sic] of customers they were best placed to target.'</i>	EWS representations dated 6 October 2004, paragraph 8.7.
Customer lists read out at Meeting	Gwain Paterson of Thermoseal states that <i>'Howard then outlined his strategy for fighting back against UKae in that we should all take five or six of UKae's customers and try to win that business from them by offering lower prices. He listed the accounts that EWS would target and each of the other companies at the meeting, including Thermoseal, then took it in turn to name their list of potential targets. I recall that John Hesketh of DQS had a large print out of UKae's customers, presumably one that he took with him when he left UKae. I also recall that this print out was a bit out of date. Before the meeting I had hoped to poach the names of some UKae customers from John Hesketh but the names that he read out were already commonly known in the market as being UKae accounts.'</i>	Gwain Paterson's statement, 19 September 2003, paragraph 19.
Customer lists read out at Meeting	John Hesketh of DQS states, <i>'I recall mentioning the names of potential customers...'</i>	Attachment to DQS representations dated September 2004, John Hesketh's statement, paragraph 31.
Customer allocation	Gwain Paterson of Thermoseal states that in a telephone call, <i>'Howard [Worthington of EWS] also outlined his strategy for fighting back, namely that each of the distributors would take five or six of UKae's customers and try to win that business by offering lower prices.'</i>	Gwain Paterson's statement, 19 September 2003, paragraph 17.
Customer allocation	Martin Riley of Ulmke states that at the Meeting on 20 November 2002, <i>'Our list was added to by means of discussion and in the end there were approximately 10 targets on our list'</i>	Martin Riley's second statement, 29 August 2003, paragraph 25.
Customer allocation	Chris Hollingsworth and Martin Riley of Ulmke state that <i>'We discussed which of UKae's customers each of us should target and the 10 UKae companies that Ulmke was to target were subsequently listed in a letter dated 21 November 2002 from Howard Worthington to me (document reference SAS16). Some of these targets were already customers, or have been</i>	Chris Hollingsworth's and Martin Riley's first statements, 20 December 2002, paragraph 21.

	<i>customers latterly of Ulmke, although not necessarily previously for aluminium spacer bars. Each of the other distributors present at the meeting offered up lists of their current UKae customers to target. They were then discussed amongst the attendees because some of us already provided products to UKae customers other than spacer bar. Each of the attendees selected some of the UKae customers and I presume that these were subsequently confirmed in writing in the same way as happened with Ulmke's targets. There was a general acceptance from those present not to target each other's existing UKae customers in order to avoid "friendly fire"</i>	
Customer allocation; exclusive targets agreed	Chris Hollingsworth of Ulmke states that <i>'At the end of the discussion each of the companies had a list of UKae's customers to target. It was agreed that we should not target the customers selected by any of the other companies at the meeting. The clear aim of all those present at the meeting was to remove as quickly as possible a large number of UKae's customers with the intention of further destabilising their cashflow'.</i>	Chris Hollingsworth's second statement, 15 August 2003, paragraph 9.
Customer allocation; exclusive targets agreed	Gwain Paterson of Thermoseal states that <i>'There was a general discussion among those present about who might be best placed to target certain customers and eventually all the companies present, including EWS, had an agreed set of customers that they would exclusively target as part of a concerted effort to knock UKae out of the market.'</i> Mr Paterson then lists, according to his recollection, the targets for Thermoseal, EWS, DQS and Ulmke.	Gwain Paterson's statement, 19 September 2003, paragraphs 19 to 21.
Customer allocation; targets agreed	Martin Riley of Ulmke states that <i>'Ulmke's targets that had been agreed at the meeting on 20 November 2002 were subsequently confirmed to us in writing by HW in a letter of 21 November 2002, referred to as SAS16.'</i>	Martin Riley's second statement, 29 August 2003, paragraph 29.
Customer allocation	EWS states that everyone present at the Meeting <i>'read out the list of customers they were best placed to target'.</i>	EWS representations dated 6 October 2004, paragraph 8.7.
Confirmed list of agreed target customers	A letter from EWS to Ulmke reads, <i>'Thanks for coming over for the EWS Distributors' Conference yesterday. Following our various conversations and meetings, I would just like to confirm that EWS will discount Ulmke Metals' current prices by [...] [C] p per metre on 15.5mm and 19.5 satin anodized tube for all of your target accounts, namely: ...'</i>	Document taken from Ulmke during OFT's s28 visit on 5 December 2002. Inspection reference: SAS/16.
Confirmed list of agreed target customers	EWS has accepted in its Original Representations that after the Meeting, it sent to each of the distributors a list of the UKae customers it had been agreed at the Meeting that they would target: <i>'...following the meeting, EWS...circulated to each distributor the list that related to it.'</i>	EWS representations dated 6 October 2004, paragraph 8.11.
Confirmed list of agreed target customers	An internal EWS memorandum lists the targets for EWS, Ulmke, Thermoseal and DQS.	Document taken from EWS during OFT's s28 visit on 5 December 2002. Inspection reference: SMB/1 (pages 1 & 2).
Confirmed list of agreed target customers	Another internal EWS memorandum states, <i>'With particular interest in UKae, I would just like to advise you that we have set the wheels in motion with a concerted four-man attack on designated targets and with pricing issues established.'</i> It is clear from the wording of this memorandum that the four Parties together agreed an attack on designated targets, with prices also agreed.	Document taken from EWS during OFT's s28 visit on 5 December 2002. Inspection reference: EW/47 and Attachment 28 to EWS letter dated 28 January 2003, sent in response to OFT enquiries made under s26 on 10 January 2003.

Confirmed focus on agreed target customers	A letter from EWS to Thermoseal reads, <i>'Thank you very much indeed to you and Mark [Hickox] for coming along to the Distributors' conference earlier in the week. I believe, generally speaking, the meeting went fairly well and that we can now focus on our targets'</i>	Document taken from Thermoseal during OFT's s28 visit on 5 December 2002. Inspection reference: TC/1.
Liaison on targeted customers	An e-mail from EWS to Thermoseal reads, <i>'Dear Mark, Thanks for your e-mail. Your contact at [...] [C] [an IG unit manufacturer / retail double glazing supplier, i.e. an existing or potential customer of EWS and Thermoseal] would be [...] [C]. His telephone number and address details are as follows:- [...] [C] (Direct Line) Please tread carefully as I know he is particularly keen to tie up the spacer tube contract and then move on to the georgian at a later date. He buys georgian 100% from UKae. Kind regards, Merv.'</i>	Document taken from EWS during OFT's s28 visit on 5 December 2002. Inspection reference: PJS/O21.
Evidence of market activity post Meeting	Sales reports, which describe points discussed during visits to customers, show that Thermoseal <i>'gained all Spacer Bar and sealant business'</i> of [...] [C] during a visit on 25 November 2002.	Document attached to letter dated 3 January 2003 from Thermoseal's legal representatives, in response to verbal request from OFT during its s28 visit on 5 December 2002.
Intention to draw up further customer lists and allocate customers	A letter from EWS to DQS reads, <i>'you will recall we will be meeting again on 15th January 2003, same time (11:00), same place, and it really would do your corner a great deal of justice if you did some homework and came up with a second list of where we should all attack'</i> .	Document taken from EWS during OFT's s28 visit on 5 December 2002. Inspection reference: SMB/1 page 6.
Intention to draw up further customer lists and allocate customers	Chris Hollingsworth and Martin Riley of Ulmke state that <i>'It was agreed between the participants at the meeting on 20 November (as recorded in SAS16) that the progress of the proposal would be reviewed at a further meeting to be held on 15 January 2003. As part of that review process it had been envisaged that we might add additional target customers to the list'</i>	Chris Hollingsworth's and Martin Riley's first statements, 20 December 2002, paragraph 28.
Intention to draw up further customer lists and allocate customers	A letter from EWS to Ulmke reads, <i>'These can be added to at the next meeting on the 15th January 2003, same time, same place.'</i>	Document taken from Ulmke during OFT's s28 visit on 5 December 2002. Inspection reference: SAS/16.

Customer allocation/market sharing – contrary evidence and arguments of the Parties

228. This section sets out the contrary evidence and the arguments advanced in rebuttal by the Parties in respect of customer allocation/ market sharing. The OFT also sets out its conclusions with regard to such evidence and/or arguments.

(a) DQS' assertion that it did not bring a list of UKae customers to the Meeting

229. In paragraphs 85 to 88 above, the OFT set out the evidence that each of the distributors was asked by EWS to bring to the Meeting on 20 November 2002 a list of UKae accounts that could be targeted. In paragraphs 107 to 114 above, the OFT set out the evidence that each of the distributors read out names of UKae customers from their lists, and that these customers were selected by and/or

allocated between the Parties so that each of the four Parties had an agreed set of customers that they would exclusively target as part of a concerted effort to eliminate UKae from the market.

230. DQS argued in its Original Representations that it did not prepare or produce at the Meeting on 20 November 2002 a list of UKae customers to be targeted:

*'DQS submits that whilst the other distributors present at the meeting had prepared lists of customers to target and produced these lists to the meeting, on no occasion did any of DQS' employees or officers produce a list of current UKae customers to target. The allegation that a list was prepared by DQS and produced to the meeting is denied by both John Hesketh and Jim Sander and no evidence has been provided to support the existence of such a list. Jim Sander and John Hesketh have each confirmed to the OFT that neither prepared any documents to take to the meeting and no notes were taken during the meeting.'*²⁰⁸.

231. It is not the OFT's case, and nor is it necessary for the finding of an infringement, that DQS prepared a list of UKae customers, or that DQS 'produced' (i.e. circulated) its list of UKae customers to the other distributors present at the Meeting. Rather, the OFT contends that, whilst all the others present at the Meeting did specifically prepare for the Meeting lists of UKae customers that they could target, DQS relied on a list of UKae customers that it would seem was already in John Hesketh's possession from his previous employment with UKae, from which Mr Hesketh read out names. There is strong evidence to support this:

- from the statement given by Chris Hollingsworth of Ulmke (see paragraph 109 above) – *'... each of the four companies present took it in turns to read out the names of the UKae's customers that they would be targeting ... John Hesketh of DQS, formerly of UKae, had brought along and proceeded to read aloud from a printed list of UKae's customers from two years previously. This list contained a lot of out of date information as some of the customers mentioned on it were now supplied by others at the meeting, including Ulmke. The list of customers that DQS were to target, therefore, had to be narrowed down'*²⁰⁹;
- from the statement given by Martin Riley of Ulmke (see paragraph 110 above) – *'I remember that somebody, possibly Mark Hickox, suggested that John Hesketh (as he was the former UKae Sales Director) ought to use his list. John Hesketh did in fact have, what appeared to be, an extensive list of UKae customers printed out on computer listing paper. I assumed this was something he had had in his possession when he left UKae several months earlier. John Hesketh went through the print out and proposed only a few names from it as potential targets for Thermoseal and us. Mark Hickox suggested that John Hesketh appeared to be only selecting a few targets from the list for us and keeping the rest for himself. This comment generated quite a bit of light-hearted conversation'*²¹⁰;

²⁰⁸ DQS representations dated September 2004, paragraph 4.10.

²⁰⁹ Chris Hollingsworth's second statement, 15 August 2003, paragraph 9.

²¹⁰ Martin Riley's second statement, 29 August 2003, paragraph 24.

- from the statement given by Gwain Paterson of Thermosteel (see paragraph 111 above) – *'each of the other companies at the meeting, including Thermosteel, then took it in turn to name their list of potential targets. I recall that John Hesketh of DQS had a large print out of UKae's customers, presumably one that he took with him when he left UKae. I also recall that this print out was a bit out of date. Before the meeting I had hoped to poach the names of some UKae customers from John Hesketh but the names that he read out were already commonly known in the market as being UKae accounts'*²¹¹;
- from EWS' admission in its Original Representations that everyone present at the Meeting *'read out the list of customers they were best placed to target'*²¹²; and
- from the Howard Worthington (EWS) letter sent to John Hesketh on 21 November 2002 (see paragraph 135 above), in which he stated *'you will recall we will be meeting again on 15th January 2003...and it really would do your corner a great deal of justice if you did some homework and came up with a **second list** of where we should all attack'* (emphasis added)²¹³.

232. In the oral representations in support of its Supplementary Representations, DQS has sought to argue that a list of UKae customers was not even brought by John Hesketh to the Meeting. However, DQS has provided little in the way of credible evidence to support this claim, arguing only that (i) the OFT has *'no evidence ... that a request was made to John Hesketh to prepare or bring a list of customers to the meeting'*, (ii) John Hesketh was not asked to prepare a list (as noted above, the OFT is not alleging that the list was prepared for the Meeting) and (iii) Jim Sander does not recall John Hesketh producing a list of customers to target (again, the OFT is not alleging that the list was actually 'produced' i.e. circulated at the Meeting)²¹⁴.

233. DQS also draws attention to the e-mail dated 9 May 2003 from John Hesketh to the OFT²¹⁵, in which he stated *'...I can confirm that I did not take any documents to this meeting.'* However, the OFT considers that the evidence presented in paragraph 231 above is strong and compelling evidence that John Hesketh (or, in the alternative, Jim Sander) did bring a list of UKae customers to the Meeting and that John Hesketh read out names from that list. The evidence comes from a variety of sources and there is strong corroboration. The OFT therefore maintains that its account of events is correct.

²¹¹ Gwain Paterson's statement, 19 September 2003, paragraph 19.

²¹² EWS representations dated 6 October 2004, paragraph 8.7.

²¹³ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: SMB/1 page 6.

²¹⁴ DQS oral representations dated 9 January 2006, pages 7 to 9.

²¹⁵ E-mail dated 9 May 2003 from DQS to the OFT.

234. Notwithstanding this, this aspect of the agreement and/or concerted practice is not central to the finding of an infringement and it would not alter this finding even if Mr Hesketh had not brought the list and/or read out names from it. The fact that John Hesketh mentioned the names of potential customers at the Meeting is sufficient to establish DQS' participation in the customer allocation / market sharing part of the overall infringement. John Hesketh has admitted this action in his statement attached to DQS' Original Representations:

*'I agreed that DQS would continue to concentrate on winning the customers that it was in the process of securing orders from. I recall mentioning the names of potential customers that DQS was in the process of negotiating with. I believe that I mentioned that DQS were particularly interested in securing new orders from [...] [C] and [...] [C]'*²¹⁶.

235. The OFT notes that the two companies which Mr Hesketh states he mentioned at the meeting, were included in the list of companies allocated to DQS, set out in EWS' internal memorandum of 21 November 2002²¹⁷.

236. Furthermore, the participation of DQS in the customer allocation / market sharing part of the overall infringement is further supported by the following statements from Mr Hesketh and Mr Sander respectively, to the effect that DQS agreed at the Meeting that it would not target the UKae customers allocated to the other Parties:

*'Since the customers on the lists of the other distributors present were not obvious potential DQS customers I agreed that DQS would not target them'*²¹⁸; and

*'It was agreed that DQS would not target the customers that were on the lists of the other distributors present'*²¹⁹.

(b) *Degree of intention to participate*

237. Thermoseal has stated that it had no *'realistic or practical intention to act upon the list'*, but that it *'entered into the discussion as introduced by Howard Worthington as [it] did not want [its] competitors to know that Thermoseal was not in a position to actually implement Howard Worthington's plan'*²²⁰.

238. Furthermore, EWS has stated that there is evidence to suggest that at least some of the Parties may have had no 'subjective intention' to implement some or all of the understandings reached at the Meeting of 20 November.²²¹

²¹⁶ Attachment to DQS representations dated September 2004, John Hesketh's statement, paragraph 31.

²¹⁷ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: SMB/1 (pages 1 & 2).

²¹⁸ Attachment to DQS representations dated September 2004, John Hesketh's statement, paragraph 33.

²¹⁹ Attachment to DQS representations dated September 2004, Jim Sander's statement, paragraph 19.

²²⁰ Thermoseal representations dated 1 October 2004, paragraphs 14 and 15.

239. However, an absence of subjective intention, whether on the part of all or only some of the Parties, does not preclude a finding that an agreement and/or concerted practice was formed between the Parties in relation to this infringement. This is dealt with in more detail in section II.H.(1) on Evidence of intent, at paragraphs 387 to 402 below.

(c) *DQS' suggestion that it did not participate in the customer/market sharing discussions and that it was not allocated UKae customers to target*

240. Although DQS has accepted that it *'agreed that DQS would not target the UKae customers on the list [sic] of the other Parties...'*²²², it has further argued in its Original Representations and in the oral representations in support of its Supplementary Representations that it *'did not participate in discussions concerning how to allocate UKae customers and how the aluminium spacer bar market should be shared'*, and that *'DQS was not allocated UKae customers to target and it did not agree to target any specific customers of UKae'*²²³. Again, there is strong evidence to contradict DQS' assertions:

- from the statement given by Chris Hollingsworth of Ulmke (see paragraph 109 above) – *'... each of the four companies present took it in turns to read out the names of the UKae's customers that they would be targeting ... At the end of the discussion each of the companies had a list of UKae's customers to target.'*²²⁴ (emphasis added);
- from the statement given by Martin Riley of Ulmke (see paragraph 110 above) – *'John Hesketh went through the print out and proposed only a few names from it as potential targets for Thermoseal and us ... Mark Hickox suggested that John Hesketh appeared to be only selecting a few targets from the list for us and keeping the rest for himself ... Eventually HW summarised the targets...'*²²⁵;
- from the statement given by Gwain Paterson of Thermoseal (see paragraph 111 above) – *'each of the other companies at the meeting, including Thermoseal, then took it in turn to name their list of potential targets ... There was a general discussion among those present about who might be best placed to target certain customers and eventually all the companies present, including EWS, had an agreed set of customers that they would exclusively target as part of a concerted effort to knock UKae out of the market'*²²⁶ (emphasis added);

²²¹ EWS representations dated 6 October 2004, paragraphs 12.20 to 12.22.

²²² DQS representations dated September 2004, paragraph 4.14.

²²³ *Ibid*, paragraph 4.13.

²²⁴ Chris Hollingsworth's second statement, 15 August 2003, paragraph 9.

²²⁵ Martin Riley's second statement, 29 August 2003, paragraphs 24 to 25.

²²⁶ Gwain Paterson's statement, 19 September 2003, paragraph 19.

- from Gwain Paterson's recollection of some of the customers DQS agreed to target (see paragraph 111 above)²²⁷;
- from John Hesketh's admission in his statement attached to DQS' Original Representations that he *'agreed that DQS would continue to concentrate on winning the customers that it was in the process of securing orders from'* and that he *'mention[ed] the names of potential customers that DQS was in the process of negotiating with'*²²⁸; and
- from the Howard Worthington (EWS) internal memo sent to Mervyn Richards on 21 November 2002 (see paragraph 126 above), in which he set out the lists of targets agreed at the Meeting, including those for DQS²²⁹.

241. In addition to this, there is no evidence to suggest (and DQS has not suggested) that DQS either objected to the proposals or left the Meeting early.

(d) Exclusivity of customers

242. Although, as noted in paragraph 114 above, EWS has accepted that an agreement not to target each other's allocated customers would have been a logical corollary of the customer allocation strategy, it has added that such an agreement:

*'...is...hard to reconcile with the fact that Mr Paterson's evidence for Thermoseal is clear that he cannot remember (and presumably took no record) of the customers that Ulmke or DQS thought they would be best placed to win'*²³⁰.

243. EWS further argued that there is a

*'question of whether, in the course of the instant in time during which the November meeting was held, any agreement was reached between the distributors inter se whereby one distributor was not permitted to target a customer on another's list'*²³¹.

244. EWS argued that such an allegation is inconsistent with the fact that the distributors were not sent lists of customers identified for the other Parties (see section (f) below), and also that it depends on the witness statement of Mr Hollingsworth which is not clear on its face as to the identity of the Parties between whom agreement was reached and which has the caveat that his recollection is poor.

245. In the OFT's view it is unsurprising that Mr Paterson should have been unable to recall all of the names of customers allocated to other Parties several months after

²²⁷ *Ibid*, paragraph 21.

²²⁸ Attachment to DQS representations dated September 2004, John Hesketh's statement, paragraph 31.

²²⁹ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: SMB/1 (pages 1 & 2).

²³⁰ EWS representations dated 6 October 2004, paragraphs 8.10 and 8.11.

²³¹ *Ibid*, paragraphs 15.8, 15.9 and 15.11.

the Meeting. The OFT remains of the view that there is strong and compelling evidence that UKae's customers were allocated exclusively amongst the Parties:

- Chris Hollingsworth of Ulmke states that *'At the end of the discussion each of the companies had a list of UKae's customers to target. It was agreed that we should not target the customers selected by any of the other companies at the meeting'*²³² (emphasis added);
- Gwain Paterson of Thermoseal states that *'There was a general discussion among those present about who might be best placed to target certain customers and eventually all the companies present, including EWS, had an agreed set of customers that they would **exclusively target** as part of a concerted effort to knock UKae out of the market'*²³³ (emphasis added);
- the EWS internal memorandum dated 21 November 2002 from Howard Worthington to Mervyn Richards clearly set out the four separate lists of targets, with a separate list for each Party²³⁴;
- John Hesketh of DQS states that: *'Since the customers on the lists of the other distributors present were not obvious potential DQS customers I agreed that DQS would not target them'*²³⁵ (emphasis added); and
- Jim Sander of DQS states that: *'It was agreed that DQS would not target the customers that were on the lists of the other distributors present'*²³⁶ (emphasis added).

246. Moreover, there would have been little point in each of the Parties agreeing to target particular customers if there was no shared understanding amongst the Parties that they would refrain from soliciting custom from each other's allocated UKae customers in addition to their own agreed targets.

(e) *Passive sales*

247. EWS has argued that it is important that *'there is no suggestion from the OFT that any alleged party was ever prohibited from making passive sales to any customer'*²³⁷.

248. The OFT's conclusions in relation to the allocation of UKae customers are not dependent on whether the Parties' understanding included a prohibition of passive sales.

²³² Chris Hollingsworth's second statement, 15 August 2003, paragraph 9.

²³³ Gwain Paterson's statement, 19 September 2003, paragraph 19.

²³⁴ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: SMB/1 (pages 1 & 2).

²³⁵ Attachment to DQS representations dated September 2004, John Hesketh's statement, paragraph 33.

²³⁶ Attachment to DQS representations dated September 2004, Jim Sander's statement, paragraph 19.

²³⁷ EWS representations dated 6 October 2004, paragraph 15.5.

249. Even if the OFT's findings were dependent on such an understanding, it is unclear from the evidence relating specifically to the targeting and allocation of UKae's customers whether the understanding between the Parties as regards this aspect of the infringement did or did not extend to a prohibition of passive sales. The OFT notes, however, that in relation to sales to Other Customers (as to which, see paragraphs 323 to 342 below), there is clear evidence in the portion of Gwain Paterson's statement which deals with [...] [C] to suggest that the understanding between the Parties included a prohibition of passive sales. In his statement, Mr Paterson records that:

*'Following the meeting on 20 November, one customer, [...] [C], asked for quotes for black aluminium spacer bar from a number of distributors, including Thermoseal and EWS. Howard telephoned Mark in late November/early December 2002 to ask if that customer 'belonged' to Thermoseal and if so what price EWS should quote as they did not want to undercut Thermoseal. We had already decided to quote a low price anyway, however EWS did not want to upset us as we were buying EWS products. Mark e-mailed EWS to confirm it was a Thermoseal customer although we cannot now find a copy of that e-mail'*²³⁸.

250. As regards the application of the exclusion for vertical agreements and/or the EC vertical agreements block exemption (the 'Block Exemption'), see paragraphs 467 to 503 below.

(f) *Individual lists of customers sent to the distributors*

251. EWS has argued that it is significant that, while the discussion as to who was best placed to target a customer took place in the presence of the other distributors, the lists (which detailed only that distributor's targets and not those of the others) were sent to the distributors by EWS on an individual basis. It argues that this is consistent with the fact they were vertical arrangements put in place by a manufacturer with each of its distributors²³⁹.

252. However, it is irrelevant that the lists of exclusive customers were sent individually to the other three Parties at the Meeting. By EWS' own admission, the Parties discussed together at the Meeting which companies should be targeted by each of the Parties:

*'At the Distributors' Conference, Mr Worthington read out the list of UKae's customer accounts that he thought EWS was in the best position to target. The other distributors read out the list [sic] of customers they were best placed to target'*²⁴⁰.

253. This extract confirms that EWS participated in the market sharing infringement acting as a distributor, i.e. that this aspect of the overall infringement constituted a horizontal agreement and/or concerted practice. Indeed, EWS tacitly

²³⁸ Gwain Paterson's statement, 19 September 2003, paragraph 25.

²³⁹ EWS representations dated 6 October 2004, paragraph 12.23.

²⁴⁰ *Ibid*, paragraph 8.7.

acknowledges that it was acting as a distributor in this connection by stating '*The other distributors*', thereby confirming that it saw itself as acting as a distributor rather than as a manufacturer for this discussion.

254. This was reinforced during EWS' oral representations to the OFT, during which EWS' legal representatives stated:

*'The first evidential point which I think is wholly uncontroversial is that there was fierce competition for all the distributors and EWS before the meeting...I think it is completely uncontroversial that the companies went into the meeting on 20 November as competitors'*²⁴¹ (emphasis added).

255. There is strong and compelling evidence, detailed above, that targets for each of the Parties were agreed at the Meeting. Each Party's agreement to pursue its selected targets was sufficient to influence the future conduct on the market of the other three Parties, and as such constituted an infringement of the Chapter I prohibition.

256. Indeed, EWS has accepted in its Original Representations that the Parties discussed at the Meeting which of them would be best placed to target each of the UKae customers:

*'Any "discussion" was limited to trying to identify whether the distributor concerned in fact had the best customer relationship with the account concerned or whether, in fact, another distributor would be better placed to win the business'*²⁴².

257. As the European Court of Justice unequivocally stated in *Suiker Unie v Commission*, '*...each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells*'. It is clear from the foregoing that the Parties did not determine independently the UKae customers that each of them intended to target²⁴³.

258. The OFT deals in more detail with EWS' arguments on vertical arrangements in the section on the potential impact of market sharing on inter brand competition, at paragraph 264 below, and in section II.H(5) on the application of the exclusion for vertical agreements and the Block Exemption, at paragraphs 467 to 503 below.

(g) *Degree of implementation*

259. Thermosteel has stated that it

*'did not pursue any of the companies agreed for us, save (unsuccessfully so far) for Custom Glass'*²⁴⁴.

²⁴¹ EWS oral representations dated 14 October 2004, pages 13 to 14 of transcript.

²⁴² EWS representations dated 6 October 2004, paragraph 8.7.

²⁴³ Joined Cases 40/73 *et seq Suiker Unie v European Commission* [1975] ECR 1663, at paragraph 173.

260. EWS has also stated that no concerted practice can be found to exist because there is no direct evidence that the Parties implemented the understandings reached between them on the market; and that such implementation cannot be presumed.

261. The presumption that when determining its conduct on the market an undertaking will take account of information exchanged with its competitors so long as it remains active on the market is discussed in section II.H(4)(b), at paragraphs 431 to 440 below. It follows from this presumption that had the OFT's intervention not brought the infringement to an abrupt end in December 2002 / January 2003, the Parties would have taken further steps to implement the market sharing strategy agreed at the Meeting on 20 November 2002. The OFT notes that the Parties had planned a further meeting on 15 January 2003 at which it was intended that they would continue and reinforce the agreements and/or concerted practices arising out of the first meeting. Moreover, it would create a perverse incentive if the OFT were required to delay before intervening in unlawful activity in order to ensure that the presumption of implementation arose.

(h) The suggestion that the targets would have been targeted anyway, had the meeting not taken place

262. Chris Hollingsworth of Ulmke has stated that:

'whilst we discussed the possibility of targeting certain UKae customers, Ulmke does and would have targeted these and many others in the normal course of our sales activity'²⁴⁵.

263. It is irrelevant that Ulmke may have targeted similar customers if the Meeting had not taken place. By attending the Meeting and **indicating to its competitors** that it was going to act on the market in a certain way, Ulmke was influencing the future course of action of its competitors and, along with the other Parties, was substituting the certainty of co-operation for the risks of competition. The Parties agreed to allocate UKae's existing customers between them on an exclusive basis – this gave each Party the confidence to target its own allocated customers, secure in the knowledge that it would face little or no competition from the other Parties for those customers.

Potential impact of market sharing on inter brand competition

264. As discussed in paragraphs 512 to 514 below, given the Parties' position as competitors at the distribution level, the relationship between the Parties is properly treated as horizontal. Moreover, as explained in paragraph 56 above, both the non-exclusive nature of the relationship between EWS and its distributors Ulmke and DQS and the absence of an established distribution relationship between EWS and Thermoseal mean that any co-operation between the Parties had the potential adversely to affect not only intra brand competition in relation to EWS-manufactured aluminium Spacer Bars, but also inter brand competition

²⁴⁴ Gwain Paterson's statement, 19 September 2003, paragraph 19.

²⁴⁵ Chris Hollingsworth's and Martin Riley's first statements, 20 December 2002, paragraph 33.

between EWS-manufactured aluminium Spacer Bars and aluminium Spacer Bars produced by its competitors, Profilglass and Alu-pro (which are distributed by Ulmke, DQS and Thermoseal).

Customer allocation/market sharing - conclusion

265. In the view of the OFT, the understanding reached between the Parties at the Meeting on 20 November 2002 in relation to the allocation of UKae customers was such as to constitute an agreement for the purposes of the Chapter I prohibition of the Competition Act 1998.
266. In any event, there is sufficient evidence to show that the Parties knowingly substituted practical co-operation for the risks of competition, and in particular that they engaged in reciprocal horizontal contacts which had as their object or effect the removal or reduction of uncertainty as to their future conduct on the market²⁴⁶. The Parties' behaviour therefore constituted a concerted practice for the purposes of the Chapter I prohibition of the Competition Act 1998.

(2) Price fixing in relation to UKae Target Customers

267. The second element of the overall infringement is a horizontal price fixing agreement and/or concerted practice. At the Meeting on 20 November 2002, the Parties reached an understanding that they would each charge agreed 'target' prices to the named customers of their competitor UKae, that had been allocated to each of them on an exclusive basis (the Target Customers).
268. In particular, as stated in paragraphs 115 to 118 above the Parties:
- (i) discussed the prices for the two most popular sizes of aluminium Spacer Bar, 15.5 mm and 19.5 mm;
 - (ii) reached an understanding on the range within which the 'target' prices would need to fall; and
 - (iii) discussed the 'target' prices at which they would need to sell in order to win customers from UKae.
269. Although not itself a part of the infringement, the Parties also reached an understanding at the Meeting that in order to sell to the Target Customers at these 'target' prices, there would need to be a facilitating reduction in the prices at which EWS sold its aluminium Spacer Bars to the other three Parties.

Price fixing in relation to UKae Target Customers – supporting evidence

270. The evidence of price fixing in relation to UKae Target Customers arises from the sources set out in the following table.

Issue	Evidence (in summary form)	Source document
-------	----------------------------	-----------------

²⁴⁶ See Case 48/69 *ICI v Commission* ("Dyestuffs") [1972] ECR 619 at paragraph 64 and Joined Cases 40/73 *et seq Suiker Unie v European Commission* at paragraphs 26 and 175, as summarised in *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 206.

Purpose of meeting to discuss prices	An e-mail from DQS to EWS asks for a call <i>'to discuss prices...we are getting hammered every day by UKae etc and are struggling to compete'</i> .	Documents taken from EWS during OFT's s28 visit on 5 December 2002 and from DQS during OFT's s27 visit on 12 March 2003. Inspection references: PJS/02 and EL/1.
Purpose of meeting to discuss prices and fighting back against UKae	Gwain Paterson of Thermoseal states that <i>'About a week to ten days before the meeting on 20 November 2002, Howard telephoned me and invited me to a meeting with EWS's other distributors to discuss the low prices being charged by UKae and how we could fight back against them.'</i>	Gwain Paterson's statement, 19 September 2003, paragraph 17.
Resale prices and 'guide prices' discussed	Chris Hollingsworth and Martin Riley of Ulmke state that <i>'Those present at the meeting also discussed the prices at which we would seek to supply spacer bar to the UKae customers that were being targeted. These "guide prices" were to be based on the average current prices being quoted by UKae for new business. Howard Worthington, the Managing Director of EWS, stated that these guide prices were based on the lowest prices at which EWS would be able to supply the products to us and which we could then use to compete more effectively with UKae. I understood these guide prices to be the target prices at which we would attempt to sell spacer bars to the UKae customers being targeted. However, it was generally agreed at the meeting that merely matching UKae's prices in the market would not be enough to win business from them and it would be necessary to undercut them by a further 5-10%... So that the distributors present at the meeting could offer these low prices to attract the target UKae customers, EWS agreed to reduce the prices it was charging the distributors for aluminium tube...'</i>	Chris Hollingsworth's and Martin Riley's first statements, 20 December 2002, paragraphs 22 to 24.
Likely specific resale prices and specific differential from UKae prices discussed and agreed	Chris Hollingsworth of Ulmke states that <i>'As outlined in paragraph 22 of my first statement, there was also a discussion at the meeting on the prices at which we should seek to sell spacer bars to the UKae's customers that had been targeted. We discussed the prices for the two most popular sizes of spacer bar, 15.5mm and 19.5mm. It was thought by all those present at the meeting that prices would need to be considerably lower than UKae's existing average prices to win business from them and that this would involve undercutting UKae's prices by 5%-10%. I recall that it was agreed that, on this basis, the target selling price for 19.5mm would need to be around [...] [C] p and for 15.5mm it would need to be around [...] [C] p. Howard said that he would calculate the prices at which EWS would sell to its distributors to help them achieve these selling prices in order to take business from UKae.'</i>	Chris Hollingsworth's second statement, 15 August 2003, paragraph 10.
Likely specific resale prices and specific differential from UKae prices discussed and agreed	Martin Riley of Ulmke states that <i>'In my first statement I referred to a discussion among those present at the meeting on 20 November 2002 about "guide prices" that would need to be charged to win business from UKae. I recall that it was generally agreed by those present that this would mean undercutting UKae by 5%-10% and, on the basis of the average current prices being quoted by UKae at that time, it was discussed that target selling price for 19.5mm spacer would need to be around [...] [C] p. I do not remember the specific target price for 15.5mm spacer. HW told the meeting that he would calculate the prices at which EWS would sell to its distributors to help them achieve these selling prices in order to take business from</i>	Martin Riley's second statement, 29 August 2003, paragraphs 26 to 29.

	<i>UKae ... Ulmke's targets that had been agreed at the meeting on 20 November 2002 were subsequently confirmed to us in writing by HW in a letter of 21 November 2002, referred to as SAS16. In SAS16, HW refers to reducing Ulmke's current prices by [...] [C] p per metre on both 15.5mm and 19.5mm spacer bar on the "target" accounts. This was so that Ulmke could effectively undercut UKae when targeting the accounts. The prices that Ulmke were receiving from EWS prior to the meeting on 20 November 2002 were [...] [C] per metre for 19.5mm LPD clear anodised and [...] [C] per metre for 15.5mm LPD clear anodised.'</i>	
Specific differential from UKae prices discussed	<i>Gwain Paterson of Thermoseal states that 'There was a general discussion that in order to win business from UKae we would need to offer lower prices than they were currently offering and I recall that it was suggested that prices would need to be in the region of 5%-10% lower than UKae's current prices in order to have a chance of winning customers away from them. I do not recall any specific target prices being discussed although Howard did suggest at one point that we all target UKae by selling to its accounts at cost. If any specific selling prices were mentioned in this context, I would not have paid much attention to them as they would have been too low for Thermoseal'</i>	Gwain Paterson's statement, 19 September 2003, paragraph 22.
Resale prices discussed and target prices agreed	<i>An internal EWS memorandum states, 'Following our meeting with distributors yesterday, just a brief note to confirm the salient points...we will be reducing our selling price to DQS for: 19.5 satin anodized spacer tube to [...] [C] p-a-metre and 15.5 [...] [C] p-a-metre with effect from December 1st...As far as Ulmke Metals are concerned, I have agreed initially that we will support their prices to their main targets by [...] [C] p per metre with effect from whenever they get them! The agreed target price for 19.5 mm is [...] [C] p-a-metre and for 15.5 mm [...] [C] p-a-metre, with minimum selling prices elsewhere to be [...] [C] and [...] [C] respectively'. It is clear from this wording that the 'salient points' emanated from the agreement between the Parties at the Meeting.</i>	Document taken from EWS during OFT's s28 visit on 5 December 2002. Inspection reference: SMB/1 (pages 1 & 2).
Agreement reached on pricing issues	<i>Another internal EWS memorandum states, 'With particular interest in UKae, I would just like to advise you that we have set the wheels in motion with a concerted four-man attack on designated targets and with pricing issues established.' It is clear from the wording of this memorandum that the four Parties together agreed an attack on designated targets, with prices also agreed.</i>	Document taken from EWS during OFT's s28 visit on 5 December 2002. Inspection reference: EW/47 and Attachment 28 to EWS letter dated 28 January 2003, sent in response to OFT enquiries made under s26 on 10 January 2003.
Resale prices discussed and target prices agreed	<i>A further internal EWS e-mail states, '...Furthermore, where we agreed to target their business at [...] [C] p and [...] [C] p-a-metre respectively, I have to say that it is more important to get the business, even if it is only at [...] [C] p and [...] [C] per metre. This would still give us a contribution, after costs, of [...] [C] per metre. Obviously the better the price that we can get, the happier we are, but our real task is to gain the business'. This wording demonstrates that it had been agreed by the Parties that the UKae customers would be targeted at specific prices.</i>	Document taken from EWS during OFT's s28 visit on 5 December 2002. Inspection reference: SMB/2.
Target prices agreed	<i>Chris Hollingsworth of Ulmke states that 'On 26 November 2002 I received a telephone call from Howard [Worthington of EWS]...Howard told me that he had given some further thought to the target prices and that, as a result, he had decided to change the price at which EWS were prepared to sell the 19.5mm and 15.5mm sizes [of Spacer Bars] to Ulmke to [...] [C]</i>	Chris Hollingsworth's second statement, 15 August 2003, paragraph 13.

<i>p</i> and [...] [C] <i>p</i> respectively. Howard said that these prices should help us win business from UKae.'	
---	--

271. The extracts from witness statements set out above demonstrate that at the Meeting on 20 November 2002 the Parties discussed the prices at which they should all aim to sell EWS-manufactured 15.5mm and 19.5mm aluminium Spacer Bars to each of their UKae Target Customers. These 'guide prices' or 'target prices' were to be set at a level between 5 per cent and 10 per cent below the prices UKae was charging to its customers for its aluminium Spacer Bars. Specific figures were discussed at the Meeting, [...] [C] *p* for 15.5mm and [...] [C] *p* for 19.5mm.

272. It was agreed that EWS would calculate the amount by which it could reduce the input prices it was charging to the other three Parties, and that it would confirm the revised input prices to them after the Meeting. The precise figures that could be charged by the Parties to their UKae Target Customers would then follow from these revised input prices.

273. Such discussion of specific prices and specific ranges of prices between competitors constitutes price fixing and is therefore an infringement of the Chapter I prohibition.

Price fixing in relation to UKae Target Customers – contrary evidence and arguments of the Parties

274. This section sets out the contrary evidence and the arguments advanced in rebuttal by the Parties in respect of price fixing in relation to UKae Target Customers. The OFT also sets out its conclusions with regard to such evidence and/or arguments. The Parties' arguments regarding the credibility of the witness evidence and the reliance that may be placed on it are discussed separately, at paragraphs 343 to 384 below.

(a) Minimum, maximum and 'target' prices

275. EWS has alleged in its Supplementary Representations that the Parties were not acting as competitors (that is, undertakings at the same level of the supply chain) for this part of the overall infringement:

*'In simple terms, the OFT continues to mischaracterize a meeting held by EWS with its Distributors with a view to reaching legitimate vertical agreements with those Distributors to win the customers of a competing manufacturer by enabling them to offer lower prices, as a hard-core **horizontal** market sharing / price fixing cartel'²⁴⁷ (emphasis added by EWS).*

276. The OFT does not accept EWS' suggestion that the discussion was vertical in nature. As discussed in more detail at paragraphs 482 to 486 below, this was a horizontal discussion between distributors as to the retail price they would charge their customers. This is most clearly the case as between Thermoseal, Ulmke and DQS. However EWS was also acting, at least in part, as a distributor for this part of the discussion at the Meeting. This part of the discussion did not concern EWS'

²⁴⁷ EWS representations dated 22 December 2005, paragraph 4.1.

supplies to the other three Parties; instead it concerned the downstream prices at which each of the four Parties intended to sell aluminium Spacer Bars to the Target Customers then held by UKae. EWS had its own list of UKae customers to target, and it was therefore participating in this part of the discussion in the same role as the other three Parties, namely as a distributor seeking to win accounts from UKae. Consequently, this part of the overall infringement constituted a horizontal agreement and/or concerted practice between undertakings operating at the same level of the supply chain.

277. Even if the Parties were not acting as competitors for this part of the overall infringement, which the OFT rejects, the OFT considers that the margin available to the distributors was so small that the agreed 'target prices' operated as minimum selling prices²⁴⁸.
278. The revised input prices confirmed by EWS in letters to the Parties were set at [...] [C] p/[...] [C] p for 15.5mm and [...] [C] p for 19.5mm. Given that the specific 'target prices' for selling aluminium Spacer Bars to customers discussed at the Meeting were [...] [C] p for 15.5mm and [...] [C] p for 19.5mm, there was very little margin available to the distributors so that the agreed 'target prices' operated as minimum selling prices. In the OFT's view, it cannot be argued that the 'target prices' constituted maximum prices as there was virtually no room for manoeuvre below those prices.
279. EWS has argued in its Supplementary Representations that *'it is simply not true that there would be "very little margin available" ... At [...] [C] p a Distributor would still, on the input prices referred to by the OFT, obtain a [...] [C] per cent margin with ample room for manoeuvre.'*²⁴⁹.
280. In response, the OFT would point out firstly that EWS has, in order to attempt this argument, used the Spacer Bar price with by far the widest margin (i.e. 15.5mm sold to Ulmke and Thermoseal). The margin available to DQS on 15.5mm Spacer Bar would have been less, at [...] [C] per cent. The margin available to all of the distributors on 19.5mm Spacer Bar would have been only [...] [C] per cent.
281. Secondly, the OFT would argue that in assessing the size of the available margins, attention should be paid to the margins generally operating in the market at that time. All of the evidence available to the OFT demonstrates that even a figure of [...] [C] per cent would have represented an unusually low margin, and that [...] [C] per cent would have given virtually no room for manoeuvre, as argued above by the OFT.

²⁴⁸ Note that in the Supplementary Statement, the OFT used the phraseology *'did in effect represent'* instead of *'operated as'*. EWS appears to have interpreted this phrase as an indication that the OFT regarded this part of the overall infringement as being effects-based (see paragraphs 3.55, 5.8, 5.24 to 5.26, 5.39, 5.42 to 5.44, and 7.4 of its Supplementary Representations). However, this did not constitute the OFT's case. The OFT would repeat that, as noted in paragraphs 504 to 517 below and as clearly stated in paragraphs 445 to 458 of the Supplementary Statement, price fixing is an object infringement and it is therefore not incumbent upon the OFT to prove any actual or potential effect upon the market of this agreement and/or concerted practice. The OFT has changed this phraseology in order to avoid any such misunderstanding.

²⁴⁹ EWS representations dated 22 December 2005, paragraph 5.27.

282. For example, in his first statement, Chris Hollingsworth of Ulmke stated with regard to average margins being made in the market that, *'In 1990 the average gross margin achieved by Ulmke on its sales of spacer bar was about [...] [C] %, but this has now reduced to about [...] [C] %'*²⁵⁰. Mr Hollingsworth clearly regarded [...] [C] per cent as a historically low margin figure.
283. Similarly, in Annex 6 to its Original Representations DQS provided evidence that average margins at the time of the infringement ranged from [...] [C] per cent to [...] [C] per cent²⁵¹. DQS refers to this evidence as *'evidence of declining margins'* (emphasis added), suggesting that DQS considered these margins to be lower than those to which it was accustomed.
284. Finally, although the OFT acknowledges that the margins on sales to Other Customers may to some extent be artificial, given the circumstances in which the relevant input prices and resale prices were established, the OFT notes that with regard to Other Customers, the Parties agreed at the Meeting minimum prices of [...] [C] p for 15.5mm and [...] [C] p for 19.5mm (see table in paragraph 325 below). With the revised input prices agreed with EWS ([...] [C] p/[...] [C] p for 15.5mm and [...] [C] for 19.5mm), DQS and Thermoseal (whose revised input prices were agreed to be applicable to all companies, not just for UKae customers) would have had an available margin of [...] [C] per cent for 19.5mm, and [...] [C] per cent / [...] [C] per cent respectively for 15.5mm Spacer Bars.
285. In the circumstances, therefore, the OFT maintains that the margin available to the distributors ([...] [C] / [...] [C], and [...] [C] per cent) was such that the agreed 'target prices' operated as minimum selling prices.
286. EWS argued in its Original Representations that any 'minimum pricing agreement' would have been irrational in the light of the competitive situation in the market at the time since it would simply have resulted in UKae winning new accounts and compounding the problem of falling EWS sales volume²⁵².
287. This might have been the case if the agreed target prices had been above the level of UKae's prices in the market. However, the Parties agreed at the meeting to sell aluminium Spacer Bars to UKae's customers at a level *'5%-10% lower than UKae's [then] current prices'*²⁵³ (emphasis added).
288. In such circumstances, the effect of any minimum pricing level would merely have served to preserve the Parties' margins as far as possible, while at the same time enabling them to take UKae's business and undermine its position in the market. The internal e-mail sent on 27 November 2002 from Mr Worthington of EWS to Mervyn Richards confirms that this was also EWS' understanding:

²⁵⁰ Chris Hollingsworth's and Martin Riley's first statements, 20 December 2002, paragraph 15.

²⁵¹ DQS representations dated September 2004, Annex 6.

²⁵² EWS representations dated 6 October 2004, paragraphs 8.14 and 8.15.

²⁵³ Gwain Paterson's statement, 19 September 2003, paragraph 22.

'...Furthermore, where we agreed to target their business at [...] [C] p and [...] [C] p-a-metre respectively, I have to say that it is more important to get the business, even if it is only at [...] [C] p and [...] [C] per metre. This would still give us a contribution, after costs, of [...] [C] per metre. Obviously the better the price that we can get, the happier we are, but our real task is to gain the business'²⁵⁴.

289. Moreover, as the quotation in the previous paragraph illustrates, there was scope for EWS to reduce its wholesale prices further. In the absence of the price fixing agreement and/or concerted practice, each distributor (other than EWS) might independently have put pressure on EWS to reduce the prices charged to the relevant distributor further in future, so as further to improve its competitiveness. In the absence of intervention by the OFT, one benefit to EWS of the price fixing agreement and/or concerted practice may, therefore, have been that prices for aluminium Spacer Bars would have been maintained at a level higher than they would have been in the absence of the agreement and/or concerted practice.
290. EWS also argued in its Original Representations that any discussion of prices was limited to the issue of the 'target' or 'guide' price, which was EWS' attempt to establish from the distributors the broad pricing levels they would need to match in order to win business from UKae. This information was to be used by EWS to inform it of the level of price support/wholesale price reduction it was to make available to the distributors to give them a realistic chance of increasing sales. As such, EWS said (i) that the distributors remained free to price above that price (and increase their margin) or below that price (and reduce their margin) and (ii) that it was not to be the actual selling price that the distributors were to sell at²⁵⁵.
291. EWS denied that there was *'agreement at the Distributors' Conference that the distributors would be bound to sell at the "target price"*, and stated that *'the "target" price was only discussed in the sense that it was generally considered to be in the general order of a price which, if quoted, might secure additional sales...Moreover, even the "target" price was not specific; in reality, it was thought it would lie anywhere in a range from 5 to 10 per cent below the existing UKae price.'*²⁵⁶.
292. In fact, EWS' comments are supportive of the OFT's case in relation to this part of the overall infringement. EWS has confirmed that target prices were discussed, that a precise range of target figures was discussed, and that this range of target prices was related specifically to UKae's existing prices. Howard Worthington's internal memo to Mervyn Richards sent after the Meeting confirmed that there were *'agreed target price[s]'*²⁵⁷ (emphasis added). The object of such a discussion between ostensibly competing distributors (including EWS, which for these purposes was acting as a distributor, as is clear from the fact that it was agreed

²⁵⁴ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: SMB/2.

²⁵⁵ EWS representations dated 6 October 2004, paragraphs 8.15 to 8.17.

²⁵⁶ *Ibid*, paragraphs 8.16 and 8.17.

²⁵⁷ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: SMB/1 (pages 1 & 2).

that it, too, would target certain specified UKae customers) can only have been to obtain UKae's customers with maximum effectiveness and with minimum commercial risk to the Parties. The Parties were, as stated above, substituting the certainty of co-operation for the risks of competition²⁵⁸.

293. EWS further stated in its Original Representations that the OFT's evidence *'fails to establish a strong and compelling case of horizontal price fixing'*. It suggested that 'guide prices' may not even have been discussed, and noting the witnesses' use of the phrase *'generally agreed'*, submitted that none of the witnesses reported that 'guide prices' were actually agreed at the Meeting²⁵⁹.

294. This is surprising, however, since EWS itself acknowledges elsewhere in its representations, quoted in paragraph 291 above, that target prices were discussed, that a precise range of target figures was discussed, and that this range of target prices was related specifically to UKae's existing prices.

295. Moreover, the extracts from the witness statements quoted by EWS in paragraphs 16.9 and 16.11 of its Original Representations should be taken in the context of the overall infringement. The price fixing arrangement described in this section was linked closely to, and supported (necessarily, according to the witness statements) the customer allocation/market sharing arrangement described above. Hollingsworth speaks of the 'guide prices' in terms that acknowledge them as a fact, using in his first statement phrases such as *'were to be based on...'*; *'were based on'*; and *'it would be necessary to undercut (UKae) by a further 5-10%'* (emphasis added)²⁶⁰ and in his second statement the phrase *'prices would need to be considerably lower than UKae's existing average prices to win business from them and that this would involve undercutting UKae's prices by 5%- 10%'*²⁶¹. Riley states, following the phrase *'it was generally agreed...that this would mean undercutting...'*, that HW *'told the meeting that he would calculate the prices at which EWS would sell to its distributors...in order to take business from UKae'* (emphasis added)²⁶². Paterson says *'we explained to Howard that we would need lower prices in order to be able to win business from UKae...'*²⁶³. Clearly, the

²⁵⁸ See Case 8/72 *Cementhandelaren v Commission* [1972] ECR 977, which concerned a body of decisions of the Netherlands Cement Dealers' Association. These included a system of "target prices". The Association argued in that case that *'these target prices, moreover, rarely adhered to in practice, far from constituting a constraint on members, in fact only represent a basis of calculation which leaves largely untouched the freedom for each of the members of the association to calculate its prices in accordance with the facts of each individual transaction'* (paragraph 16 of judgment). This was rejected by the Court, which cited the provision of *'Article 85(1) ... [that] expressly identifies agreements which 'directly or indirectly fix ... selling prices or any other trading conditions' as incompatible with the common market'* and held that, *'if a system of imposed selling prices is clearly in conflict with that provision, the system of 'target prices' is equally so. It cannot be supposed that the clauses of the agreement concerning the determination of 'target prices' are meaningless. In fact the fixing of a price, even one which merely constitutes a target, affects competition because it enables all the participants to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be'* (paragraphs 18 to 21 of judgment).

²⁵⁹ EWS representations dated 6 October 2004, paragraphs 16.9 to 16.15.

²⁶⁰ Chris Hollingsworth's and Martin Riley's first statements, 20 December 2002, paragraph 22.

²⁶¹ Chris Hollingsworth's second statement, 15 August 2003, paragraph 10.

²⁶² Martin Riley's second statement, 29 August 2003, paragraph 26.

Parties considered that the agreement of a target price was a necessary adjunct to the customer allocation/market sharing. Furthermore, these statements are supported by the EWS internal memo sent after the Meeting which states, *'Following our meeting with distributors yesterday, just a brief note to confirm the salient points...The agreed target price for 19.5 mm is [...] [C] p-a-metre and for 15.5 mm [...] [C] p-a-metre*²⁶⁴.

(b) *Arguments regarding the significance of the 5 to 10 per cent range*

296. EWS has stated in its Supplementary Representations that, *'the [price] range allegedly mentioned at the Conference was within and/or exceeded the percentage band referred to in the German Banks case*²⁶⁵, *and therefore cannot be assumed (in the absence of supporting evidence) to have any probative value in establishing an agreement or concerted practice whose object or effect was to restrict competition*²⁶⁶. These representations supplement those made regarding the same case, set out in the letter from EWS' legal representatives dated 21 October 2004²⁶⁷.

297. In response, the OFT would firstly point out that in the German Banks case, there was an issue as to whether there was any discussion of prices at the meeting of the parties on 15 October 1997. In the present case, by contrast, there is no doubt that at the Meeting of the Parties on 20 November 2002 there was a discussion of prices.

298. Secondly, EWS' comparison of this case and the German Banks case is highly misleading. In the German Banks case, if there was a discussion of prices then it concerned a currency exchange commission recalled as being somewhere between 2 per cent and 6 per cent, i.e. there was a range of 300 per cent between the highest and lowest price discussed.

299. As the CFI stated, *'It is true, admittedly, that the fixing of a reference band or a target price may constitute a method of unlawful price-fixing, since in such circumstances the prices are no longer the result of autonomous decisions taken by the operators but of their concurrence of wills. However, the figures mentioned (between 2% and 4%; around 3%; between 2% and 6% ...) reflect ... the market prices as established by the EMI, are vague and very wide (the highest figure quoted is three times the lowest). Consequently, the probative nature of that evidence appears to be debatable.*²⁶⁸ (emphasis added).

²⁶³ Gwain Paterson's statement, 19 September 2003, paragraph 23.

²⁶⁴ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: SMB/1 (pages 1 & 2).

²⁶⁵ Case T-56/02 *Bayerische Hypo-und Vereinsbank AG v Commission* at paragraph 113.

²⁶⁶ EWS representations dated 22 December 2005, paragraph 5.36.

²⁶⁷ Letter from Ashurst to OFT dated 21 October 2004.

²⁶⁸ Case T-56/02 *Bayerische Hypo-und Vereinsbank AG v Commission* at paragraph 113.

300. In the present case, by contrast, all of the witnesses recall the range of price reductions discussed as being 5 to 10 per cent, i.e. there is a range of 5 per cent between the highest and lowest price discussed. The present case deals with percentage price *reductions*, whereas the German Banks case involved percentage commission rates, i.e. the whole price, expressed as a percentage. As the CFI stated, the fixing of a reference band may constitute a method of unlawful price-fixing, and the OFT is entirely satisfied with the probative nature of the evidence in this case.

301. Finally, in any event the OFT has provided supporting evidence not only of the agreement at the Meeting on a range of prices; but also of discussion of specific prices that would need to be charged in order to take the Target Customers from UKae²⁶⁹.

(c) *Thermoseal's lack of recollection of discussion of specific prices*

302. Thermoseal has stated that it is unable to recall a discussion regarding specific prices, although it does recall a discussion that prices would need to be between 5 per cent and 10 per cent lower than UKae's current prices:

*'There was no discussion at the meeting regarding what prices should be charged to specific customers. There was a general discussion that in order to win business from UKae we would need to offer lower prices than they were currently offering and I recall that it was suggested that prices would need to be in the region of 5%-10% lower than UKae's current prices in order to have a chance of winning customers away from them. I do not recall any specific target prices being discussed although Howard did suggest at one point that we all target UKae by selling to its accounts at cost. If any specific selling prices were mentioned in this context, I would not have paid much attention to them as they would have been too low for Thermoseal'*²⁷⁰.

303. The OFT considers it unsurprising that, some months after the Meeting and after the infringement had been brought to an end, not all of the Parties were able to recall every aspect of the discussion at the meeting – particularly where, by Mr Paterson's own admission, he *'would not have paid much attention to'* any specific prices being discussed. In the OFT's view, there is sufficient evidence that prices in relation to Target Customers were fixed in that:

- both Chris Hollingsworth and Martin Riley of Ulmke were able to recall one or both specific prices having been discussed;
- three witnesses (Chris Hollingsworth and Martin Riley of Ulmke, and Gwain Paterson of Thermoseal) recalled a discussion of prices to be charged to target customers needing to be between 5 per cent and 10 per cent below UKae's current prices; and
- contemporaneous documentary evidence from EWS supports these witness statements, with references to *'agreed target price[s]'*²⁷¹, *'pricing issues*

²⁶⁹ See the evidence presented in the rows entitled *'Likely specific resale prices and specific differential from UKae prices discussed and agreed'* and *'Resale prices discussed and target prices agreed'* in the table which follows paragraph 270 above.

²⁷⁰ Gwain Paterson's statement, 19 September 2003, paragraph 22.

[being] *established*²⁷², and it being *'agreed to target their business at [...] [C] p and [...] [C] p-a-metre respectively*²⁷³.

(d) *Thermoseal's lack of recollection of the EWS offer at the meeting to reduce input prices*

304. Thermoseal has also stated that it is unable to recall EWS' offer at the Meeting, to reduce its prices to the distributors in order to facilitate their targeting of UKae's customers:

*'I do not recall Howard offering in the meeting to specifically reduce EWS's prices to the distributors in order that we could lower our prices to compete with UKae. However, in the hotel bar following the meeting, myself and Mark did manage to discuss with Howard the prices EWS were charging to Thermoseal. We explained to Howard that we would need lower prices in order to be able to win business from UKae and also to ensure that we bought more spacer bar from EWS. Howard agreed to reduce our prices and on 22 November 2002 he wrote to myself (document TC/1) to confirm what Thermoseal's new prices would be'*²⁷⁴.

305. Again, the OFT does not consider that this particular discrepancy is significant. The OFT is not alleging that EWS' offer to reduce its input prices to the other three Parties constituted an infringement in itself – merely that it formed a part of the overall arrangement between the Parties, facilitating the targeting of UKae customers with low prices. It is significant that, although EWS went further than was necessary to facilitate the horizontal price fixing agreement in its reduction of input prices to DQS and Thermoseal (in that it agreed a reduction for all aluminium Spacer Bars they purchased), for Ulmke the reduction was restricted only to the UKae Target Customers. Thus it was only in respect of the UKae Target Customers that EWS reduced its input prices to all of the distributors.

306. It is also noteworthy that the agreed revised input prices for 19.5mm aluminium Spacer Bars were identical at [...] [C] p per metre, while the agreed revised input prices for 15.5mm aluminium Spacer Bars were identical for two of the distributors at [...] [C] p per metre, and only different by 0.1p for the remaining distributor at [...] [C] p per metre. Thus, even though the revised input prices themselves were apparently agreed individually with each of the distributors, the actual revised input prices were not at all diverse.

307. Finally, the OFT notes that both of the Ulmke witnesses do recall a discussion at the Meeting of the need for EWS to reduce its input prices to the other Parties.

²⁷¹ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: SMB/1 (pages 1 & 2).

²⁷² Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: EW/47 and Attachment 28 to EWS letter dated 28 January 2003, sent in response to OFT enquiries made under section 26 on 10 January 2003.

²⁷³ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: SMB/2.

²⁷⁴ Gwain Paterson's statement, 19 September 2003, paragraph 23.

(e) EWS' allegation that the Ulmke witnesses do not recall the conclusion of an agreement in respect of target prices

308. EWS has alleged in its Supplementary Representations that *'The OFT seeks to argue Mr Paterson's witness statement demonstrates the conclusion of an agreement in respect of target prices. Such an assertion is plainly rebutted by the evidence of Mr Hollingsworth and Mr Riley, which expressly states there was no such agreement ... It would be incredible for the OFT to seek to defend an infringement finding, whose central elements are rebutted by the evidence of its own witnesses'*²⁷⁵. EWS also states that *'even if there were a discussion about pricing, it was limited to the "broad price range" within which prices would need to fall in order to win sales'*²⁷⁶.

309. The OFT considers EWS' assertions to be spurious. Far from 'expressly stating' that there was no agreement in respect of target prices, both Mr Riley's and Mr Hollingsworth's second statements specifically and independently corroborate not only Mr Paterson's statement but also the contemporaneous written evidence contained in the internal memorandum from Howard Worthington to Mervyn Richards dated 21 November 2002 (see paragraphs 310 to 316 below) that target prices were agreed, as follows:

- Mr Riley stated: *'I recall that **it was generally agreed** by those present that this would mean undercutting UKae by 5%-10% and, on the basis of the average current prices being quoted by UKae at that time, it was discussed that target selling price for 19.5mm spacer would need to be around [...] [C] p. I do not remember the specific target price for 15.5mm spacer'*²⁷⁷ (emphasis added); and
- Mr Hollingsworth stated: *'We discussed the prices for the two most popular sizes of spacer bar, 15.5mm and 19.5mm. It was thought by all those present at the meeting that prices would need to be considerably lower than UKae's existing average prices to win business from them and that this would involve undercutting UKae's prices by 5%- 10%. I recall that **it was agreed** that, on this basis, the target selling price for 19.5mm would need to be around [...] [C] p and for 15.5mm it would need to be around [...] [C] p'*²⁷⁸ (emphasis added).

(f) EWS' assertion that its internal memo was an instruction to a salesperson and not a description of items agreed at the meeting

310. EWS stated in its Original Representations that the internal memorandum from Howard Worthington to Mervyn Richards dated 21 November 2002, in which Mr Worthington set out the matters agreed at the Meeting,

²⁷⁵ EWS representations dated 22 December 2005, paragraphs 3.55 to 3.56.

²⁷⁶ *Ibid*, paragraph 5.11.

²⁷⁷ Martin Riley's second statement, 29 August 2003, paragraph 26.

²⁷⁸ Chris Hollingsworth's second statement, 15 August 2003, paragraph 10.

*'identified the "target" price in respect of direct accounts on EWS's list. [It then] identified a minimum price in respect of EWS's other direct accounts. This was an attempt by EWS to maintain some control over the overall margin of its direct sales and ensure that the impact of the promotional strategy upon EWS's overall profits was managed in a sensible way'*²⁷⁹.

311. EWS suggested that the purpose of this internal memorandum was purely as an instruction to a salesperson on the actions to take following the Meeting on 20 November 2002, and that it did not constitute a summary of the actions agreed by the Parties at the Meeting²⁸⁰.

312. However, a proper analysis of the wording of the memorandum clearly suggests that it did in fact include a summary of agreed actions. The memorandum begins:

'Following our meeting with distributors yesterday, just a brief note to confirm the salient points:'

313. Thus, Mr Worthington refers to the Meeting with the other three Parties on the previous day, and in the same sentence goes on to confirm the *'salient points'*. Any logical reading of the construction of this sentence must conclude that these *'salient points'* describe what was agreed at that Meeting. The words *'salient points'* are followed by a colon signalling that all of the information that follows in the letter constitutes those *'salient points'* agreed at the Meeting.

314. Amongst the points listed by Mr Worthington in this letter is the phrase, *'The agreed target price for 19.5 mm is [...] [C] p-a-metre and for 15.5 mm [...] [C] p-a-metre'*. This demonstrates that the target price is the price at which all of the Parties agreed that they would aim to target UKae's customers, rather than a price purely for EWS' salesperson to implement unilaterally.

315. It is also clear from the extracts from the Ulmke witness statements set out in paragraph 309 above, that at least one of the other Parties concluded that there had been agreement at the Meeting on these target prices. Another of the Parties, Thermoseal, recalled prices being discussed although its witness's recollection is less clear, being confined to the differential from UKae's prices, as by the witness's own confession he *'would not have paid much attention'* to a discussion on target prices.

316. The OFT is therefore confident that agreement was reached at the Meeting on a range of target prices, and that this agreement was recounted in the internal memorandum sent by Howard Worthington to Mervyn Richards of EWS the day after the Meeting.

²⁷⁹ EWS representations dated 6 October 2004, paragraph 9.6.

²⁸⁰ EWS further suggests in its Supplementary Representations dated 22 December 2005, at paragraph 5.40, that if the memorandum were a summary of the actions agreed by the Parties at the meeting then *'the OFT might reasonably expected (sic) to have seen a memorandum sent in such terms to the Distributors'*. However, the OFT would point out that cartel activity is by its very nature conducted as secretly as possible and we would not therefore 'expect' to find such a memorandum distributed so widely.

(g) *Degree of implementation*

317. Ulmke has stated that

*'Following the meeting, none of the "guide" prices which were discussed have been implemented by Ulmke. I am not aware that any of the other attendees have implemented these "guide" prices either'*²⁸¹.

318. EWS has also stated that no concerted practice can be found to exist because there is no direct evidence that the Parties implemented the understandings reached between them on the market; and that such implementation cannot be presumed. More specifically, it has asserted that *'none of the "target" prices discussed were implemented'*²⁸². EWS provides evidence (from its own perspective) to support this assertion in section 7 of its Supplementary Representations²⁸³.

319. The presumption that when determining its conduct on the market an undertaking will take account of information exchanged with its competitors so long as it remains active on the market is discussed in section II.H(4)(b), at paragraphs 431 to 440 below. It follows from this presumption that had the OFT's intervention not brought the infringement to an abrupt end in December 2002 / January 2003, the Parties would have taken further steps to implement the price fixing strategy agreed at the Meeting on 20 November 2002.

Potential impact of price fixing on inter brand competition

320. As discussed in paragraph 264 above, both the non-exclusive nature of the relationship between EWS and its distributors Ulmke and DQS and the absence of an established distribution relationship between EWS and Thermoseal mean that any co-operation between the Parties had the potential adversely to affect not only intra brand competition in relation to EWS-manufactured aluminium Spacer Bars, but also inter brand competition between EWS-manufactured aluminium Spacer Bars and aluminium Spacer Bars produced by its competitors.

Price fixing in relation to UKae Target Customers – conclusion

321. The OFT considers that the understanding reached between the Parties at the meeting of 20 November 2002 regarding price fixing in relation to UKae Target Customers was such as to constitute an agreement for the purposes of the Chapter I prohibition of the Competition Act 1998.

322. In any event, there is sufficient evidence to show that the Parties knowingly substituted practical co-operation for the risks of competition, and in particular that they engaged in reciprocal horizontal contacts which had as their object or effect the removal or reduction of uncertainty as to their future conduct on the

²⁸¹ Chris Hollingsworth's and Martin Riley's first statements, 20 December 2002, paragraph 33.

²⁸² EWS representations dated 6 October 2004, paragraph 9.9.

²⁸³ EWS representations dated 22 December 2005, paragraphs 7.1 to 7.4.

market²⁸⁴. The Parties' behaviour therefore constituted a concerted practice for the purposes of the Chapter I prohibition of the Competition Act 1998.

(3) Price fixing and non-compete arrangement in relation to Other Customers

323. The third element of the overall infringement is a horizontal price fixing and non-compete agreement and/or concerted practice. In addition to the agreements reached in relation to Target Customers, the Parties also reached an understanding at the Meeting on 20 November that they would each charge minimum prices and otherwise not compete in relation to Other Customers.

324. In particular, as set out in paragraphs 119 to 124 above, the Parties:

- (i) reached an understanding that they would no longer actively compete with each other on price when in direct competition for Other Customers; and
- (ii) reached an understanding on the minimum prices at which they would in future be prepared to sell aluminium Spacer Bars to Other Customers.

Price fixing and non-compete arrangement in relation to Other Customers – supporting evidence

325. The evidence for the price fixing and non-compete arrangement in relation to Other Customers arises from the sources set out in the following table.

Issue	Evidence (in summary form)	Source document
Price fixing discussed in relation to Other Customers; Agreement to set minimum prices	Gwain Paterson of Thermoseal states that <i>'At the meeting there was also a discussion about the pricing of spacers more generally in the market which went beyond the agreement to target UKae's customers. This was in response to a suggestion by myself and Mark that those present should not compete with each other on price when in direct competition for a customer. This suggestion was well received and a discussion followed about the level of prices below which we should not compete. It was eventually agreed by those present, including EWS, that there would be minimum selling prices for the two most popular sizes of spacer bar below which they would not quote in respect of customers held by the other distributors. The two most popular sizes of spacer bar are 19.5mm anodised (sometimes referred to as 20mm) and 15.5mm anodised (sometimes referred to as 16mm) and to the best of my recollection the minimum selling price for 19.5mm anodised was [...] [C] or [...] [C] pence metre and for 15.5mm it was [...] [C] pence per metre, although I should point out that I had no intention of sticking to these prices'</i>	Gwain Paterson's statement, 19 September 2003, paragraph 24.
Price fixing discussed in relation to Other Customers	Chris Hollingsworth and Martin Riley of Ulmke state that <i>'There was even a suggestion from Thermoseal that if any of the attendees came across each other in the market that we should not quote as aggressively as in the past. No one reacted to this suggestion and there was certainly no further discussion (or intention on Ulmke's part) to implement it.'</i>	Chris Hollingsworth's and Martin Riley's first statements, 20 December 2002, paragraph 21.

²⁸⁴ See Case 48/69 *ICI v Commission* ("Dyestuffs") [1972] ECR 619 at paragraph 64 and Joined Cases 40/73 *et seq Suiker Unie v European Commission* at paragraphs 26 and 175, as summarised in *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 206.

Price fixing discussed in relation to Other Customers	Chris Hollingsworth of Ulmke states, <i>'At paragraph 21 of my first statement, I refer to a suggestion made by Thermoseal at the meeting that if any of attendees came across each other in the market that we should not quote as aggressively against each other as we had done in the past. I do recall the discussion reference competition against each other but cannot remember if prices were mentioned below which we should [not] quote when in a head to head situation with other companies at the meeting.'</i>	Chris Hollingsworth's second statement, 15 August 2003, paragraph 11.
Price fixing discussed in relation to Other Customers	Martin Riley of Ulmke states, <i>'In my first statement I also referred to a suggestion made by Thermoseal at the meeting on 20 November 2002 that if any of the attendees came across each other in the market place that we should not quote as aggressively against each other as we had done in the past. I recall that there was a discussion about this proposal and during the course of this discussion it was suggested, again by Thermoseal, that minimum selling prices for the 19.5mm should be [...] [C] p. I cannot remember the specific price mentioned for 15.5mm spacer. No-one at the meeting voiced any direct agreement or disagreement with this particular suggestion from Thermoseal although, for my part, I had no intention of agreeing to such an arrangement because I did not trust Thermoseal.'</i>	Martin Riley's second statement, 29 August 2003, paragraph 27.
Price fixing discussed	Thermoseal states that <i>'Minimum prices were discussed by those present at the meeting ... again [it] had no intention of implementing them. Mr Paterson raised the question of minimum prices in order to lull the other distributors into a false sense of security and preserve Thermoseal's image as a strong and credible competitor'</i>	Thermoseal representations dated 1 October 2004, paragraph 15.
Minimum prices existed for Other Customers	An internal EWS memorandum states, <i>'Following our meeting with distributors yesterday, just a brief note to confirm the salient points:</i> ... <i>The agreed target price for 19.5mmm is [...] [C] p-a-metre and for 15.5mm [...] [C] p-a-metre , with minimum selling prices elsewhere to be [...] [C] and [...] [C] respectively.'</i>	Document taken from EWS during OFT's s28 visit on 5 December 2002. Inspection reference: SMB/1 (pages 1 & 2).
Price fixing discussed in relation to Other Customers; Agreement to set minimum prices	Gwain Paterson of Thermoseal states that <i>'Following the meeting on 20 November, one customer, [...] [C], asked for quotes for black aluminium spacer bar from a number of distributors, including Thermoseal and EWS. Howard telephoned Mark in late November/early December 2002 to ask if that customer "belonged" to Thermoseal and if so what price EWS should quote as they did not want to undercut Thermoseal. We had already decided to quote a low price anyway, however EWS did not want to upset us as we were buying EWS products. Mark e-mailed EWS to confirm it was a Thermoseal customer although we cannot now find a copy of that e-mail'</i>	Gwain Paterson's statement, 19 September 2003, paragraph 25.

Price fixing and non-compete arrangement in relation to Other Customers – contrary evidence and arguments of the Parties

326. This section sets out the contrary evidence and the arguments advanced in rebuttal by the Parties in respect of the price fixing and non-compete arrangement in relation to Other Customers. The OFT also sets out its conclusions with regard to such evidence and/or arguments. The Parties' arguments regarding the credibility of the witness evidence and the reliance that may be placed on it are discussed separately, at paragraphs 343 to 384 below.

(a) *EWS' lack of recollection of this part of the discussion*

327. EWS stated in its Original Representations that it '*cannot recall any suggestion that the parties should agree minimum prices in respect of other accounts*²⁸⁵, and that it is unable to recall a discussion regarding '*friendly fire*²⁸⁶'.

328. The OFT considers it unsurprising that, many months after the Meeting and after the infringement had been brought to an end, not all of the Parties were able to recall every aspect of the discussion at the Meeting. In the OFT's view, it is sufficient that:

- three witnesses (Chris Hollingsworth and Martin Riley of Ulmke, and Gwain Paterson of Thermoseal) recall that the issue was raised at the Meeting;
- these three witnesses also state clearly in their most recent statements that the issue was discussed at the Meeting; Mr Hollingsworth's and Mr Riley's first statements (upon which the OFT places less evidential weight²⁸⁷) are less clear on this point stating that '*No one reacted to [Thermoseal's] suggestion and there was certainly no further discussion (or intention on Ulmke's part) to implement it*', from which it is unclear whether they meant only that there was no further discussion after the Meeting or that there was no discussion at the Meeting itself;
- two of the witnesses (Messrs Paterson and Riley) recall that specific minimum prices were discussed;
- contemporaneous documentary evidence from EWS supports these witness statements, with reference to '*minimum selling prices elsewhere to be [...] [C] and [...] [C] respectively*²⁸⁸;
- the figures for the minimum selling prices included in the EWS document are consistent with the recollections of Messrs Paterson and Riley, although Mr Riley states that he can only recall the specific price in relation to one of the products (19.5 mm); and
- Mr Paterson recalls a further discussion after the Meeting, in respect of [...] [C] (an Other Customer), which supports a finding of price fixing and otherwise not competing in respect of Other Customers.

(b) *Degree of intention to participate*

329. EWS further noted in its Original Representations that after the extract from Mr Riley's statement quoted in paragraph 123 above, he stated '*I did not trust Thermoseal*'. EWS alleges that this '*believes the suggestion that there was an agreement on the part of Ulmke*' and '*also highlights the improbability that any of the parties would have engaged in practical co-operation where, quite simply, they did not trust each other*²⁸⁹'.

²⁸⁵ EWS representations dated 6 October 2004, paragraph 8.13.

²⁸⁶ *Ibid*, paragraph 8.10.

²⁸⁷ See paragraphs 344 to 350 below.

²⁸⁸ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: SMB/1 (pages 1 & 2).

²⁸⁹ EWS representations dated 6 October 2004, paragraph 18.9.

330. As stated above in paragraph 239, an absence of subjective intention does not prevent the conclusion that an agreement and/or concerted practice was formed between the Parties in relation to this infringement. It is clear from the evidence presented in this Decision that the Parties met and engaged in an overall agreement and/or concerted practice designed to fix prices and allocate customers for aluminium Spacer Bars. Any lack of trust between the Parties is, in these circumstances, of at most only marginal relevance to the finding of an infringement. There is no evidence that any reservations or objections were expressed openly or publicly. Some of the Parties have stated since that they had private reservations about some parts of the overall infringement, but there is no evidence that these were expressed openly to the other Parties either at the Meeting or subsequently. It is clear that private reservations and objections that are not expressed openly cannot be capable of affecting the behaviour of others. This is dealt with in more detail in section II.H(1) on Evidence of intent, at paragraphs 387 to 402 below.

(c) *EWS' assertion that its internal memo was an instruction to a salesperson and not a description of items agreed at the Meeting*

331. EWS stated in its Original Representations that the internal memorandum from Howard Worthington to Mervyn Richards dated 21 November 2002, in which Mr Worthington set out the matters agreed at the Meeting,

'identified the "target" price in respect of direct accounts on EWS's list. [It then] identified a minimum price in respect of EWS's other direct accounts. This was an attempt by EWS to maintain some control over the overall margin of its direct sales and ensure that the impact of the promotional strategy upon EWS's overall profits was managed in a sensible way'²⁹⁰.

332. EWS asserted that the purpose of this internal memorandum was purely as an instruction to a salesperson on the actions to take following the Meeting on 20 November 2002, and that it did not constitute a summary of the actions agreed by the Parties at the Meeting.

333. However, a proper analysis of the wording of this memorandum demonstrates that it did in fact include a summary of agreed actions. The memorandum begins:

'Following our meeting with distributors yesterday, just a brief note to confirm the salient points:'

334. Thus, Mr Worthington refers to the Meeting with the other three Parties on the previous day, and in the same sentence goes on to confirm the *'salient points'*. Any logical reading of the construction of this sentence must conclude that these *'salient points'* describe what was agreed at the Meeting. The words *'salient points'* are followed by a colon signalling that all of the information that follows in the letter constitutes those *'salient points'* agreed at the Meeting.

335. Amongst the points listed by Mr Worthington in this letter is the phrase *'minimum selling prices elsewhere to be [...] [C] and [...] [C] respectively'*. This demonstrates

²⁹⁰ *Ibid*, paragraph 9.6.

that the minimum selling prices elsewhere (i.e. to the non-targeted Other Customers) are the prices agreed for all of the Parties to use, rather than prices purely for EWS' salesperson to implement unilaterally.

336. EWS has also stated that the '*minimum selling prices elsewhere*' referred to '*EWS's other direct accounts*' and did not apply '*in respect of other accounts vis a vis its distributors. This is because it is EWS's general policy not to target the accounts of its own distributors...*'.²⁹¹

337. The OFT is not alleging that EWS intended to use the agreed minimum prices to target the accounts held by its distributors. It is far more likely that EWS intended to use these agreed minimum prices to target new accounts, currently supplied by manufacturers other than EWS or UKae, for which it would normally have been competing with its distributors and others. The internal memo is written in the context of reporting the actions agreed at the Meeting, and the OFT concludes that the '*minimum selling prices elsewhere*' should be interpreted in this context.

(d) Degree of implementation

338. EWS has stated in section 7 of its Supplementary Representations that there was no agreement on price fixing to Other Customers because the prices '*allegedly discussed and agreed*' at the Meeting '*were not in fact implemented by EWS*'.²⁹²

339. The presumption that when determining its conduct on the market an undertaking will take account of information exchanged with its competitors so long as it remains active on the market is discussed in section II.H(4)(b), at paragraphs 431 to 440 below. It follows from this presumption that had the OFT's intervention not brought the infringement to an abrupt end in December 2002 / January 2003, the Parties would have taken further steps to implement the price fixing strategy agreed at the Meeting on 20 November 2002.

Potential impact of price fixing and non-compete arrangement on inter brand competition

340. As discussed in paragraph 264 above, both the non-exclusive nature of the relationship between EWS and its distributors Ulmke and DQS and the absence of an established distribution relationship between EWS and Thermoseal mean that any co-operation between the Parties had the potential adversely to affect not only intra brand competition in relation to EWS-manufactured aluminium Spacer Bars, but also inter brand competition between EWS-manufactured aluminium Spacer Bars and aluminium Spacer Bars produced by its competitors.

Price fixing and non-compete arrangement in relation to Other Customers – conclusion

341. The OFT considers that the understanding reached between the Parties at the meeting of 20 November 2002 regarding the price fixing and non-compete arrangement in relation to Other Customers was such as to constitute an

²⁹¹ *Ibid*, paragraphs 9.6 and 9.7.

²⁹² EWS representations dated 22 December 2005, paragraphs 7.5 to 7.10.

agreement for the purposes of the Chapter I prohibition of the Competition Act 1998.

342. In any event, there is sufficient evidence to show that the Parties knowingly substituted practical co-operation for the risks of competition, and in particular that they engaged in reciprocal horizontal contacts which had as their object or effect the removal or reduction of uncertainty as to their future conduct on the market²⁹³. The Parties' behaviour therefore constituted a concerted practice for the purposes of the Chapter I prohibition of the Competition Act 1998.

General comments on the credibility of the witness statements

343. In both its Original Representations and its Supplementary Representations, EWS seeks to question the credibility of some parts of the witness statements used by the OFT in this case. EWS alleges that the OFT has inserted evidence into witness statements; contaminated evidence through exposure of the witness to details originating from another source; distorted testimony in witness statements; and co-ordinated evidence between witnesses²⁹⁴. In this section the OFT examines the reliability of each of the witness statements in the light of EWS' representations.

Ulmke witness statements – Mr Riley and Mr Hollingsworth's first statements

344. In its Original Representations, EWS noted in respect of Mr Riley's and Mr Hollingsworth's first witness statements that these were similar, and stated that:

*'It is inconceivable that two individuals attending a meeting will have an identical recollection of events. As such, it is clear that the statements concerned do not comprise their direct testimony...'*²⁹⁵.

345. In its Supplementary Representations, EWS has stated *'The OFT has said that it did not draft those statements, although it appears that it had two occasions in December 2002 to comment on those first drafts'*²⁹⁶ and *'It is the OFT which is responsible for the investigation and the OFT which purports to rely on this evidence without any proper explanation of how it was prepared, and consequently the weight that can safely be placed upon it'*²⁹⁷.

346. DQS has also highlighted the similarity of these two statements in the oral representations made in support of its Supplementary Representations, stating that:

²⁹³ See Case 48/69 *ICI v Commission* ("Dyestuffs") [1972] ECR 619 at paragraph 64 and Joined Cases 40/73 *et seq Suiker Unie v European Commission* at paragraphs 26 and 175, as summarised in *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 206.

²⁹⁴ EWS representations dated 22 December 2005, paragraph 3.7.

²⁹⁵ EWS representations dated 6 October 2004, paragraph 15.13.

²⁹⁶ EWS representations dated 22 December 2005, paragraph 3.30.

²⁹⁷ *Ibid*, paragraph 3.31.

*'The credibility of the [first] witness statements of Chris Hollingsworth and Martin Riley is questionable'*²⁹⁸.

347. As was made clear to the Parties in the Supplementary Statement, these witness statements were produced entirely independently of the OFT and away from the OFT's offices, by the witnesses themselves in conjunction with the lawyers acting for Ulmke. Moreover, it is untrue that the OFT has not provided a proper explanation of the sequence of preparation of these witness statements. A full chronology of the preparation of these and the other witness statements was provided to EWS' legal representatives in Annexes B and C to the OFT's letter of 14 November 2005²⁹⁹.
348. The first witness statements of Mr Riley and Mr Hollingsworth were produced, at most, less than one month after the infringement ended – the OFT notes that EWS has also highlighted the beneficially broadly contemporaneous nature of these witness statements in its Supplementary Representations – *'It is important to note that these statements were settled a matter of days after the meetings...'*³⁰⁰. In these circumstances, it is likely that the events surrounding the Meeting of the Parties will have been fresh in the witnesses' memories and that their recollection will therefore have indeed been broadly the same.
349. While the preparation of these first witness statements was carried out in the presence of and with the assistance of Ulmke's legal representatives, the OFT does not accept that this renders the statements invalid as evidence. At most, it could be argued that they should be treated with some caution and regarded as submissions based on the composite view of two key witnesses who were both present at the bilateral meeting of EWS and Ulmke on 19 November 2002 and at the Meeting of all the Parties on 20 November 2002 where the price fixing and market sharing strategies, that are the subject of this Decision, were discussed. Importantly, although it is not possible to determine from the statements themselves or from what is known of their preparation the precise extent to which each witness's recollection of the matters recorded in his statement may have been prompted by the recollections of the other, it is certain that everything in these statements derived from the recollection of one or both of these two key witnesses. Moreover, it is equally certain that by signing his statement each witness was ready personally to attest to the accuracy of its contents.
350. Finally, the OFT has not sought to rely solely on these two witness statements or (in particular) on the fact that they corroborate each other to support its conclusions. Instead, it has provided witness statements from a variety of sources (including later witness statements from both Mr Riley and Mr Hollingsworth that are not only different from each other but also clarify and/or amplify, in different ways, some of the points made in the earlier witness statements), along with contemporaneous documentary evidence which corroborates and supports both Mr Riley's and Mr Hollingsworth's versions of events. The OFT places only limited

²⁹⁸ DQS oral representations dated 9 January 2006, page 8.

²⁹⁹ Annexes B and C to letter from OFT to Ashurst dated 14 November 2005.

³⁰⁰ EWS representations dated 22 December 2005, paragraph 3.23.

evidential weight on Mr Riley's and Mr Hollingsworth's first witness statements where these are not supported by and/or are contradicted by other evidence.

Ulmke witness statements – Mr Riley's second statement

351. In its Supplementary Representations³⁰¹, EWS suggests that Mr Riley's second statement has been distorted in order to provide a better fit with the OFT's allegations. EWS notes that, with regard to the meeting of EWS and Ulmke on 19 November 2002, the sentence in the first draft of Mr Riley's statement, '*We did not discuss with HW how the customers of UKae were to be targeted and, in particular, no discussion took place about the possible prices that might be charged to them*' was changed in the final version to, '***I do not remember discussing with HW how the customers of UKae were to be targeted and, in particular, I do not think any discussion took place about the possible prices that might be charged to them***'³⁰² (emphasis added).
352. Firstly, the OFT notes that the broad meaning of these two versions of Mr Riley's statement is not markedly dissimilar. Mr Riley does not say in either version that a discussion took place at the 19 November meeting, either of how UKae should be targeted or of the prices that should be charged to it.
353. Secondly, the OFT is not alleging that any such discussion at the bilateral meeting between EWS and Ulmke on 19 November 2002 formed part of the infringement. The discussions on customer allocation and price fixing took place at the Meeting of all the Parties on 20 November 2002. This part of Mr Riley's statement is at best peripheral to the OFT's case.
354. Thirdly, the OFT would point out that where drafts of the statement were prepared by the OFT, this was done on the basis of discussions between the OFT and Mr Riley and the drafts were checked by Mr Riley (who was legally advised), away from the OFT's offices, prior to signature. Where Mr Riley disagreed with the draft, the statement was amended to accord with his recollection of events. The OFT also notes the warning against providing false or misleading information set out at the beginning of Mr Riley's statement:
- 'I have been informed that if in the statement I knowingly or recklessly provide information to the Director General that is false or misleading in a material particular I will be guilty of an offence, punishable by a fine (of up to £5,000) or a maximum of two years' imprisonment or both*'³⁰³.
355. Finally, and most importantly, this amendment to Mr Riley's witness statement was in any event made by Mr Riley himself, away from the OFT's offices.
356. The second allegation of distortion made by EWS in its Supplementary Representations concerns Mr Riley's recollection of the selling prices agreed by the Parties at the Meeting, for 15.5mm and 19.5mm Spacer Bars. Following a meeting

³⁰¹ *Ibid*, paragraphs 3.13 to 3.21.

³⁰² Martin Riley's second statement, 29 August 2003, paragraph 21.

³⁰³ *Ibid*, paragraph 2.

with Mr Riley on 1 May 2003 during which his recollection of these prices was discussed, the OFT drafted a short amendment to his second statement to reflect his recollection of the prices, and sent this to Mr Riley for review and correction as appropriate.

357. Mr Riley made the appropriate corrections to the revised draft, to reflect the fact that he could not after all confirm recalling the specific prices agreed for 15.5mm Spacer Bars, but that he did recall the specific prices agreed by the Parties at the Meeting for sales of 19.5mm Spacer Bars to both the Target Customers and the Other Customers.
358. Again, the OFT would point out that the suggested amendments to Mr Riley's statement were carefully checked by Mr Riley (who was legally advised) away from the OFT's offices prior to signature, and that where he disagreed with a suggested amendment he made sure that his statement was amended to reflect his own recollection of events. He was not '*forced to write to the OFT*'³⁰⁴ in the improper manner suggested by EWS; this was a natural part of the iterative process of finalising witness statements and demonstrates that Mr Riley was a scrupulous witness who maintained ownership and control of his statement, and that he felt perfectly free to amend it so that it accurately reflected his testimony.
359. Indeed, the care shown by Mr Riley in this regard would tend, if anything, to lend further weight to Mr Riley's evidence concerning the Parties' agreement as to the price to be charged both to Target Customers and to Other Customers for 19.5mm Spacer Bars, thereby enhancing the corroborative value of Mr Riley's evidence on this point.
360. EWS has also alleged, in paragraph 3.33 of its Supplementary Representations, that Mr Riley's second statement was co-ordinated and/or discussed in the presence of other witnesses. The basis for this allegation appears to be the OFT's note of the meeting with Mr Riley on 1 May 2003 at the offices of Ulmke's lawyers, Wragge & Co. The note records that there were four people attending this meeting, two of whom were OFT case officers. The names of the third and fourth people have not been '*redacted*' from the note of the meeting as alleged by EWS; they were simply not recorded on the note. The third person attending was of course Mr Riley, while the fourth person at the meeting was the lawyer at Wragge & Co who was acting for Ulmke. Mr Hollingsworth, who had retired from Ulmke three months earlier, did not attend this meeting, and thus there is no basis whatsoever for EWS' allegations that there was co-ordination between the witnesses in preparation of this statement; or indeed that the OFT has provided '*wholly misleading*' descriptions or shown a '*lack of transparency*'. In this connection, the OFT refers again to the full chronology of the preparation of the witness statements provided to EWS' legal representatives in Annexes B and C to the OFT's letter of 14 November 2005³⁰⁵.
361. EWS also alleges that it has not been provided with the first draft of Mr Riley's second statement³⁰⁶. This, too, is incorrect – as noted in Annex C to the OFT's

³⁰⁴ EWS representations dated 22 December 2005, paragraph 3.27.

³⁰⁵ Annexes B and C to letter from OFT to Ashurst dated 14 November 2005.

³⁰⁶ EWS representations dated 22 December 2005, paragraph 3.38.

letter of 14 November 2005³⁰⁷, the first draft of Mr Riley's second statement is 'Document 7' of the draft witness statements in EWS' possession (using the nomenclature adopted by EWS' legal representatives)³⁰⁸.

Ulmke witness statements – Mr Hollingsworth's second statement

362. In its Supplementary Representations³⁰⁹, EWS also suggests that Mr Hollingsworth's second statement has been subjected to distortion in order to provide a better fit with the OFT's allegations. EWS alleges that, with regard to the agreement relating to Other Customers, a sentence in the final version of Mr Hollingsworth's statement '*I do recall the discussion reference competition against each other but cannot remember if prices were mentioned below which we should [not] quote when in a head to head situation with other companies at the meeting*'³¹⁰ had been '*amended by the OFT to suggest that a discussion took place about Thermoseal's suggestion*'³¹¹.

363. Firstly, the OFT would again point out that where drafts of the statement were prepared by the OFT, this was done on the basis of discussions between the OFT and Mr Hollingsworth and the drafts were checked by Mr Hollingsworth (who was legally advised), away from the OFT's offices, prior to signature. Where Mr Hollingsworth disagreed with the draft, the statement was amended to accord with his recollection of events. The OFT also notes the warning against providing false or misleading information set out at the beginning of Mr Hollingsworth's statement:

'I have been informed that if in the statement I knowingly or recklessly provide information to the Director General that is false or misleading in a material particular I will be guilty of an offence, punishable by a fine (of up to £5,000) or a maximum of two years' imprisonment or both'³¹².

364. Secondly, this amendment to Mr Hollingsworth's witness statement was again not '*drafted by OFT*'³¹³ but was made by Mr Hollingsworth himself, in response to a request from the OFT to clarify and add detail to his recollection of this part of the Meeting:

³⁰⁷ Annexes B and C to letter from OFT to Ashurst dated 14 November 2005.

³⁰⁸ EWS alleges in footnote 22 of its Supplementary Representations that the document headed "28-03" is '*a tracked changes 13 page document which in fact appears to be the statement sent under the cover of an email from Wragges dated 5 June 2003*'. In fact, there are two documents headed "28-03"; there is the one to which EWS refers, being a later draft of Mr Riley's second statement and given the number Document 12 by EWS' legal representatives; and there is a letter from Wragge to the OFT dated 25 March 2003 which attaches the first draft of Mr Riley's second statement. This first draft of Mr Riley's second statement is headed "8-5-03" and the first paragraph reads "I am the Managing Director of Ulmke Metals Limited ("Ulmke") and have worked for Ulmke since June 1987".

³⁰⁹ EWS representations dated 22 December 2005, paragraphs 3.22 to 3.25.

³¹⁰ Chris Hollingsworth's second statement, 15 August 2003, paragraph 11.

³¹¹ EWS representations dated 22 December 2005, paragraph 3.25.

³¹² Chris Hollingsworth's second statement, 15 August 2003, paragraph 2.

³¹³ EWS representations dated 22 December 2005, paragraph 3.24.

*'Please can you add in here Chris's recollection of this discussion, including any recollection he has of any specific prices being mentioned'*³¹⁴.

365. EWS also noted in its Original Representations that, by Ulmke's lawyers' admission, Mr Hollingsworth's

*'recollection of the conversation at the end of the meeting...is rather limited. He remembers the conversation took place but unfortunately not its contents'*³¹⁵.

366. The OFT does not, however, seek to rely solely upon Mr Hollingsworth's recollection of the part of the overall infringement to which this qualification refers. It is already clear, for example from the extract from his second statement set out in paragraph 122 above and cited by EWS in its Supplementary Representations³¹⁶, that his recollection of this aspect is limited. The OFT provides in addition corroborating evidence from two other witnesses, namely Mr Riley of Ulmke and Mr Paterson of Thermoseal, as well as contemporaneous documentary evidence in the form of an internal EWS memo. Taken together, the OFT considers that this is more than sufficient to meet the requisite standard of proof.

Thermoseal witness statement – Gwain Paterson's statement

367. EWS suggests that *'OFT evidence has been inserted into [Mr Paterson's] witness statement(s) which did not originate from the witness(es) themselves'*³¹⁷. It notes that in the first draft of Mr Paterson's statement³¹⁸, drafted by Mr Paterson without any 'input' from the OFT, Mr Paterson recalled prices of [...] [C] p and [...] [C] p respectively being agreed by the Parties at the Meeting in respect of sales of 19.5mm and 15.5mm spacer bars to Other Customers. Although one of these prices ([...] [C] p) was identical to the 'minimum selling prices elsewhere' set out in EWS' internal note of the Meeting circulated the following day³¹⁹, the other ([...] [C] p) differed by 0.5p from EWS' note of the prices in respect of Other Customers agreed at the Meeting.

368. As EWS itself notes³²⁰, Mr Paterson *'specifically confirmed* (in the first draft of his statement) *that he could not remember whether [...] [C] p and [...] [C] p were the exact figures'*. The OFT therefore asked Mr Paterson in interview *'whether if it was put to him that the prices were [...] [C] and [...] [C] he "wouldn't argue"'*³²¹.

³¹⁴ Second draft of Chris Hollingsworth's second statement, 6 May 2003, paragraph 11.

³¹⁵ EWS representations dated 6 October 2004, paragraph 15.12.

³¹⁶ EWS representations dated 22 December 2005, paragraph 3.24.

³¹⁷ *Ibid*, paragraph 3.9.

³¹⁸ First draft of Gwain Paterson's statement, 10 April 2003, paragraph 21.

³¹⁹ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: SMB/1 (pages 1 & 2).

³²⁰ EWS representations dated 22 December 2005, paragraph 3.10.

³²¹ *Ibid*, paragraph 3.11.

The OFT notes in this connection the warning given to Mr Paterson, and his acknowledgement of that warning, at the beginning of the interview:

' "And this interview tape recording will be used in the investigation and decision making process by the Office of Fair Trading. Before I start the interview I must warn Mr Paterson that if you knowingly or recklessly provide information to the Office of Fair Trading that is false or misleading in any material particular you may be guilty of an offence punishable by a fine of up to £5,000 or a maximum of 2 years imprisonment or both. Do you understand that?" ... "Yeah I understand" ³²².

369. Mr Paterson confirmed in response to the OFT's question that he would not argue with those figures, and the statement was amended to *'to the best of my recollection the minimum selling price for 19.5mm anodised was [...] [C] or [...] [C] pence metre and for 15.5mm it was [...] [C] pence per metre...'*³²³. The original price remembered by Mr Paterson was not removed from the statement – instead, the statement set out both possible prices, thereby (far from being *'misleading'* as suggested by EWS) properly reflecting the doubt on Mr Paterson's part as to the exact figure agreed at the Meeting. Mr Paterson, who it should be remembered was legally advised, accepted this suggested amendment and signed the witness statement, away from the OFT's offices, to confirm it as his testimony.

370. The OFT considers that in this connection, the following points are highly significant:

- as EWS accepts, the first version of Mr Paterson's witness statement was drafted *'without "input" from the OFT'*³²⁴;
- Mr Paterson's recollections as set out in the first version of his witness statement included the following:
 - there was a price discussion in which the Parties discussed the prices to be charged to Other Customers;
 - the prices agreed at the Meeting by the Parties were [...] [C] p for 15.5mm and [...] [C] p for 19.5mm Spacer Bars;
- Mr Paterson's recollection, as recorded in the original version of his statement drafted without any 'input' from the OFT, of the price agreed by the Parties at the Meeting for 15.5mm Spacer Bars is identical to that recorded in the contemporaneous EWS internal memo sent the day after the Meeting³²⁵;

³²² *Ibid*, document at Tab 6.

³²³ Gwain Paterson's statement, 19 September 2003, paragraph 24.

³²⁴ EWS representations dated 22 December 2005, paragraph 3.10.

³²⁵ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: SMB/1 (pages 1 & 2).

- Mr Paterson's recollection, as recorded in the original version of his statement drafted without any 'input' from the OFT, of the price agreed by the Parties at the Meeting for 19.5mm Spacer Bars is only 0.5p different from that recorded in the contemporaneous EWS internal memo sent the day after the Meeting³²⁶;
- given that the EWS memo³²⁷ was internal to EWS, Mr Paterson cannot have had sight of it (or been privy to its contents) prior to preparing the first version of his witness statement; and
- quite irrespective of any influence that the OFT may or may not have had over subsequent drafts of the statement, it follows from the above that the allegation made by EWS that Mr Paterson had *'no such independent recollection'* is incorrect.

371. Indeed, the OFT considers that Mr Paterson's recollection of these agreed prices reinforces its conclusion that (contrary to the assertions of EWS) the contemporaneous EWS internal memo was a description of items agreed between the Parties at the Meeting (see paragraphs 331 to 337 above).

372. EWS also noted in its Original Representations that certain parts of draft witness statements had been omitted from the final versions of those witness statements. The OFT points out that this is a normal part of the process of gathering evidence and that it does not mean that the final statement is necessarily flawed. Furthermore, the witness statements do not *'comprise the understanding of the OFT case officers rather than the direct testimony of the witness'*³²⁸ as EWS suggested. The OFT has throughout its investigation sought to ensure that the witness statements reflected entirely the witnesses' own recollection of events. As the OFT has pointed out in paragraphs 354 and 363 above, where drafts of the statement were prepared by the OFT, this was done on the basis of discussions between the OFT and the witness and the drafts were checked by the witness (all of whom were at that time legally advised) prior to signature. Where the witness disagreed with the draft, the statement was amended to accord with his recollection of events.

373. Specifically, EWS noted that *'Mr Paterson's description of the legitimate reasons he had for attending the meeting'* has been omitted. EWS stated *'These innocent explanations did not find their way into the evidence provided to the Parties...despite their relevance to the object of the meeting'*³²⁹.

374. As set out in section II.H(2) (Purpose of the meeting), at paragraphs 403 to 411 below, the OFT accepts that there may have been some entirely legitimate reasons for attending the Meeting. It is clear that these were not the sole reasons for the Meeting, however. In particular, it was clearly intended before the Meeting took

³²⁶ *Ibid.*

³²⁷ *Ibid.*

³²⁸ EWS representations dated 6 October 2004, paragraph 15.13.

³²⁹ *Ibid.*, paragraph 15.16.

place that a strategy of market sharing would be discussed and agreed. This purpose is confirmed in an internal memo sent from Mr Worthington of EWS to Mr Penman of LSSD UK Limited two weeks before the Meeting – see paragraph 78 above. In these circumstances, any additional legitimate purpose for the Meeting is largely irrelevant.

375. Furthermore, at paragraph 23 of the final statement made by Gwain Paterson, he states *'Thermoseal's main reason for attending the distributors' meeting was to try and get a chance to individually negotiate a better cost price with EWS and this we achieved'*³³⁰. Thus it is untrue that *'innocent explanations did not find their way into the evidence provided to the Parties'*.
376. Moreover, whatever the Parties' original reasons for attending the Meeting may have been, this does not in any way alter the OFT's conclusion that the object of the agreement/concerted practice arising from the Meeting was the prevention, restriction or distortion of competition. To the extent that the discussion at the Meeting differed from their original aims or expectations, none of the Parties publicly objected to that discussion or left the Meeting early.
377. Secondly, EWS noted that in relation to Mr Paterson's statement *'to the best of my recollection, the distributors also agreed a minimum price for the following spacer bars'*, he added the qualification in his draft statement that *'I cannot remember whether these were the exact figures that were agreed upon because I had no intention of sticking to them'*.³³¹ EWS complained that this qualification was not included in the final version of Mr Paterson's statement. As noted below in paragraphs 387 to 402, even if Thermoseal genuinely had no intention of implementing the actions agreed at the Meeting, the object or effect of its agreement to those actions, even if only tacit, was to influence the conduct on the market of its competitors. Furthermore, this removed extract would have provided further confirmation that **exact** figures were indeed agreed upon. As such, the interests of the OFT's case would, if anything, have been better served by the inclusion rather than the removal of Mr Paterson's original qualification.
378. Thirdly, EWS noted that in a draft statement Mr Paterson stated in relation to selling at cost that *'I would not agree to do that as I was not prepared for Thermoseal to lose money'*.³³² This was replaced in the final statement by *'If any specific selling prices were mentioned in this context, I would not have paid much attention to them as they would have been too low for Thermoseal'*³³³.
379. In response, the OFT would point out firstly that any amendments to the statement prior to its signature, will have been made so as more accurately or fully to reflect Mr Paterson's testimony, including his responses to any questions put to him in interview by the OFT. In this connection, the OFT notes the warning

³³⁰ Gwain Paterson's statement, 19 September 2003, paragraph 23.

³³¹ EWS representations dated 6 October 2004, paragraph 15.17.

³³² *Ibid*, paragraph 15.18.

³³³ Gwain Paterson's statement, 19 September 2003, paragraph 22.

against providing false or misleading information set out at the beginning of Mr Paterson's statement:

*'I have been informed that if in the statement I knowingly or recklessly provide information to the Office of Fair Trading that is false or misleading in a material particular I will be guilty of an offence, punishable by a fine (of up to £5,000) or a maximum of two years' imprisonment or both*³³⁴.

380. Secondly, as noted in paragraph 213 above, 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 – the parties may show varying degrees of commitment to the common plan and there may well be internal conflict.
381. Thirdly, the OFT notes that there is no evidence that any of the Parties objected publicly at the Meeting to any of the proposals, despite any privately held doubts they may have held – this is discussed in more detail at paragraphs 387 to 402 below.
382. EWS has also alleged in its Supplementary Representations that *'in relation to Mr Patterson's [sic] interview which was recorded, it is apparent from further notes disclosed by the OFT, that this was not a complete record of his interview. In the circumstances it is very difficult to know what evidence he might have given which could have assisted EWS in establishing its defence*³³⁵.
383. Unfortunately EWS does not provide a reference for these *'further notes'* apparently disclosed by the OFT, so it is difficult to tell what EWS believes to be the basis for this allegation. The only 'notes' disclosed by the OFT in relation to the preparation of Mr Paterson's witness statement are the notes of the second meeting with Mr Paterson on 17 July 2003. As the OFT clearly stated in its account of the preparation of the witness statements, which it provided to EWS' legal representatives in Annexes B and C to its letter of 14 November 2005³³⁶, the discussion on Spacer Bars at this second meeting *'related only to the suspected infringement in 2000* [which is not the subject of this Decision and does not relate to it], *i.e. nothing was discussed regarding the infringement being pursued by the OFT'*. The OFT is satisfied that the transcript of the interview with Mr Paterson on 30 April 2003 provides a complete record of that interview.
384. In summary, the OFT is entirely satisfied as to the credibility of the witness evidence relied on in this Decision and that the reliance placed on it by the OFT is warranted.

³³⁴ *Ibid*, paragraph 2.

³³⁵ EWS representations dated 22 December 2005, paragraph 3.39.

³³⁶ Annexes B and C to letter from OFT to Ashurst dated 14 November 2005.

The OFT's conclusion on the overall infringement

385. On the basis of the evidence set out and analysed at paragraphs 222 to 342 above, the OFT is satisfied that the material outlined above provides strong and compelling evidence that in November/December 2002 each of the Parties engaged in an overall agreement and/or concerted practice designed to fix prices and share the market for the supply of aluminium Spacer Bars, with the intention of distorting competition in that market. Given this common objective, the sub-agreements and/or concerted practices which comprised the overall agreement and/or concerted practice may thus be regarded as together comprising a single overall infringement of the Act³³⁷.

386. In particular, the Parties engaged in:

- (a) customer allocation/market sharing in relation to Target Customers of UKae for aluminium Spacer Bars;
- (b) fixing a target price in relation to those Target Customers, for the most popular sizes of aluminium Spacer Bars; and
- (c) a non-compete arrangement, which included the fixing of a minimum price, in relation to Other Customers, for the most popular sizes of aluminium Spacer Bars.

H. Further arguments of the Parties

(1) Evidence of intent

387. In its Original Representations, EWS argued that there is evidence to suggest that at least some of the Parties may have had no 'subjective intention' to implement some or all of the understandings reached at the Meeting of 20 November³³⁸.

388. Thermoseal also argued in its Original Representations, in relation to customer allocation / market sharing, that it had no '*realistic or practical intention to act upon the list*', although it admitted that it '*entered into the discussion as introduced by Howard Worthington as [it] did not want [its] competitors to know that Thermoseal was not in a position to actually implement Howard Worthington's plan*'³³⁹. Thermoseal notes in its Supplementary Representations that '*EWS was therefore the only company capable of implementing the ideas discussed and the only one who could gain from such a strategy*'³⁴⁰.

389. In relation to price fixing for Other Customers, Thermoseal further argued in its Original Representations that although '*Minimum prices were discussed by those present at the meeting...again [Thermoseal] had no intention of implementing*

³³⁷ See paragraphs 206 to 209 above.

³³⁸ EWS representations dated 6 October 2004, paragraphs 12.20 to 12.22.

³³⁹ Thermoseal representations dated 1 October 2004, paragraphs 14 and 15.

³⁴⁰ Thermoseal representations dated 20 December 2005, paragraph 13.

them', and that *'Mr Paterson raised the question of minimum prices in order to lull the other distributors into a false sense of security and preserve Thermoseal's image as a strong credible competitor'*³⁴¹.

390. However, an absence of subjective intention does not preclude a finding that an agreement and/or concerted practice was formed between the Parties in relation to these infringements. The case law in relation to the concept of an agreement under Article 81(1) has been summarised by the CFI as follows:

*'the concept of an agreement within the meaning of Article [81(1)] ... centres around the existence of 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'*³⁴².

391. Although, in this context, the CFI makes reference to *'a concurrence of wills'* and *'the parties' intention'*, this cannot be understood to mean that there is a requirement as to the parties' **subjective** intentions. The test of intention is essentially objective rather than subjective.

392. This principle is well established in English contract law³⁴³, and will equally be the case in relation to the concepts of agreement and concerted practice for the purposes of the Chapter I prohibition. Indeed, it is well established that the concept of agreement for the purposes of Article 81 – and therefore the Chapter I prohibition – is broader than that under contract law. See for example *ACF Chemiefarma*³⁴⁴ (concerning a 'gentleman's agreement') and *Binon*³⁴⁵ (concerning a terminated agreement).

393. This is supported by a number of decisions in which the European Court has applied an objective test of intention³⁴⁶.

394. For example, in *Hercules v Commission* the CFI held:

³⁴¹ Thermoseal representations dated 1 October 2004, paragraph 15.

³⁴² Case T-41/96 *Bayer AG v European Commission* [2000] ECR II-3383, paragraph 69.

³⁴³ See, for example, *Smith v Hughes* (1871) LR 6 QB 597: *'If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms'* and *Storer v Manchester City Council* [1974] 3 All ER 824: *'In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed where there is, to all outward appearances, a contract. A man cannot get out of a contract by saying 'I did not intend to contract', if by his words he has done so'*.

³⁴⁴ Case 41/69 *ACF Chemiefarma* [1970] ECR I-4235 paragraphs 106 to 112.

³⁴⁵ Case 243/83 *Binon* [1985] ECR 2015.

³⁴⁶ Although some of these cases may relate principally to agreements and others to concerted practices, the OFT considers that the principle of objective test of intention must be interchangeable between both agreements and concerted practices since otherwise the Commission would be required to reach a definitive view as to whether a particular type of conduct constituted either an agreement or a concerted practice. It is a well established principle of law that it is not necessary for an infringement to be characterised as exclusively an agreement or a concerted practice (see paragraphs 197 to 205 above).

*'it must be concluded that the Commission has established to the requisite legal standard that the applicant participated in a quota system in so far as, even though it may not have expressly subscribed to the quota which had been allocated to it ... it obtained information on the sales volume restriction which its competitors considered necessary, on their past sales figures and on the sales volume targets which they were allocating to one another and, by its presence at the meetings and its lack of objection to the quota which had been allocated to it, **gave its competitors the impression** that it would take account of all that information and of that quota in determining the policy which it intended to follow on the market and thus supported the common purposes which emerged between the participants at the meetings'* (emphasis added)³⁴⁷.

395. Similarly, in *Solvay v Commission* the CFI held:

*'the applicant claims that it took part in the meeting without any anti-competitive intention since, as a newcomer on the market, it needed to obtain information in order to acquire a share of that market. In this regard, it should be observed that since it has been established that the applicant took part in those meetings and that their purpose was inter alia to fix price and sales volume targets **the applicant at least gave its competitors the impression** that it was participating in them in the same spirit as the others. In those circumstances it is for the applicant to adduce evidence to show that its participation in the meetings was without any anti-competitive intention, by showing that it had **indicated to its competitors** that it was participating in the meetings in a spirit which was different from theirs. It must be observed that the applicant's arguments based on its conduct on the market and designed to show that its participation in the meetings had the sole purpose of enabling it to obtain information on foreseeable market trends do not form evidence of such a kind as to prove that it had no anti-competitive intention, since the applicant puts forward no evidence capable of proving **that it had informed its competitors** that its conduct on the market would not be governed by what occurred at the meetings. Even if its competitors had been told this, the mere fact of exchanging with them information which an independent operator keeps strictly secret as confidential business information is sufficient to demonstrate that it had an anti-competitive intention. ...'* (emphasis added)³⁴⁸.

396. The CFI again stated in *Tate & Lyle*:

*'It should be noted that Napier Brown took part in meetings which had an anti-competitive purpose and that, at the very least, it gave the impression that its participation took place in the same spirit as that of its competitors...In those circumstances, it is for Napier Brown to adduce evidence to show that its participation in the meetings was without any anti-competitive intention by demonstrating that **it had indicated to its competitors** that it was participating in those meetings in a spirit which was different from theirs'* [reference to *Solvay*, paragraph 99]³⁴⁹ (emphasis added).

³⁴⁷ Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, paragraph 232.

³⁴⁸ Case T-12/89 *Solvay v Commission*, paragraphs 98 to 100.

397. In the present case, the Parties took part in a meeting which had an anti-competitive purpose and, at the very least, gave the impression that their participation took place in the same spirit as that of their competitors. Indeed, as demonstrated in the above extract (paragraph 389), Thermoseal entered into the discussion in order to make the other three Parties believe that it was going to implement the agreed actions. Thus the object or effect of its discussion of those actions was to influence the conduct on the market of its competitors. None of the Parties has provided any evidence to demonstrate that it **indicated to its competitors** that it was participating in the Meeting in a spirit which was different from theirs.

398. Furthermore, as the ECJ stated in its *Cement* judgment:

*'According to settled case-law, it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, **without manifestly opposing them**, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had **indicated to its competitors** that it was participating in those meetings in a spirit that was different from theirs'³⁵⁰ (emphasis added).*

399. Neither EWS nor Thermoseal, nor either of the other two Parties, has provided any evidence that any of the Parties expressed publicly at the Meeting any reservations on their respective parts regarding the actions agreed at the Meeting. Furthermore, the actions were confirmed in writing by EWS after the Meeting, in the form of letter(s) confirming the specific individual Target Customers agreed for each of the Parties attending (see paragraphs 128 to 132 above), and there is no evidence to suggest that any of the three other Parties rejected the content of EWS' letters in any way.

400. It is clear from the evidence and from the Parties' representations that, although some of the Parties claim to have had private reservations about some of the actions agreed at the Meeting, none of the Parties manifestly opposed any of those actions or indicated to their competitors that they were participating in the discussion of those actions in a spirit that was different from their competitors'. As the ECJ explained in *Cement*:

'The reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it'³⁵¹.

³⁴⁹ Cases T-202/98, 204/98 and 207/98 *Tate & Lyle plc v European Commission* [2001] ECR II-2035, paragraphs 63-4.

³⁵⁰ Cases C-204/00P, 205/00P, 211/00P, 213/00P, 217/00P and 219/00P *Aalborg Portland A/S v European Commission* [2004] ECR I-123, at paragraph 81.

³⁵¹ *Ibid*, at paragraph 82.

401. The ECJ continued that the principles established in the case law cited in paragraph 398 above:

*'also apply to participation in the implementation of a single agreement...a party which tacitly approves of an unlawful initiative, **without publicly distancing itself from its content or reporting it to the administrative authorities**, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of **rendering the undertaking liable in the context of a single agreement**. Nor is the fact that an undertaking does not act on the outcome of a meeting having an anti-competitive purpose such as to relieve it of responsibility for the fact of its participation in a cartel, **unless it has publicly distanced itself from what was agreed in the meeting**. Neither is the fact that an undertaking has not taken part in all aspects of an anti-competitive scheme or that it played only a minor role in the aspects in which it did participate material to the establishment of the existence of an infringement on its part. Those factors must be taken into consideration only when the gravity of the infringement is assessed...*³⁵² (emphasis added).

402. It is clear from the 'settled case-law' set out by the ECJ in the above extracts, and from the evidence set out above, that the behaviour of all of the Parties was such as to indicate their participation in the agreement and/or concerted practice. None of the Parties objected to the proposals or left the Meeting early. No minutes of any dissenting opinion were kept. The expression of joint intention at the Meeting would have been sufficient to influence the subsequent conduct on the market of each of the Parties. As Thermoseal implicitly states in the above extracts, it wanted its competitors to think that it was willing and able to proceed with the agreed actions. By either expressly or tacitly accepting the proposed course of conduct, each Party was giving the other participants in the Meeting to believe that it subscribed to what was decided there and would comply with it, thereby influencing the other Parties to agree to the proposed strategies and to put them into effect.

(2) Purpose of the Meeting

403. In its Original Representations, Thermoseal noted that there were additional purposes for its meeting with EWS and the other distributors on 20 November 2002, namely '*hoping that it could persuade [EWS] to reduce prices further*' and '*to obtain market intelligence about DQS and...what Ulmke's plans were for the future*'³⁵³. In its Supplementary Representations Thermoseal has noted that its primary aim was '*to try and persuade EWS that it would do a better job than its existing distributors*', and '*to achieve a better cost price for all of its bar, and not specifically in relation to the target customers agreed at the meeting*'³⁵⁴.

³⁵² *Ibid*, at paragraphs 83 to 86.

³⁵³ Thermoseal representations dated 1 October 2004, paragraphs 12 and 13.

³⁵⁴ Thermoseal representations dated 20 December 2005, paragraph 10.

404. EWS also argued in its Original Representations that *'the Parties attended the meeting on the basis that it was for a legitimate and innocent purpose...'*³⁵⁵, reinforcing this in its oral representations, during which EWS' legal representatives stated that the *'common motivation amongst the distributors was to get a lower transfer price'*³⁵⁶.

405. It is not the OFT's case that the anti-competitive actions agreed at the Meeting were its sole purpose, however. Moreover, whatever the Parties' original reasons for attending the Meeting may have been, this does not in any way alter the OFT's conclusion that the object of the agreement/concerted practice arising from the Meeting was the prevention, restriction or distortion of competition. To the extent that the discussion at the Meeting differed from their original aims or expectations, none of the Parties publicly objected to that discussion or left the Meeting early.

406. It is not disputed by EWS that the Meeting was arranged in order to discuss UKae's prices and the collective response of EWS and the other Parties:

'The various approaches from individual key distributors all seeking to improve the competitiveness of their prices for EWS spacer bar in relation to UKae were the reason for arranging the Distributors' Conference', and 'EWS arranged to meet its distributors together' (emphasis added)³⁵⁷.

407. Gwain Paterson of Thermoseal has also accepted in his statement (see paragraphs 81 and 87 above) that one of the main (and in all probability the principal) reasons for the meeting of all of the Parties was to agree a strategy for fighting back against UKae:

*'Howard [Worthington of EWS] telephoned me and invited me to a meeting with EWS's other distributors to discuss the low prices being charged by UKae and how we could fight back against them'*³⁵⁸.

408. Nor is it disputed by EWS that it asked (at least one of) the distributors to bring target lists of UKae accounts to the Meeting:

*'At the 19 November 2004 meeting with Ulmke, Mr Worthington of EWS suggested to Ulmke that they compile a list of those customers currently supplied by UKae whose business they thought they might have a good chance of winning'*³⁵⁹ (emphasis added).

409. It is clear from Mr Paterson's statement that this strategy was also discussed with Thermoseal:

³⁵⁵ EWS representations dated 6 October 2004, paragraph 11.17.

³⁵⁶ EWS oral representations dated 14 October 2004, page 35 of transcript.

³⁵⁷ EWS representations dated 6 October 2004, paragraph 8.1.

³⁵⁸ Gwain Paterson's statement, 19 September 2003, paragraph 17.

³⁵⁹ EWS representations dated 6 October 2004, paragraph 8.3.

*'Howard also outlined his strategy for fighting back, namely that each of the distributors would take five or six of UKae's customers and try to win that business by offering lower prices. He asked me to bring to the meeting a list of potential customers of UKae that Thermoseal might be able to target'*³⁶⁰.

410. EWS' intention prior to the Meeting is clearly demonstrated in the contemporaneous internal memorandum dated 7 November 2002 to Jeff Penman of LSSD UK Limited, in which Howard Worthington states:

*'I am proposing to launch a coalition raid, bringing strengths from DQS, Ulmke, Thermoseal and EWS to bear at a time of disruption for UKae, thus maximising their discomfort. The intended result is the elimination of UKae...'*³⁶¹.

411. Thus, while the Parties may have had additional objectives for the Meeting on 20 November 2002, the OFT is satisfied that they also had a shared common objective of fighting back against UKae and that this included by means of an unlawful customer allocation/market sharing strategy. Moreover, as set out above, whatever the Parties' original reasons for attending the Meeting may have been, this does not in any way alter the OFT's case that the object of the agreement/concerted practice arising from the Meeting was anti-competitive.

(3) The relevance of the 'tacit acceptance' test in *Bayer*

412. In its Original Representations, EWS argued that, *'in the absence of evidence of express agreement'*³⁶², the OFT should have considered the test of tacit acceptance set out by the ECJ in *Bayer*.³⁶³ In particular, EWS made reference to the statement of the ECJ at paragraph 102 of that case that:

*'For an agreement within the meaning of Article [81(1)] of the Treaty to be capable of being regarded as having been concluded by tacit acceptance, it is necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal constitute an invitation to the other party, whether express or implied, to fulfil that goal jointly, and that applies all the more where, as in this case, such an agreement is not at first sight in the interests of the other party, namely the wholesalers'*³⁶⁴.

413. The OFT considers that the evidence in this case supports the conclusion that express understandings were reached in relation to each of the three elements of the infringement and therefore that the issue of tacit acceptance is not relevant. It is sufficient that each of the elements of the infringement in this case was openly discussed at the Meeting and that a clear understanding of the agreements reached was shared between the Parties. None of the Parties publicly objected to

³⁶⁰ Gwain Paterson's statement, 19 September 2003, paragraph 17.

³⁶¹ Attachment 3 to EWS letter dated 28 January 2003, sent in response to OFT enquiries made under section 26 on 10 January 2003.

³⁶² EWS representations dated 6 October 2004, paragraphs 12.24 *et seq.*

³⁶³ *Ibid*, paragraph 12.27.

³⁶⁴ Cases C-2/01 P and C-3/01P *Commission v Bayer* [2004] ECR I-00023, paragraph 102.

the proposals or left the Meeting early. As noted in paragraph 398 above, the ECJ confirmed in its *Cement* judgment that:

*'According to settled case-law, it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, **without manifestly opposing them**, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had **indicated to its competitors** that it was participating in those meetings in a spirit that was different from theirs'³⁶⁵ (emphasis added).*

414. In addition, the ECJ's judgment in *Bayer* must in any event be understood in its proper context. In *Bayer*, the ECJ was addressing tacit acceptance in the context of measures:

- apparently adopted unilaterally³⁶⁶;
- imposed in the context of bilateral vertical contacts between a manufacturer and its distributors; and
- that operated against the apparent interests of the distributors.

415. None of these conditions are present in this case. The infringing understandings between the Parties:

- arose as a result of multi-lateral discussions and could not in any sense be described as even apparently unilateral;
- these discussions were horizontal contacts in that they took place between parties that were competitors and the discussions that together constitute the overall infringement were horizontal in nature (see paragraphs 467 to 503 below); and
- the understandings operated so as to reduce competition between the Parties to the benefit of the participating distributors.

416. In this context the OFT considers that the issue of tacit acceptance as addressed in the ECJ's judgment in *Bayer* is irrelevant. This latter interpretation is in line with the CAT's comment in relation to *Bayer* that:

'it does not seem to us that the judgments in Bayer are intended to qualify the principles of Suiker Unie and many subsequent cases'³⁶⁷.

³⁶⁵ Cases C-204/00P, 205/00P, 211/00P, 213/00P, 217/00P and 219/00P *Aalborg Portland A/S v European Commission* [2004] ECR I-123, at paragraph 81.

³⁶⁶ See paragraph 71 of the CFI's judgment at first instance in Case T-41/96 *Bayer AG v European Commission* [2000] ECR II-3383 and paragraph 101 of the ECJ's judgment in *Bayer* (Cases C-2/01 P and C-3/01P *Commission v Bayer* [2004] ECR I-00023).

417. Notwithstanding the above, the OFT considers that even if the issue of tacit acceptance were relevant in this case (and for the reasons set out in this section the OFT does not consider that it is), the test referred to by EWS in its Original Representations is met. At the Meeting EWS invited the other Parties to join it in a strategy of customer allocation / market sharing and price fixing with respect to Target Customers, as evidenced in the tables following paragraphs 227 and 270 above. Thermoseal invited the other Parties to join it in a strategy of price fixing with respect to Other Customers, as evidenced in the table following paragraph 325 above. Thus the agreement is capable of being regarded as having been concluded by tacit acceptance.

(4) The finding of a concerted practice

418. EWS submitted in its Original Representations that no finding of a concerted practice could be made in this case for at least two reasons. First, EWS argued that there is no direct evidence of 'practical co-operation' between the Parties since there is no evidence that the Parties either:

- targeted customers on their individual lists;
- charged listed customers target prices; or
- refrained from charging Other Customers prices below agreed minimum prices.³⁶⁸

419. Second, EWS argued that knowing co-operation between the Parties cannot be presumed, in particular because the Parties met on a single isolated occasion and because of the relatively short period between the Meeting of 20 November 2002 and the OFT's intervention on 5 December 2002.

420. In summary, EWS submitted that no concerted practice could be found to exist because:

- there is no direct evidence that the Parties implemented the understandings reached between them on the market; and
- such implementation cannot be presumed.

421. For the reasons set out below, the OFT believes that, contrary to EWS's submissions:

- there is sufficient direct evidence of practical co-operation – including implementation – to support a finding that a concerted practice existed in relation to each of the three infringements, albeit that much of that evidence does not relate to action 'on the market'; and
- implementation on the market will, in any event, be presumed absent the production of contrary evidence by the Parties.

³⁶⁷ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, paragraphs 666 to 669. See paragraphs 214 to 217 above.

³⁶⁸ EWS representations dated 6 October 2004, paragraph 11.6.

(a) **Evidence of practical co-operation**

422. It is clear from the case law of the European Courts that practical co-operation, including participation in meetings, with the purpose of influencing the participants' conduct on the market, is a sufficient basis for a finding that a concerted practice has taken place. There is no additional requirement that such behaviour include implementation. For example, in *Rhone-Poulenc v Commission* the CFI held:

'the applicant participated in meetings concerning the fixing of price and sales volume targets during which information was exchanged between competitors about the prices they wished to see charged on the market, the prices they intended to charge, their profitability thresholds, the sales volume restrictions they judged to be necessary, their sales figures or the identity of their customers. Through its participation in those meetings, it took part, together with its competitors, in concerted action the purpose of which was to influence their conduct on the market and to disclose to each other the course of conduct which each of the producers itself contemplated adopting on the market.

...

*The Commission was therefore justified, in the alternative, having regard to their purpose, in categorising **the EAP meeting** of 22 November 1997 in which the applicant participated **and the regular meetings of polypropylene producers** in which the applicant participated between the end of 1978 or the beginning of 1979 and the end of 1980 as concerted practices within the meaning of Article [81(1)] of the [EC] Treaty' (emphasis added)³⁶⁹.*

423. Similarly, in *Thyssen v Commission*, the CFI held (applying the equivalent concept of 'concerted practice' in Article 65(1) of the ECSC Treaty):

*'it is not necessary for the concertation to have had an effect, in the sense understood by the applicant, on the conduct of competitors on the market. It suffices to find that each undertaking was bound to take into account, directly or indirectly, the information obtained during its contacts with its competitors (*Rhone-Poulenc v Commission*, cited above, paragraph 123). ...*

*... Undertakings engage in a concerted practice within the meaning of that provision where they actually take part in a scheme designed to eliminate the uncertainty about their future market conduct and necessarily implying that each of them takes into account the information obtained from its competitors (*Rhone-Poulenc v Commission*, cited above, paragraph 123). It is therefore not necessary for the Commission to demonstrate that the exchanges of information in question led to a specific result or were put into effect on the market in question'³⁷⁰.*

³⁶⁹ Case T-1/89 *Rhone-Poulenc v Commission* [1991] ECR II 867, paragraphs 122 to 124.

³⁷⁰ Case T-141/94 *Thyssen v Commission* [1999] ECR II-347, at paragraphs 269 and 271.

424. Thermoseal has accepted in its Supplementary Representations that '*non-implementation is not relevant to the finding of an infringement*'³⁷¹.

425. In this case there is very clear direct evidence of practical co-operation – including implementation – that constitutes a concerted practice in relation to each element of the infringement:

- *customer allocation/market sharing*: relevant practical co-operation includes the sharing of information regarding the names of UKae customers in the context of a discussion between competing undertakings regarding the exclusive allocation of customers (see paragraphs 107 to 114 above), followed by correspondence from EWS confirming the identities of the allocated customers (see paragraphs 128 to 132 above), upon receipt of which the three other Parties did not object in any way to the content, or make contact with EWS to inform it that they would not go ahead with the actions agreed at the Meeting, and the exchange of e-mails on 29 November 2002 between Mervyn Richards of EWS and Mark Hickox of Thermoseal regarding the passing on of a possible sales lead for [...] [C] in relation to Georgian Spacer Bars, a product not supplied by EWS (see paragraph 144 above);
- *fixing a target price in relation to target customers*: relevant practical co-operation includes the multilateral discussion of target prices for Target Customers (see paragraphs 115 to 118 above); and
- *a non-compete arrangement, which included the fixing of a minimum price, in relation to Other Customers*: relevant practical co-operation includes the multilateral discussion of minimum prices and a non compete arrangement in respect of Other Customers (see paragraphs 119 to 124 above), and the subsequent conversation that took place in late November / early December between Howard Worthington of EWS and Mark Hickox of Thermoseal regarding the prices they would each offer to [...] [C] (see paragraph 143 above).

426. As pointed out by EWS³⁷²:

'As the CAT has recently affirmed in the Replica Football Kits case, the jurisprudence on a concerted practice is conveniently summarised in Anic where Article 81 is intended: 'to apply to all collusion between undertakings, whatever the form it takes. ...The only essential thing is the distinction between independent conduct, which is allowed, and collusion, which is not, regardless of any distinction between types of collusion'³⁷³.

The actions and acts of practical and knowing co-operation outlined in the previous paragraph cannot be described as independent conduct; rather, they

³⁷¹ Thermoseal representations dated 20 December 2005, paragraph 31.

³⁷² EWS representations dated 6 October 2004, paragraph 11.12.

³⁷³ *JJB Sports PLC v Office of Fair Trading* [2004] CAT 17, paragraph 153 citing case 49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125.

constituted collusive conduct forming part of the overall infringement that is the subject of this Decision.

427. Furthermore, as the ECJ held in *Pioneer*³⁷⁴:

'...A concerted practice is capable of continuing in existence, even in the absence of active steps to implement it. Indeed, if the practice is sufficiently effective and widely known, it may require no action to secure its implementation. Cases may arise in which the absence of any evidence of measures taken to implement a concerted practice may suggest that the practice has come to an end. That, however, is a matter of evidence, which must depend upon the circumstances of the case ... It is perhaps of interest to observe the decision of the United States Court of Appeals in US v Stromberg and Others, 268 F 2d.256, in which it held that a conspiracy, once established, is presumed to continue until the contrary is shown.' (emphasis added).

428. The OFT has concluded that (to use the US terminology) a 'conspiracy' was established at the Meeting on 20 November 2002 and that no evidence of termination of the agreement, prior to the OFT's visit to the premises of three of the Parties on 5 December 2002, has been shown.

429. Finally, in defining the concept of a concerted practice in *Cimenteries v Commission*³⁷⁵, the CFI stated the following:

'In order to prove that there has been a concerted practice, it is not therefore 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 colluded over their future conduct on the market. It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct (on the market to be expected on his part).'

430. It is clear from the evidence set out in paragraphs 77 to 144 above that the Parties met on 20 November 2002 and variously stated their intentions to share the aluminium Spacer Bar market by allocating UKae Target Customers between themselves; to fix prices in relation to those Target Customers, for the most popular sizes of aluminium Spacer Bars; and to fix prices and otherwise not compete in relation to Other Customers, for the most popular sizes of aluminium Spacer Bars. Each Party's declarations of intended future conduct on the market were sufficient to eliminate or, at the very least, substantially reduce the other Parties' uncertainty as to its future conduct, and thereby had the potential to influence the other Parties' own future conduct on the market.

(b) Presumption of implementation on the market

431. In any event, notwithstanding the fact that as demonstrated in the previous section there is sufficient direct evidence of practical co-operation – including

³⁷⁴ Joined Cases 100/80 et seq *Musique Diffusion française v European Commission* [1983] ECR 1825, page 1941.

³⁷⁵ Cases T-25/95 etc. *Cimenteries CBR v European Commission* [2000] ECR II-491, paragraph 1852.

implementation – to support a finding that a concerted practice existed in relation to each of the three infringements, implementation on the market will be presumed absent the production of contrary evidence by the Parties. The concept of a concerted practice must be understood in light of the principle that each economic operator must determine independently the policy it intends to adopt on the market³⁷⁶. The ECJ has stated³⁷⁷, and the CAT has recently confirmed in its judgment in *Apex Asphalt*³⁷⁸, that, subject to proof to the contrary - which it is for the Parties to adduce - there is a presumption that undertakings participating in concerting arrangements and remaining active on the market will take account of information exchanged with their competitors when determining their conduct on the market.

432. In its Original Representations, EWS argued that this presumption does not apply in the present case since the actions of the Parties consisted of one meeting, followed by a series of letters and internal memos from one of the participants (EWS). It contrasted this with the complexity and length of the infringements that were the subject of *Hüls*³⁷⁹ and *Anic*³⁸⁰, which EWS pointed out related to a complex cartel, involving 15 competitors which met systematically, at times monthly, over a period of at least 5 to 6 years³⁸¹.

433. EWS quoted from *Hüls*³⁸², that the presumption that undertakings taking part in concerted action and remaining active on the market take account of information exchanged with their competitors for the purpose of determining their conduct on that market *'is all the more true where the undertakings concert together on a regular basis over a long period'* (emphasis added by EWS)³⁸³.

434. EWS added that *'where parties attend a single meeting and do not agree to adhere to any collective devices regarding their conduct on the market, it cannot be said that they are concerting'*³⁸⁴. It quoted from *Anic*³⁸⁵ that *'a case in which an undertaking participates on an isolated occasion in a meeting whose purpose is unlawful is different from that in which it takes part in a series of similar meetings stretching over several years, as in the present case'* (emphasis added by EWS)³⁸⁶.

³⁷⁶ Case C-199/92 P etc. *Hüls AG v European Commission* [1999] ECR I-4287.

³⁷⁷ Case C-199/92 P etc. *Hüls AG v European Commission* [1999] ECR I-4287, paragraph 161 *et seq*, and Case T-25/95 etc *Cimenteries CBR v European Commission* [2000] ECR-II 491, paragraph 1910.

³⁷⁸ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 206 (x).

³⁷⁹ Case C-199/92 P etc. *Hüls AG v. European Commission* [1999] ECR I-4287.

³⁸⁰ Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125.

³⁸¹ EWS representations dated 6 October 2004, paragraph 3.9.

³⁸² Case C-199/92 P etc. *Hüls AG v. European Commission* [1999] ECR I-4287.

³⁸³ EWS representations dated 6 October 2004, paragraph 3.10.

³⁸⁴ *Ibid*, paragraph 3.11.

³⁸⁵ Case C-49/92P *European Commission v Anic Partecipazioni* [1999] ECR I-4125.

³⁸⁶ EWS representations dated 6 October 2004, paragraph 3.11.

435. Whilst the OFT does not accept that contact was limited to an isolated occasion in this case (see paragraphs 438 to 439 below), the OFT considers that EWS' interpretation of the case law on this issue is incorrect. The rulings in *Hüls* and *Anic* made it clear that the presumption of taking account of exchanged information '**is all the more true where the undertakings concert together on a regular basis over a long period**' (emphasis added). This does not mean that such a presumption does not apply at all where the concerted practice is of short duration. The ECJ's statement is qualitative, highlighting the increased seriousness of longer information exchanges. Contrary to the submissions of EWS, the presumption is capable of applying even where contact between the undertakings concerned is isolated to a single instance³⁸⁷.
436. To suggest otherwise would be contrary to the logic of the Chapter I prohibition, which consistent with the case law of the European Court in relation to Article 81, is intended '*to apply to all collusion between undertakings, whatever the form it takes*' and '*regardless of any distinction between types of collusion*'³⁸⁸. A concerted practice is '*a form of co-ordination between undertakings which*' has not '*reached the stage where an agreement properly so called has been concluded*'³⁸⁹. Where, as here, two or more undertakings have held a meeting with the purpose of influencing each other's conduct on the market in a way that prevents, restricts or distorts competition, it would be contrary to the logic of these ECJ judgments to conclude that, unless the measures discussed are put into effect, an infringement will only have been committed if the co-ordination between the parties had reached the stage where an agreement properly so called had been concluded. This would be to give an unwarranted significance to the distinction between 'agreements' and 'concerted practices'.
437. It would also, perversely, create a situation in which, even if the OFT had advance notice of such conduct, the OFT would only be able to deter similar conduct by the adoption of an infringement decision if the OFT refrained from intervening until after consumers had been prejudiced by the implementation of the anti-competitive arrangements.
438. Furthermore, in this case the Parties' activities were not limited to a single meeting. Although the Parties in fact held only one meeting, there were clear plans to hold a further meeting to discuss the same issues two months later. It was agreed that the next meeting would be held at the same time, in the same place, on 15 January 2003, and this was confirmed in letters from EWS to each of the other three Parties, as detailed in paragraphs 131, 135 and 138 above. Furthermore, it was clear from that correspondence that this next meeting was to constitute, at least in part, a continuation and reinforcement of the agreements and/or concerted practices arising out of the first meeting: to Ulmke '*These [targets] can be added to at the next meeting*'; and to DQS '*it really would do your*

³⁸⁷ See the treatment of the so-called "Dudley Contracts" in *Apex* (*supra* at footnote 378) at paragraphs 239 to 247.

³⁸⁸ Case 49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125.

³⁸⁹ Case 48/69 *ICI Ltd. v European Commission* [1972] ECR 1969, paragraph 64. See also the *Replica Kit* judgment [2004] CAT 17, paragraph 151.

corner a great deal of justice if you did some homework and came up with a second list of where we should all attack'. It appears that the only reason for the Parties not implementing their agreement further, was the intervention of the OFT.

439. In addition, there was correspondence between the Parties following the Meeting which confirmed the actions agreed at the Meeting, discussed at paragraphs 128 to 141 above, and subsequent contact regarding customers between EWS and Thermoseal, discussed at paragraphs 143 to 144 above. The OFT also notes that the understandings reached at the Meeting were capable of affecting the Parties' behaviour both before and after its intervention on 5 December 2002. It is incumbent on the Parties to adduce positive evidence that their behaviour was not in fact affected either before or after that intervention.

440. The OFT is therefore satisfied that the presumption (which it is for the Parties to rebut) that an undertaking which remains active on the market has taken into account information exchanged with its competitors in determining its conduct on that market, applies in this case and that the Parties have not provided any evidence to rebut this presumption.

(c) Reciprocity

441. Whilst the concept of a concerted practice *prima facie* implies the existence of reciprocal contacts, the CFI has stated that *'that condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it, or at the very least, accepts it'*³⁹⁰. The CFI has further stated that *'the fact that only one of the participants at the meetings in question reveals its intentions is not sufficient to exclude the possibility of an agreement or concerted practice'* and that *'that conclusion [reference to Rhone Poulenc paragraphs 122-3] also applies where, as in this case, the participation of one or more undertakings in meetings with an anti-competitive purpose is limited to the mere receipt of information concerning the future conduct of their market competitors'*³⁹¹. This is because, in the words of the CAT, *'the recipient of the information in question cannot normally fail to take that information into account when formulating its policy on the market'*³⁹².

442. EWS commented in its Original Representations that the CFI further stated in *Cimenteries v Commission* that it was *'...apparent from its record of that meeting that no reservations or objections were expressed when the competitor informed it of its intentions. In those circumstances, the attitudes of that party at the meeting cannot be reduced to the purely passive role of a recipient of the information...'*³⁹³.

³⁹⁰ Cases T-25/95 etc. *Cimenteries CBR v European Commission* [2000] ECR II-491, paragraph 1849.

³⁹¹ Cases T-202/98, 204/98 and 207/98 *Tate & Lyle plc v European Commission* [2001] ECR II-2035, paragraphs 54 and 58.

³⁹² *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, paragraph 663.

³⁹³ Cases T-25/95 etc. *Cimenteries CBR v European Commission* [2000] ECR II-491, paragraph 1849.

443. From this, EWS concluded that *'It follows that where the participants to an alleged anti-competitive co-operation express their reservations and objections to taking part, it cannot reasonably be argued that there was any degree of reciprocity'*³⁹⁴.
444. The OFT considers that EWS' interpretation of the case law on this issue is incorrect. What can be inferred from the CFI's judgment is that even where no reservations or objections are expressed by a competitor, that competitor is not acting in a purely passive role as a recipient of information, i.e. there is some degree of reciprocity. It does not follow that where reservations or objections are expressed, there is no reciprocity. For example, a meeting may take place in which a competitor argues at length and with fervour that the suggested action should not take place, but in the end agrees to go ahead with the suggested action, perhaps because in its view it is on balance the best approach. Clearly reciprocity has occurred in such a situation, in that agreement has finally been reached, even though reservations and objections were expressed during the discussion which led to the agreement.
445. In the present case, there is no evidence that any reservations or objections were expressed at the Meeting at all. Although subsequent statements in the context of this investigation suggest that some of the Parties may have had private reservations about some parts of the overall infringement, as discussed in paragraphs 387 to 402 above there is no evidence to suggest that these reservations were expressed publicly to the other Parties whether at the Meeting or afterwards. It is clear that private reservations and objections that are not expressed publicly cannot be capable of influencing the conduct of others.
446. Furthermore, as noted in paragraph 213 above, 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 common plan – the parties may show varying degrees of commitment to the common plan and there may well be internal conflict.
447. The OFT is therefore satisfied not only that there is no evidence that any reservations or objections were expressed at the Meeting, but also that the expression of reservations or objections alone would not be sufficient to prevent the discussion held by the Parties from amounting to a concerted practice that constituted an infringement of the Chapter I prohibition.

(d) Typical elements of a concerted practice

448. In its Original Representations, EWS further misinterpreted the case law in its interpretation of the CAT's review of the relevant authorities in the *Replica Football Kits*³⁹⁵ case, where the CAT discussed the various elements that might indicate the existence of a concerted practice³⁹⁶.

³⁹⁴ EWS representations dated 6 October 2004, paragraph 3.8.

³⁹⁵ *JJB Sports PLC v Office of Fair Trading* [2004] CAT 17 at paragraphs 150 to 208.

³⁹⁶ EWS representations dated 6 October 2004, paragraph 11.19.

449. Firstly, EWS noted that *'cartels are by their nature hidden and secret (205). In this case, there was nothing covert about the meeting'*. The OFT does not believe there is anything in this argument. It cannot be the case that an agreement that prevents, restricts or distorts competition does not constitute an infringement of the Chapter I prohibition simply because it is not covert. The CAT was only pointing out in this extract that evidence of cartels may be difficult to obtain because of their hidden and secret nature.
450. Secondly, EWS noted that *'cartels will involve conduct akin to dishonesty (199).'* The OFT sets out in this Decision the evidence that the Parties engaged in an overall agreement and/or concerted practice which constituted an infringement of the Chapter I prohibition. Dishonesty is a requirement of the cartel offence under Part 6 of the Enterprise Act 2002, but it is not necessary in order to establish an infringement of the Chapter I prohibition.
451. Thirdly, EWS noted that *'cartels involve the parties meeting with an illegal intent or purpose...it was a legitimate meeting and the means by which they could achieve a reduction in their wholesale prices to enable them to compete more effectively with a low price competitor'*. The OFT sets out in this Decision that the purpose of the Meeting was certainly not wholly legitimate – for example, according to Gwain Paterson's (Thermoseal) statement (see paragraph 87 above), when inviting him to the meeting Howard Worthington of EWS stated that *'each of the distributors would take five or six of UKae's customers and try to win that business by offering lower prices. He asked me to bring to the meeting a list of potential customers of UKae that Thermoseal might be able to target'*³⁹⁷. It was clearly decided even before the meeting took place that a strategy of market sharing would be discussed and agreed. This purpose is confirmed in an internal memo sent from Howard Worthington of EWS to Jeff Penman of LSSD UK Limited two weeks before the Meeting (see paragraph 78 above), stating *'I am proposing to launch a coalition raid, bringing strengths from DQS, Ulmke, Thermoseal and EWS to bear at a time of disruption for UKae, thus maximising their discomfort. The intended result is the elimination of UKae...'*³⁹⁸.
452. Finally, EWS noted that *'cartels sometimes involve complaints from one competitor to another that it should abandon/restrict some form of competitive behaviour (160)...in this case, the genesis of the meeting was the legitimate desire of the EWS distributors to obtain lower ex-manufacturer prices so that they could compete more effectively against UKae.'* The OFT does not deny that cartels *'sometimes'* involve complaints. In this case, the OFT demonstrates clearly (for example, in the above paragraph) that although the distributors may have been seeking to obtain lower input prices from EWS, this was not the sole purpose for the Meeting – see also section II.H(2) above, where the issue of the purpose of the Meeting is discussed more fully. Indeed, the fact that the precise lower input prices were confirmed individually with EWS by each of the distributors outside of the Meeting (see paragraphs 8.1 to 8.6 and 8.22 of EWS' Original Representations³⁹⁹) demonstrates that it was unnecessary to hold the main Meeting to achieve this

³⁹⁷ Gwain Paterson's statement, 19 September 2003, paragraph 17.

³⁹⁸ Attachment 3 to EWS letter dated 28 January 2003, sent in response to OFT enquiries made under section 26 on 10 January 2003.

- aim. One of the purposes of the Meeting was to agree a customer allocation/market sharing strategy (and supporting price fixing strategies) that maximised the efficiency of the attack on UKae's customers and minimised the commercial risks to each of the Parties, substituting knowing co-operation for the risks of competition. This conduct was not '*fundamentally pro-competitive*'; it was manifestly anti-competitive and it constituted a breach of the Chapter I prohibition.
453. The CAT set out a more rigorous assessment of the typical elements of a concerted practice in its judgment on *Apex Asphalt*⁴⁰⁰. The OFT has assessed this infringement against the twelve broad principles identified by the CAT as being relevant in that case, as demonstrated in the following paragraphs.
454. (i) *Absence of purely unilateral conduct*⁴⁰¹: The discussion at the Meeting on 20 November 2002 took place between four different undertakings, and therefore cannot be considered as unilateral. It was also preceded by bilateral contacts between EWS and each of the other Parties, whether by telephone or in a meeting (see paragraphs 87, 91 and 97 above), and was followed by further bilateral contacts between EWS and each of Thermoseal and Ulmke (see paragraphs 125 and 140 above).
455. (ii) *Concepts of agreement and concerted practice intended to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and the forms in which they manifest themselves*⁴⁰²: Hence the fact that the infringement lasted for only a few weeks does not preclude the application of the presumption that, in the absence of contrary evidence adduced by the Parties, the Parties will have taken account of the information exchanged when determining their conduct on the market – see paragraphs 431 to 440 above. For the avoidance of doubt, nor does it prevent the Parties' conduct from constituting an agreement.
456. (iii) *Concerted practice refers to a form of co-ordination between undertakings which knowingly substitutes, for the risks of competition, practical co-operation between them*⁴⁰³: The Parties discussed which of them should target each of the UKae customers discussed at the Meeting; they discussed the prices at which each of them would offer aluminium Spacer Bars to those Target Customers; they discussed the prices at which they should offer aluminium Spacer bars to Other Customers in the market; and they discussed refraining from competition in respect of those Other Customers. Thus they substituted practical co-operation for the risks of competition.
457. (iv) *Each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells*⁴⁰⁴: As discussed in the previous

³⁹⁹ EWS representations dated 6 October 2004, paragraphs 8.1 to 8.6 and 8.22.

⁴⁰⁰ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, paragraph 206.

⁴⁰¹ Case T-41/96 *Bayer AG v European Commission* [2000] ECR II-3383, paragraph 66.

⁴⁰² Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 131.

⁴⁰³ Case 48/69 *ICI v Commission ("Dyestuffs")* [1972] ECR 619, paragraph 64.

paragraph, the Parties determined their future course of action on the market by reference to each others' plans rather than independently; and this included a joint discussion of the UKae customers to which each of the undertakings determined to offer and sell aluminium Spacer Bars and, in respect of Other Customers, as to the desirability of not entering into direct competition with each other on price.

458. *(v) Requirement of independence strictly precludes any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market*⁴⁰⁵: The OFT has set out in this Decision details of the actions of the Parties, during which they not only (a) disclosed to each other at the Meeting on 20 November 2002 their intended future course of conduct, but also (b) could not fail to have influenced the future conduct on the market of the other Parties, which was only thwarted as a result of the OFT's intervention. For example, by declaring that it was going to target certain of UKae's customers as part of the overall plan, each Party will have influenced the other Parties not to compete for that business. Similarly, by discussing the prices at which they would target both UKae's and other non-UKae customers, each Party was influencing the price level at which the other Parties would sell aluminium Spacer Bars.
459. *(vi) In particular, reciprocal contacts between the parties which have the object or effect of removing or reducing uncertainty as to future conduct on the market*⁴⁰⁶: The reciprocal contact at the Meeting on 20 November 2002 had, as discussed in the previous paragraph, the object or effect of removing or at least reducing each Party's uncertainty as to the other Parties' future conduct on the market. The OFT also discusses reciprocity in paragraphs 441 to 447 above.
460. *(vii) Reciprocal contacts established where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it*⁴⁰⁷: As discussed in the preceding two paragraphs, each of the Parties disclosed to their competitors at the Meeting on 20 November 2002 their future intentions regarding conduct on the market. Reciprocal contacts were therefore established.
461. *(viii) It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct on the market to be expected on his part*⁴⁰⁸: By agreeing to the plans for market sharing and price fixing discussed at the Meeting on 20 November 2002, and at the very least by not dissenting to any of those plans, each of the Parties either eliminated or at the very least substantially reduced uncertainty on the part

⁴⁰⁴ Joined Cases 40/73 *et seq Suiker Unie v European Commission*, paragraph 173.

⁴⁰⁵ *Ibid*, paragraph 174.

⁴⁰⁶ *Ibid*, paragraph 175.

⁴⁰⁷ Case T-25/95 *etc Cimenteries CBR v Commission* [2000] ECR II-491, paragraph 1849.

⁴⁰⁸ *Ibid*, paragraph 1852.

of the other Parties as to the future conduct on the market to be expected on its part.

462. *(ix) A concerted practice implies, besides undertakings concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two*⁴⁰⁹: The OFT has demonstrated in paragraphs 422 to 430 above the evidence that conduct on the market took place pursuant to the Meeting – and furthermore has demonstrated in subsequent paragraphs that in any event a presumption of subsequent conduct applies in this instance (see next paragraph).
463. *(x) Subject to proof to the contrary, which it is for the economic operators concerned to adduce, there is a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period*⁴¹⁰: The OFT has demonstrated in paragraphs 431 to 440 above that this presumption is applicable in this case; and that none of the Parties has provided any evidence to rebut this presumption.
464. *(xi) Although the concept of a concerted practice presupposes conduct of the participating undertakings on the market, it does not necessarily imply that that conduct should produce the concrete effect of restricting, preventing or distorting competition*⁴¹¹: The OFT has demonstrated that, despite the short period between the Meeting and the OFT's intervention on 5 December 2002, the actions agreed by the Parties at the Meeting were already having a distorting effect on competition, for example in the form of the telephone call from Howard Worthington of EWS to Mark Mitchell of Thermoseal in which he asked whether [...] [C] 'belonged' to Thermoseal (see paragraph 143 above). Notwithstanding this, this principle shows that it is unnecessary for such a concrete effect to occur for there to have been a concerted practice capable of preventing, restricting or distorting competition.
465. *(xii) It follows from the actual text of Article 81(1) that concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object*⁴¹²: The OFT is satisfied that the object of the Parties' actions at and following the Meeting on 20 November 2002 was anti-competitive. The OFT's reasoning in relation to this is set out in section II.I at paragraphs 504 to 517 below.
466. In conclusion, the OFT is satisfied that, to the extent that the Parties' activities did not constitute actual agreements, they constituted concerted practices which eliminated or reduced any uncertainty on the part of the other Parties as to the conduct on the market to be expected on their respective parts. The OFT is

⁴⁰⁹ Case C-49/92P *Commission v Anic Participazioni* [1999] ECR I-4125, paragraph 118.

⁴¹⁰ *Ibid*, paragraph 121.

⁴¹¹ *Ibid*, paragraph 124.

⁴¹² *Ibid*, paragraph 123.

therefore satisfied that the evidence set out in this Decision establishes, at the very least, a concerted practice between the Parties.

(5) Application of the Competition Act exclusion for vertical agreements and the EC block exemption for categories of vertical agreements and concerted practices

467. In its Original Representations⁴¹³, EWS criticised the OFT for its failure to consider the application of the Competition Act exclusion for vertical agreements⁴¹⁴ (the 'Vertical Exclusion Order') or the Block Exemption⁴¹⁵.

468. Save as provided below, the Vertical Exclusion Order⁴¹⁶, which was revoked with effect from 1 May 2005 upon entry into force of the Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004⁴¹⁷, provided an automatic exclusion from the application of the Chapter I prohibition for any agreement or concerted practice to the extent that it was a vertical agreement⁴¹⁸.

469. A vertical agreement⁴¹⁹ was defined as:

*'an agreement between undertakings, each of which operates for the purposes of the agreement at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services'*⁴²⁰.

470. The vertical exclusion did not apply, however, where the vertical agreement:

*'directly or indirectly, in isolation or in combination with other factors under the control of the parties [had] the object or effect of restricting the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier imposing a maximum sale price or recommending a sale price, provided that these do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties'*⁴²¹.

⁴¹³ EWS representations dated 6 October 2004, paragraphs 14.14 to 14.24.

⁴¹⁴ Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000, SI 2000/310 as amended.

⁴¹⁵ Commission Regulation (EC) No. 2790/99 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ L336, 29.1.99, p.21).

⁴¹⁶ Section 50 of the Act; Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000, SI 2000/310 as amended.

⁴¹⁷ SI 2004/1260. For further information see 'Vertical Agreements and Restraints' (OFT419, March 2000) and 'Vertical Agreements' (OFT419, December 2004), Chapter 5.

⁴¹⁸ Article 3 of the Vertical Exclusion Order.

⁴¹⁹ By virtue of section 2(5) of the Act, references to an 'agreement' are to be read as applying equally to, or in relation to, a concerted practice.

⁴²⁰ Article 2 of the Vertical Exclusion Order.

⁴²¹ Article 4 of the Vertical Exclusion Order.

471. In addition to a number of exclusions, including until its revocation with effect from May 2005 the Vertical Exclusion Order⁴²², the Act also makes provision for the exemption of certain categories of agreements from the Chapter I prohibition. In particular, under section 10 of the Act any agreement or concerted practice that is exempt from Article 81(1) [of the EC Treaty] by virtue of a Regulation or a decision of the Commission will also be exempt from the Chapter I prohibition⁴²³.

472. The Block Exemption⁴²⁴ exempts large numbers of vertical agreements under Article 81(3), with the parallel effect pursuant to section 10 of the Act of exempting those agreements from the application of the Chapter I prohibition. The Block Exemption has been in force since before the entry into force of the Act and is unaffected by the revocation of the Vertical Exclusion Order.

473. Vertical agreements are defined in the Block Exemption⁴²⁵ in broadly the same way as in the Vertical Exclusion Order, namely as:

*'agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain [...]'*⁴²⁶.

474. As in the case of the Vertical Exclusion Order, the Block Exemption does not apply to:

*'vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object ... the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier's imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties'*⁴²⁷.

475. As the OFT's *Vertical Agreements* guideline explains:

*'For an agreement to fall within the Block Exemption, the economic relationship between the parties must be such that each of the parties to the agreement operates **at a different level of the production or distribution chain** for the purposes of the agreement.'*⁴²⁸.

476. Moreover:

⁴²² Sections 3 and 50 of the Act.

⁴²³ This applies irrespective of whether or not the agreement has an effect on trade between EU Member States (section 10(2) of the Act).

⁴²⁴ Commission Regulation (EC) No. 2790/99 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices.

⁴²⁵ Article 2(1) of the Block Exemption.

⁴²⁶ *'Vertical Agreements'* (OFT419, December 2004), paragraph 3.3.

⁴²⁷ Article 4(a) of the Block Exemption.

⁴²⁸ *'Vertical Agreements'* (OFT419, December 2004), paragraph 3.5.

*'Each undertaking must operate at a different level of the production or distribution chain for an agreement to benefit from the Block Exemption. For example, an agreement between one manufacturer and a group of six competing wholesalers (where each of the six wholesalers operates at the same level of the production or distribution chain), while being an agreement between undertakings at different levels of the production or distribution chain (that is, manufacturing and wholesaling), would not benefit from the Block Exemption. The agreement would involve more than one undertaking at one particular level of the production or distribution chain (wholesaling)'*⁴²⁹.

477. Exactly the same reasoning applies to the interpretation of the Vertical Exclusion Order⁴³⁰.

478. The agreement and/or concerted practice constituting the infringement did not satisfy the criteria set out in paragraphs 475 and 476 above, and it was therefore, including for the purposes of the Vertical Exclusion Order and the Block Exemption, horizontal, not vertical, in nature.

(a) Customer allocation/market sharing

479. Firstly, with regard to the customer allocation/market sharing aspect of the infringement, the Parties were acting as competitors (that is, undertakings at the same level of the supply chain) when, having brought lists of UKae customers to the Meeting, they discussed how to share these customers between them and agreed that each should not attempt to obtain the business for any of the UKae Target Customers exclusively allocated to the other Parties. Each of the Parties attending, including EWS, selected and/or was allocated its own set of Target Customers, and agreed to try to take the business for its own selected/allocated Target Customers away from UKae.

480. In the context of this discussion, EWS was clearly acting not as a manufacturer but as a distributor. The discussion did not concern EWS' supplies to the other three Parties; instead it concerned the allocation of UKae's aluminium Spacer Bar customers between the four Parties including EWS, in their capacity as distributors and competitors. EWS had its own list of UKae customers to target, as confirmed by:

- Chris Hollingsworth's second statement – *'At the end of the discussion each of the companies had a list of UKae's customers to target.'* (emphasis added) (see paragraph 109 above)⁴³¹;
- Gwain Paterson's statement – *'[Howard Worthington of EWS] listed the accounts that EWS would target...eventually all the companies present, including EWS, had an agreed set of customers that they would exclusively*

⁴²⁹ *Ibid*, paragraph 3.7.

⁴³⁰ *'Vertical Agreements and Restraints'* (OFT419, March 2000), paragraphs 2.3, 2.5 and 2.6.

⁴³¹ Chris Hollingsworth's second statement, 15 August 2003, paragraph 9.

target as part of a concerted effort to knock UKae out of the market' (emphasis added) (see paragraph 111 above)⁴³²;

- the internal memorandum dated 21 November 2002 from Howard Worthington to Mervyn Richards, in which he confirmed the lists of targets agreed at the Meeting, including a list of UKae customers for EWS (see paragraph 126 above)⁴³³;
- EWS' Original Representations, in which it accepted that it, along with the three other Parties, read out the names of the UKae accounts it thought it was in the best position to target: *'At the Distributors' Conference, Mr Worthington read out the list of UKae's customer accounts that he thought EWS was in the best position to target. The other distributors read out the list [sic] of customers they were best placed to target.*⁴³⁴ (emphasis added). In this extract, EWS also tacitly acknowledged that it was acting as a distributor in this connection by stating *'The other distributors'*, thereby confirming that it saw itself as acting as a distributor rather than as a manufacturer for this discussion; and
- In its oral representations to the OFT, EWS' legal representatives made the following statement on behalf of their client: *'The first evidential point which I think is wholly uncontroversial is that there was fierce competition for all the distributors and EWS before the meeting...I think it is completely uncontroversial that the companies went into the meeting on 20 November as competitors.'*⁴³⁵ (emphasis added).

481. This part of the overall infringement therefore constituted an agreement and/or concerted practice between undertakings operating at the same level of the supply chain and is therefore to be regarded as horizontal.

(b) Price fixing in relation to UKae Target Customers

482. Secondly, with regard to the pricing arrangement for the Target Customers, the Parties were again acting as competitors (that is, undertakings at the same level of the supply chain) when, having allocated Target Customers, they discussed the prices at which they would all seek to supply aluminium Spacer Bars to those Target Customers.

483. This part of the overall infringement is horizontal in nature because the Parties discussed the prices at which they would all seek to supply aluminium Spacer Bars to the UKae Target Customers. As described in Chris Hollingsworth's second statement:

⁴³² Gwain Paterson's statement, 19 September 2003, paragraph 19.

⁴³³ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: SMB/1 (pages 1 & 2).

⁴³⁴ EWS representations dated 6 October 2004, paragraph 8.7.

⁴³⁵ EWS oral representations dated 14 October 2004, pages 13 to 14 of transcript.

'there was also a discussion at the meeting on the prices at which we should seek to sell spacer bars to the UKae's customers that had been targeted. We discussed the prices for the two most popular sizes of spacer bar, 15.5mm and 19.5mm. It was thought by all those present at the meeting that prices would need to be considerably lower than UKae's existing average prices to win business from them and that this would involve undercutting UKae's prices by 5%- 10%. I recall that it was agreed that, on this basis, the target selling price for 19.5mm would need to be around [...] [C] p and for 15.5mm it would need to be around [...] [C] p'

(see paragraph 116 above)⁴³⁶. Thus the Parties discussed the prices they would need to charge in order to ensure the successful implementation of the first aspect of the agreement and/or concerted practice.

484. Martin Riley's second statement confirms that in addition:

'[Howard Worthington of EWS] told the meeting that he would calculate the prices at which EWS would sell to its distributors...in order to take business from UKae'

(see paragraph 117 above)⁴³⁷. The revised input prices, i.e. the revised prices at which EWS was prepared to sell to each of the other three Parties in order to facilitate the first and second parts of the overall infringement, were confirmed separately to each of the other three Parties by EWS and were also confirmed in an internal memo dated 21 November 2002 from Howard Worthington to Mervyn Richards, in which Howard Worthington also set out the *'agreed target price'* at which the Parties, including EWS, would sell to the UKae Target Customers (see paragraph 126 above)⁴³⁸.

485. In the context of the discussion of prices to be charged to UKae's customers, EWS was clearly acting not as a manufacturer but as a distributor. This part of the discussion did not concern EWS' supplies to the other three Parties; instead it concerned the downstream prices at which each of the four Parties intended to sell aluminium Spacer Bars to the Target Customers then held by UKae. EWS had its own list of UKae customers to target, and it was therefore participating in this part of the discussion in the same role as the other three Parties, namely as a distributor seeking to win accounts from UKae.

486. Consequently, this part of the overall infringement constituted an agreement and/or concerted practice between undertakings operating at the same level of the supply chain and is therefore to be regarded as horizontal.

(c) Price fixing and non-compete arrangement in relation to Other Customers

487. Thirdly, with regard to the price fixing/non-compete arrangement in relation to Other Customers, the Parties were again acting as competitors (that is, undertakings at the same level of the supply chain) when they reached an understanding that they would no longer compete with each other on price when

⁴³⁶ Chris Hollingsworth's second statement, 15 August 2003, paragraph 10.

⁴³⁷ Martin Riley's second statement, 29 August 2003, paragraph 26.

⁴³⁸ Document taken from EWS during OFT's section 28 visit on 5 December 2002. Inspection reference: SMB/1 (pages 1 & 2).

in direct competition for Other Customers, and reached an understanding on the minimum prices at which they would in future be prepared to sell aluminium Spacer Bars to Other Customers.

488. This part of the overall infringement is horizontal in nature because the Parties discussed the prices they should each charge to all of their Other Customers, and the extent to which they should no longer compete in respect of those customers. As described in Gwain Paterson's statement:

*'... there was also a discussion about the pricing of spacers more generally in the market which went beyond the agreement to target UKae's customers. This was in response to a suggestion by myself and Mark that those present should not compete with each other on price when in direct competition for a customer. This suggestion was well received and a discussion followed about the level of prices below which we should not compete. It was eventually agreed by those present, **including EWS**, that there would be minimum selling prices for the two most popular sizes of spacer bar below which they would not quote in respect of customers held by the other distributors.'*

(emphasis added) (see paragraph 120 above)⁴³⁹.

489. Martin Riley's second statement confirms that there was:

*'... a suggestion made by Thermoseal at the meeting on 20 November 2002 that if any of the attendees came across each other in the market place that we should not quote as aggressively **against each other** as we had done in the past. I recall that there was a discussion about this proposal and during the course of this discussion it was suggested, again by Thermoseal, that minimum selling prices for the 19.5mm should be [...] [C] p. I cannot remember the specific price mentioned for 15.5mm spacer.'*

(emphasis added) (see paragraph 123 above)⁴⁴⁰.

490. In the context of this discussion, EWS was clearly acting not as a manufacturer but as a distributor. The discussion did not concern EWS' supplies to the other three Parties; instead it concerned the downstream prices at which each of the four Parties, including EWS, intended to sell aluminium Spacer Bars to customers other than the UKae Target Customers, and the extent to which the Parties intended in future to compete in respect of those customers.

491. In its Original Representations EWS stated, in relation to this and other parts of the overall infringement, that they could not have constituted an agreement and/or concerted practice because Thermoseal was not one of EWS' distributors. In relation to this part of the infringement, during EWS' oral representations to the OFT, EWS' legal representatives stated:

⁴³⁹ Gwain Paterson's statement, 19 September 2003, paragraph 24.

⁴⁴⁰ Martin Riley's second statement, 29 August 2003, paragraph 27.

*'The other point to bear in mind is that Thermoseal was not an existing distributor, so it had no existing place in the market as regards the sale of EWS product. At the highest it seems he [Paterson] was flying some sort of kite'*⁴⁴¹.

492. In relation to the reduction in the prices it charged to the other three Parties, EWS stated in its Original Representations:

*'Thermoseal never even became an EWS distributor'*⁴⁴².

493. In fact, it is clear from EWS' Original Representations that Thermoseal did on occasions purchase and distribute Spacer Bars from EWS. EWS stated that *'Thermoseal had placed a one off order for [Spacer Bars] in August 2002 and EWS had been keen to encourage further orders'*⁴⁴³. Thermoseal confirmed in its Original Representations that it purchased a small quantity of aluminium Spacer Bars from EWS in August and September 2002. These were in effect 'one-off' orders and represented only a minimal proportion of its annual aluminium Spacer Bar requirements⁴⁴⁴.

494. Notwithstanding this, the extent to which one party is an established distributor of another party's products is irrelevant to the characterisation of an agreement and/or concerted practice between those parties as being horizontal. It is sufficient that Thermoseal attended the Meeting, and took part in the discussion, as an occasional seller and potential distributor of EWS aluminium Spacer Bars. The presence or absence of subjective intent behind that discussion is also irrelevant, so long as a party does not expressly and unequivocally distance itself from the discussion and resulting arrangements – see section II.H(1) on Evidence of Intent, at paragraphs 387 to 402 above.

495. Consequently, this part of the overall infringement constituted an agreement and/or concerted practice between undertakings operating at the same level of the supply chain and is therefore to be regarded as horizontal.

496. Thus, in respect of all three elements of the overall infringement, far from each of the Parties acting at different levels in the production or distribution chain, each of the Parties was acting at the same level of the supply chain (wholesale distribution) for the purposes of the agreements and/or concerted practices, and for that reason neither the Vertical Exclusion Order nor the Block Exemption applies.

497. Furthermore, as noted in the OFT's *Vertical Agreements* guideline and as discussed above:

⁴⁴¹ EWS oral representations dated 14 October 2004, page 29 of transcript.

⁴⁴² EWS representations dated 6 October 2004, paragraph 17.7.

⁴⁴³ *Ibid*, paragraph 7.22.

⁴⁴⁴ See reply from Thermoseal dated 14 June 2005, sent in response to OFT informal enquiries dated 23 May 2005, Appendix 1. Thermoseal purchased further quantities of aluminium Spacer Bars from EWS in 2003; however the amounts involved were negligible. See also paragraph 54 above.

*'Each undertaking must operate at a different level of the production or distribution chain for an agreement to benefit from the Block Exemption. For example, an agreement between one manufacturer and a group of six competing wholesalers (where each of the six wholesalers operates at the same level of the production or distribution chain), while being an agreement between undertakings at different levels of the production or distribution chain (that is, manufacturing and wholesaling), would not benefit from the Block Exemption. The agreement would involve more than one undertaking at one particular level of the production or distribution chain (wholesaling).'*⁴⁴⁵.

498. Thus, even if EWS were operating not as a distributor but as a manufacturer for the discussions that together constituted the overall infringement (and this clearly was not the case), the Block Exemption would not apply because the other three undertakings were all acting as distributors at the same level of the supply chain.

499. Finally, even if one were to accept that the agreement / concerted practice is properly to be regarded as vertical in nature (which the OFT does not), as explained above, neither the Vertical Exclusion Order nor the Block Exemption applies to agreements or concerted practices which have as their object the restriction of the buyer's ability to determine its sale price.⁴⁴⁶ The object of the infringement in this case was to restrict the pricing freedom of the Parties in relation to both Target Customers and Other Customers. For this reason too, neither the Vertical Exclusion Order nor the Block Exemption applies in this case.

500. In its Supplementary Representations, EWS has stated that *'The central plank of the OFT's analysis – its assertion that, because EWS competes with its Distributors to make direct sales, the nature of the agreement must be horizontal rather than vertical – is simply wrong'*⁴⁴⁷.

501. EWS quotes from Article 2(4) of the Block Exemption, which states that *'The exemption provided for in paragraph 1 shall not apply to vertical agreements entered into between competing undertakings; however, it shall apply where competing undertakings enter into a non-reciprocal vertical agreement and - ... (b) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor not manufacturing goods competing with the contract goods ...'*⁴⁴⁸.

502. EWS states that as a result, *'Competing undertakings may enter into a vertical agreement in the context of a manufacturer making direct sales in competition with its distributors'* and *'The exemptions in the [Block Exemption] will apply to any non-reciprocal arrangement between EWS and its Distributors'*.

503. The OFT considers that EWS' interpretation of the law is incorrect. Article 2(1) of the Block Exemption creates a 'safe harbour' for *'agreements or concerted practices entered into between two or more undertakings each of which operates,*

⁴⁴⁵ See 'Vertical Agreements' (OFT419, December 2004), paragraph 3.7.

⁴⁴⁶ Article 4.

⁴⁴⁷ EWS representations dated 22 December 2005, paragraph 4.8.

⁴⁴⁸ Article 2(4) of the Block Exemption.

for the purposes of the agreement, at a different level of the production or distribution chain⁴⁴⁹. Article 2(4) is a **clarification** of Article 2(1), withdrawing this 'safe harbour' where the vertical agreement is entered into between competing undertakings unless the agreement is non-reciprocal and **one** of the undertakings is a manufacturer and distributor and the **other** is a distributor. It is not an additional 'safe harbour' and thus, as is explained in paragraphs 497 to 498 above, an agreement or concerted practice which (as in this case) is entered into between a number of parties, two or more of which are at the same level of the supply chain, will not benefit from the Block Exemption.

I. Object or effect – prevention, restriction or distortion of competition

504. Section 2(1) of the Act prohibits, inter alia, *'agreements between undertakings...or concerted practices which...have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom'*. Accordingly, in light of the specific wording of section 2(1), the OFT is not, as a matter of law, obliged to establish that an agreement or concerted practice has an anti-competitive **effect** where it is found to have as its **object** the prevention, restriction or distortion of competition⁴⁵⁰.

505. In considering whether an agreement and/or concerted practice has as its object the prevention, restriction or distortion of competition, the OFT will consider the aims of the agreement and/or concerted practice in the economic context in which it operates. The OFT's assessment of the aims of the agreement and/or concerted practice is determined by an objective assessment of the meaning and purpose of the agreement, rather than by any consideration of the subjective intention of the parties when entering into the agreement and/or concerted practice. In this respect the OFT takes the view that, if the obvious consequence of an agreement is to prevent, restrict or distort competition, that will be its object notwithstanding that it may have other aims as well⁴⁵¹.

506. Section 2(2) of the Act provides that the Chapter I prohibition applies, in particular, to agreements which *'...directly or indirectly fix... selling prices...[and]...share markets or sources of supply'*.

507. Accordingly, any agreement and/or concerted practice which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, fixes the prices at which goods or services are sold, or shares markets or sources

⁴⁴⁹ Article 2(1) of the Block Exemption.

⁴⁵⁰ The ECJ has acknowledged this principle on many occasions in relation to the interpretation of Article 81(1). In *Consten & Grundig v Commission* [1966] ECR 299 it stated that *'there is no need to take account of the concrete effects of an agreement once it has as its object the prevention, distortion or restriction of competition.'*

⁴⁵¹ See Cases T-374/94 etc. *European Night Services v Commission* [1998] ECR II-3141, paragraph 136 (*'... in assessing an agreement under Article 85(1) of the Treaty, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned ..., unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets (Case T-148/89 Tréfilunion v Commission [1995] ECR II-1063, paragraph 109). In the latter case, such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article 85(3) of the Treaty, with a view to granting an exemption from the prohibition in Article 85(1)'*).

of supply, will amount to an infringement of the Chapter I prohibition⁴⁵². As discussed above in paragraph 213, the fact that a Party attended the Meeting reluctantly, or had no intention of putting into practice any agreement (without distancing itself from such agreement), or did not in fact implement the agreement, is not relevant to the finding of an infringement in this case.

508. Since the overall agreement and/or concerted practice in this case involved customer allocation/market sharing and the fixing of prices (both to Target Customers and to Other Customers), the OFT takes the view that it had as its object the prevention, restriction or distortion of competition. Similarly, since each of the three elements comprising the infringement involved either market sharing or price-fixing, the OFT considers that, taken individually, each of these also had as its object the prevention, restriction or distortion of competition.

509. In its Original Representations, EWS alleged that the OFT had over-simplified the relevant case law with regard to object and effect⁴⁵³. In support of its case, EWS cited the following statement from the European Commission's Guidelines on the application of Article 81(3) of the Treaty:

*'The assessment of whether or not an agreement has as its object the restriction of competition is based on a number of factors. These factors include, in particular, the content of the agreement and the objective aims pursued by it. It may also be necessary to consider the context in which it is (to be) applied and the actual conduct and behaviour of the parties on the market. In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction of competition by object'*⁴⁵⁴ (emphasis added by EWS).

510. A proper examination of the Commission's Guidelines reveals, however, that the Guidelines do not support EWS' contention that the OFT has over-simplified the position. In the above extract, the Commission says only that *'It may also be necessary'* and *'an examination of the facts...may be required'* (emphasis added). Indeed, the Commission's Guidelines go on to state in the paragraph that follows the above extract quoted by EWS:

'Restrictions that are...identified as hardcore restrictions in guidelines and notices are generally considered by the Commission to constitute restrictions by object. In the case of horizontal agreements restrictions of competition by object include price fixing, output limitation and sharing of markets and customers'.

511. It is clear from the above that horizontal price fixing and market sharing agreements are generally considered by the Commission to be restrictions of competition by object. If anything, these Guidelines provide further support for the OFT's interpretation of the case law.

⁴⁵² See also section on Appreciability, at paragraphs 518 to 521 below.

⁴⁵³ EWS representations dated 6 October 2004, paragraph 5.3.

⁴⁵⁴ Communication from the Commission (Guidelines on the application of Article 81(3) of the Treaty), OJ 2004 C.101, page 97, at paragraph 21.

512. Furthermore, even if the OFT were required to take proper account of the context in which the agreement/concerted practice was (to be) applied or of the facts underlying it before concluding that an infringement by object had taken place, the OFT does not accept that it has failed to do so. The Parties' actions in the present case consisted of horizontal price fixing and customer allocation/market sharing agreements and/or concerted practices. As discussed in Part I. C, paragraphs 49 to 56 above where the relationship between the Parties is described, EWS, Ulmke, Thermoseal and DQS are all competing distributors of aluminium Spacer Bars. Moreover, even though at the time of the infringement there were vertical relationships in place between EWS and both Ulmke and DQS who operated as distributors of EWS aluminium Spacer Bars, these relationships were non-exclusive. Approximately one quarter of DQS' sales of aluminium Spacer Bars in 2002 were manufactured by EWS' competitor, Alu-pro. Similarly, around a third of Ulmke's sales of aluminium Spacer Bars were manufactured by Profilglass. As a result, Ulmke and DQS were active competitors of one another, and indeed of EWS, not only in relation to EWS-manufactured aluminium Spacer Bars but also in relation to non-EWS aluminium Spacer Bars.
513. Furthermore, as noted in paragraph 54 above, Thermoseal was not an established distributor of EWS aluminium Spacer Bars at the time of the infringement. Although Thermoseal purchased a relatively small quantity of aluminium Spacer Bars from EWS in August and September 2002, these were in effect one-off orders⁴⁵⁵. At the time of the infringement, therefore, Thermoseal did not have an established distribution relationship with EWS but was mostly a distributor for Profilglass.
514. Given the Parties' position as competitors at the distribution level, the relationship between the Parties is properly treated as horizontal. Furthermore, both the non-exclusive nature of the relationship between EWS and its distributors Ulmke and DQS and the absence of an established distribution relationship between EWS and Thermoseal mean that any co-operation between the Parties had the potential adversely to affect not only intra brand competition in relation to EWS-manufactured aluminium Spacer Bars, but also inter brand competition between EWS-manufactured aluminium Spacer Bars and aluminium Spacer Bars produced by its competitors, Profilglass and Alu-pro.
515. The OFT is therefore satisfied that the overall agreement and/or concerted practice referred to in this Decision had as its object the prevention, restriction or distortion of competition.
516. EWS further stated in its Original Representations that:

*'Even if agreement had been reached, it would have amounted to little more than the encouragement of active low price sales to certain customers...an appreciable anti-competitive effect will not arise in such circumstances'*⁴⁵⁶.

⁴⁵⁵ See paragraph 54 above.

⁴⁵⁶ EWS representations dated 6 October 2004, paragraph 14.12.

517. The OFT is, as noted above, not obliged to establish that an agreement or concerted practice has an anti-competitive effect where it is found to have as its object the prevention, restriction or distortion of competition. The OFT has not, therefore, investigated the extent to which the agreement and/or concerted practice had an anti-competitive effect.

J. Appreciability

518. The Chapter I prohibition applies where an agreement or concerted practice has as its object or effect the appreciable prevention, restriction or distortion of competition in the UK. The OFT takes the view that an agreement and/or concerted practice will generally not appreciably restrict competition if it is covered by the European Commission's *Notice on Agreements of Minor Importance*⁴⁵⁷. This Notice provides that an agreement between competitors will not appreciably restrict competition if the parties' combined share of the relevant market does not exceed 10 per cent⁴⁵⁸, save that agreements which directly or indirectly fix prices, share markets or limit production will be regarded as capable of appreciably restricting competition even where the combined market shares fall below this level⁴⁵⁹.

519. The OFT considers that agreements or concerted practices which have the object of directly or indirectly fixing prices or sharing markets, by their very nature, restrict competition to an appreciable extent⁴⁶⁰.

520. Given its finding that the agreement and/or concerted practice between the Parties involved both the fixing of prices and market sharing, the OFT considers that the restriction of competition should be deemed to have been appreciable irrespective of the Parties' combined shares of the relevant market. The OFT therefore takes the view that the agreement and/or concerted practice prevents, restricts or distorts competition to an appreciable extent.

521. The OFT notes that, in any event, the Parties' combined market shares⁴⁶¹ are likely to be well above the level at which their conduct, even had it not consisted of price fixing and market sharing, could have been expected to have had an insignificant effect on the market⁴⁶².

⁴⁵⁷ OJ C368, 22 December 2001, page 13. See also *'Agreements and concerted practices'* (OFT401, December 2004).

⁴⁵⁸ See paragraphs 7 to 9 of the Commission Notice and *'Agreements and concerted practices'* (OFT401, December 2004), paragraph 2.16.

⁴⁵⁹ See paragraph 11 of the Commission Notice and *'Agreements and concerted practices'* (OFT401, December 2004), paragraph 2.17.

⁴⁶⁰ See *'Agreements and concerted practices'* (OFT401, December 2004), paragraphs 3.4 and 3.10.

⁴⁶¹ See paragraphs 183 and 192 to 196 above for the OFT's estimates of market shares.

⁴⁶² See Case 5/69 *Volk v Vervaecke* [1969] ECR 295, in which the ECJ formulated the *de minimis* doctrine (the interpretation of which is now set out in the Commission Notice on Agreements of Minor Importance (*de minimis* notice) OJ C368, 22 December 2001, pages 13-15), which states that *'an agreement will fall outside the prohibition where it has only an insignificant effect on the market, taking into account the weak*

K. Effect on trade within the UK⁴⁶³

522. For the purposes of the Chapter I prohibition, the UK includes any part of the UK where an agreement/concerted practice operates or is intended to operate. By their very nature agreements to fix prices and share markets restrict competition and are likely to affect trade. It should be noted that, to infringe the Chapter I prohibition, an agreement does not actually have to affect trade so long as it is capable of doing so. Effect on trade within the UK is a purely jurisdictional test.

523. The Parties' price fixing and market sharing agreement and/or concerted practices were capable of altering the structure of competition in the UK. The OFT therefore considers that trade within the UK is likely to have been affected by the Parties' conduct.

L. Duration of the single infringement

524. The duration of infringements in cartel cases may be important in so far as it relates to the penalty that may be imposed for the infringements in question. The precise duration of the infringement is less important in this case since the infringement lasted for less than one year⁴⁶⁴.

525. On 5 December 2002 the OFT executed section 28 warrants at the premises of EWS, Ulmke and Thermoseal, and the agreement/concerted practices outlined above in paragraphs 77 to 144 were subsequently terminated.

526. The OFT considers it most likely, on the balance of probabilities, that the agreement/concerted practices were terminated on the date the warrants were executed. At the very latest, the agreement/concerted practices are likely to have been terminated either by 18 December 2002 when the first leniency agreement was signed between the OFT and one of the Parties, or by 14 January 2003 when EWS sent letters to at least two of the other Parties (DQS and Thermoseal), stating:

'...further to the meeting held on 20 November 2002...Whilst it has always been the case that you have operated as independent distributors I would like to confirm, for the avoidance of doubt, that the price at which you wish to sell our products remains a matter for you to determine. Similarly, we confirm, for the avoidance of doubt, that the choice of customers to whom you decide to sell is also a matter for you. I recognise that the above will have been clear to you and the others who attended the meeting⁴⁶⁵.

position which the persons concerned have on the market of the product in question' (the market shares in that case were 0.2% and 0.5% respectively).

⁴⁶³ Note that this Decision does not address any potential effect on inter-state trade within the EU, given that the infringement ended prior to 1 May 2004. See paragraph 150 above.

⁴⁶⁴ See *'OFT's guidance as to the appropriate amount of a penalty'* (OFT423, December 2004), paragraph 2.10.

⁴⁶⁵ Document taken from DQS during OFT's s.27 visit on 12 March 2003, inspection reference: EL/5, and document attached to Thermoseal's letter dated 30 January 2003, sent in response to OFT's enquiries made under section 26 on 10 January 2003.

527. These letters are clearly not, in the OFT's view, a true reflection of the nature of the matters discussed and agreed at the Meeting on 20 November 2002, as corroborated by subsequent exchanges of correspondence between the Parties in late November 2002. The OFT nevertheless considers that the letters were written with a view to, and with the effect of, bringing the infringement to an end with effect from the date of the letter, or at least ending EWS' involvement in it.

M. Decision

Infringement of the Chapter I prohibition of the Competition Act 1998

528. The Chapter I prohibition applies not only to any particular agreement or concerted practice establishing a common plan but also to the whole continuing process of collusion in which the Parties are involved. Such collusion can manifest itself in a whole series of measures and initiatives including express agreements, meetings, ongoing contact and other conduct or practices where they are aimed at influencing the conduct of others on the market⁴⁶⁶.

529. The conduct identified by the OFT, and described in detail at paragraphs 77 to 144 above, involved co-operation between the Parties and the co-ordination of their conduct, the object of which was to prevent, restrict or distort competition, by way of (1) allocating UKae Target Customers and fixing prices to those customers, with a view to forcing UKae from the market, and (2) not competing, including by way of fixing prices, in respect of Other Customers. The OFT considers the infringement to include not only the plans to fix prices and share the market, but also all steps forming part of the negotiation process leading to the adoption of the common plan (1) to allocate Target Customers and fix prices with a view to forcing UKae from the market, and (2) not to compete, including by way of fixing prices, in respect of Other Customers.

530. Nothing in the present case turns upon the precise form taken by each of the collusive elements comprising the overall agreement and/or concerted practice. The measures adopted by the Parties could individually constitute distinct infringements of the Chapter I prohibition. However, in this case, the OFT has taken the view that the measures adopted can be regarded as together forming an overall infringement constituting a single agreement and/or concerted practice. This view has been arrived at in this case on the basis that: (1) the individual measures were discussed and agreed at the same time; (2) each of the Parties was thus aware of each aspect of the infringement; (3) to the extent any of the Parties denies involvement in any part of the infringement it was also aware of or could reasonably have foreseen the unlawful conduct of the other Parties; and (4) as regards the allocation of Target Customers and the fixing of prices to them, these measures formed part of the Parties' common strategy to force a competitor (UKae) from the market⁴⁶⁷.

⁴⁶⁶ Joined Cases 40/73 *et seq Suiker Unie v European Commission* [1975] ECR 1663, paragraph 173; Case 86/82 *Hasselblad v European Commission* [1984] ECR 883, paragraphs 24-28; Joined Cases 100-103/80 *Musique Diffusion française v European Commission* [1983] ECR 1825, paragraph 84. See also the Commission decisions in *Ford Agricultural* OJ No L20 28.1.1993, p.1 at paragraphs 11-17; and *Gosme/Martell-DMP* OJ No L185 11.07.1991, p.23 at paragraphs 31-32.

531. The OFT concludes, on the basis of the evidence and arguments set out in paragraphs 222 to 386 above, that the Parties have infringed the Chapter I prohibition of the Act. The OFT therefore finds that EWS, Ulmke, Thermoseal and DQS were party to an overall agreement and/or concerted practice constituting a single infringement comprising a number of sub-agreements and/or concerted practices that both together and singly had as their object the fixing of prices and customer allocation/market sharing in the market for the supply of aluminium Spacer Bars in the UK, and have thereby infringed the Chapter I prohibition.
532. In the case of EWS, Ulmke and DQS, this Decision is also addressed to their respective ultimate parent companies, namely Laird, Standard Metallwerke and Precision Concepts Limited respectively. The OFT considers that in each case these parent companies form part of the same undertaking as their respective subsidiaries, and that they are equally liable for the participation of their respective subsidiary undertakings in the infringement.

⁴⁶⁷ The CFI has held that a series of connected agreements that pursue a common objective may be read together as one agreement (Case T-25/95 etc *Cimenteries CBR v Commission* [2000] ECR II-491, paragraphs 4019-4058).

PART III ENFORCEMENT

533. This part of the Decision sets out the enforcement action which the OFT is taking and its reasons for taking that action.

A. Directions

534. Section 32(1) of the Act provides that if the OFT has made a decision that an agreement or concerted practice infringes the Chapter I prohibition, it may give to such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.

535. No directions are necessary in this case as the OFT is satisfied that the agreements and/or concerted practices in question have ceased.

B. Financial penalties

Legal background

536. 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, the OFT may require the undertaking concerned to pay to it a penalty in respect of the infringement. Under section 39 of the Act, the parties to a 'small agreement', as this is defined, are immune from penalties under section 36(1). Equally, under section 36(3) of the Act the OFT may only impose a penalty if it is satisfied that the infringement has been committed intentionally or negligently by the undertaking. The provision of sections 39 and 36(3) are discussed further below.

537. Under section 38(8) of the Act, the OFT is required when setting the amount of a penalty to have regard to the Guidance for the time being in force under that section. As at the date of this Decision, this is the December 2004 edition of the Guidance⁴⁶⁸. Under section 36(8) of the Act, no penalty fixed by the OFT may exceed 10 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 ('the 2000 Penalties Order') as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 ('the 2004 Penalties Order')⁴⁶⁹. Prior to the entry into force on 1 May 2004 of the 2004 Penalties Order, the maximum penalty that could be imposed under section 36 of the Act was 10 per cent of turnover in the UK of the undertaking in the financial year preceding the date when the infringement ended (multiplied pro rata by the length of the infringement where the length of the infringement was in excess of one year, up to a maximum of three years)⁴⁷⁰. Where, as in this case, an infringement ended before 1 May 2004, the OFT will make any necessary adjustment to ensure that, as well as not exceeding the current maximum amount, the penalty also does not exceed the maximum amount applicable prior to that date.

⁴⁶⁸ 'OFT's guidance as to the appropriate amount of a penalty' (OFT423, December 2004).

⁴⁶⁹ Section 36(8) of the Act and SI 2000/309, as amended by SI 2004/1259.

⁴⁷⁰ 'OFT's guidance as to the appropriate amount of a penalty' (OFT423, December 2004), paragraph 2.18.

538. Under section 36(1) of the Act, the OFT has the power to impose financial penalties for infringements of the Chapter I prohibition on 'undertakings'. As explained in paragraph 154 above, the concept of an undertaking is used to designate an economic unit and is distinct from that of legal personality⁴⁷¹. An undertaking may comprise several persons, natural or legal. In particular, a subsidiary which has no real freedom to determine its conduct on the market and which does not enjoy economic independence, will form part of the same undertaking as its parent company even though each has its own legal personality⁴⁷².
539. When imposing a financial penalty, the OFT will identify the legal or natural person or persons whom it considers to be responsible for the infringement by each undertaking. In this case, the OFT has decided to impose penalties on EWS, Ulmke, Thermoseal, and DQS. As explained in paragraph 3 above, this Decision is also addressed in the case of EWS, Ulmke and DQS to their respective ultimate parent companies, namely Laird, Standard Metallwerke and Precision Concepts Limited. The requirement to pay a penalty in respect of each of those Parties is, therefore, also addressed in each case to the Party's ultimate parent company, which will be jointly and severally liable with its subsidiary for payment of the penalty.
540. The overall infringement comprises a number of sub-agreements and/or concerted practices between the Parties, as identified in Part II of this Decision. The OFT has decided to impose only one penalty in respect of each Party and to base that penalty on the overall infringing agreement and/or concerted practice, rather than impose separate penalties in respect of each of the sub-agreements and/or concerted practices.

Immunity from penalties

541. Section 39(3) of the Act provides that a party to a small agreement is immune from the effect of section 36(1). Small agreements are defined, pursuant to section 39(1) of the Act and the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000⁴⁷³, as agreements between undertakings the combined applicable turnover of which for the business year preceding the one in which the infringement occurred does not exceed £20 million and which are not price fixing agreements. By virtue of sections 39(9) and 2(5) of the Act the term 'price fixing agreement' for the purpose of section 39(1) means an agreement or concerted practice which has as its object or effect, or one of its objects or effects, restricting the freedom of a party to the agreement or concerted practice to determine the price to be charged (other than as between that party and another party to the agreement or concerted practice) for the product to which the agreement or concerted practice relates.
542. The combined applicable turnovers of the Parties to the price-fixing and market sharing agreement and/or concerted practices exceed £20 million. Moreover, one

⁴⁷¹ See footnote 144 above.

⁴⁷² See footnote 145 above.

⁴⁷³ SI 2000/262.

of the objects of the infringement was to restrict the freedom of the Parties to determine their prices for aluminium Spacer Bars, in relation both to targeted UKae customers and to Other Customers, and as such constituted a price-fixing agreement for the purpose of section 39(1) of the Act. Accordingly, none of the Parties can benefit from immunity from penalties under section 39(3).

Intentional/negligent infringement

543. The OFT may impose a penalty on an undertaking that has infringed the Chapter I prohibition only if it is satisfied that the infringement has been committed intentionally or negligently⁴⁷⁴, although the OFT is not obliged to specify whether it considers the infringement to be intentional or merely negligent⁴⁷⁵. The CAT has stated that:

*'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 ... It is sufficient that the undertaking could not have been unaware that its conduct had the object or would have the effect of restricting competition'*⁴⁷⁶.

544. The OFT considers that serious infringements of the Chapter I prohibition which have as their object the restriction of competition, such as price-fixing and market sharing, are by their very nature committed intentionally, in that any undertaking participating in such an infringement cannot be unaware of the anti-competitive nature of its conduct⁴⁷⁷. Ignorance or a mistake of law is no bar to a finding of intentional infringement.

545. In this case, the Parties entered into an agreement and/or concerted practice designed to fix prices and share the market for the supply of aluminium Spacer Bars. For the reasons given in the preceding paragraph, the OFT considers that the agreement and/or concerted practice was by its very nature such that the Parties could not have been unaware that their object was to restrict competition. The OFT is therefore satisfied that the Parties intentionally infringed the Chapter I prohibition.

⁴⁷⁴ Section 36(3) of the Act.

⁴⁷⁵ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2001] CAT 1, [2002] Comp AR 1, paragraphs 453 to 455; see also *Argos Ltd and Littlewoods Ltd v Office of Fair Trading* [2005] CAT 13, Judgment on penalty, paragraph 221.

⁴⁷⁶ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2001] CAT 1, [2002] Comp AR 1, paragraph 456; see also *Argos Ltd and Littlewoods Ltd v Office of Fair Trading* [2005] CAT 13, Judgment on penalty, paragraph 221 (*'an infringement is committed intentionally for the purpose of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition'*).

⁴⁷⁷ See *'Enforcement'* (OFT407, December 2004), paragraphs 5.9 and 5.10. In this regard, the OFT also notes that price-fixing falls within the OECD (Organisation for Economic Co-operation and Development) definition of 'hardcore cartels' – see *'Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty'* (OFT423, March 2000), paragraph 1.8, footnote 5.

546. Neither EWS nor Ulmke made any representations either in their Original Representations (as applicable) or in their Supplementary Representations on the question of whether their participation in the agreement and/or concerted practice was intentional or negligent.

547. In its Original Representations, Thermoseal argued that its conduct was negligent rather than intentional. It stated that *'At the time of the 20 November 2002 meeting and until the OFT's dawn raid, to the best of his belief, Mr Paterson had not received any information about the UK Competition Law regime and was unaware of the possibility that Thermoseal's participation in the November meeting might constitute an infringement'*⁴⁷⁸. As explained in paragraph 544 above, ignorance or mistake of law is no bar to a finding that an infringement was committed intentionally.

548. During the oral representations in support of DQS' Supplementary Representations, Mr Sander of DQS stated that *'During the meeting I failed to recognise the serious implications of the discussions between the other distributors regarding customer details and pricing. I simply took a passive role in the proceedings rather than actively distancing myself and John Hesketh from the others. Again, with the benefit of hindsight, how I regret accepting that invitation; and I apologise for my unwitting attendance and ensuing matters'*⁴⁷⁹.

549. As explained in paragraph 544 above, ignorance or mistake of law is no bar to a finding that an infringement was committed intentionally. Thus, even if Mr Sander failed to appreciate the serious implications of the discussion at the Meeting, it would not follow from this that DQS' participation in the infringement was, therefore, unintentional. Indeed, Mr Sander was in any event only one of the representatives of DQS present at the Meeting.

550. Without prejudice to the above, the OFT is satisfied that the undertakings ought at the very least to have known that the agreement and/or concerted practice would be of such a nature as to restrict or distort competition, and the infringement was therefore at the very least committed negligently⁴⁸⁰.

Calculation of the Penalties – General points

Step 1 – starting point⁴⁸¹

551. The starting point for calculating the level of penalty is arrived at by having regard to the seriousness of the infringement and the 'relevant turnover' of the undertaking. The starting point may not exceed 10 per cent of the 'relevant turnover' of the undertaking.

⁴⁷⁸ Thermoseal representations dated 1 October 2004, paragraph 24.

⁴⁷⁹ DQS oral representations dated 9 January 2006, pages 13 to 14.

⁴⁸⁰ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2001] CAT 1, [2002] Comp AR 1, paragraph 457; see also *Argos Ltd and Littlewoods Ltd v Office of Fair Trading* [2005] CAT 13, Judgment on penalty, paragraph 223 to 224.

⁴⁸¹ 'OFT's guidance as to the appropriate amount of a penalty' (OFT423, December 2004), Part 2.

552. The 'relevant turnover' is the turnover of the undertaking in the relevant product market and the relevant geographic market affected by the infringement in the undertaking's last business year⁴⁸².
553. Consistent with the provisions of the 2000 Penalties Order⁴⁸³, as amended by the 2004 Penalties Order, an undertaking's last business year is the business year preceding the date on which the OFT's decision is taken or, if figures are not available for that business year, the one immediately preceding it.
554. The size of the starting point calculated from the relevant turnover depends upon the nature of the infringement⁴⁸⁴. The more serious the infringement, the higher the likely starting point will be. When making this assessment, the OFT also considers a number of factors, including the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect on competitors and third parties⁴⁸⁵. The damage caused to consumers whether directly or indirectly is also an important consideration. The assessment is made on a case by case basis for all types of infringement, taking account of all the circumstances of the case.

Nature of infringement

555. The OFT considers price fixing and market sharing to be among the most serious infringements caught by the Chapter I prohibition.
556. EWS, Ulmke, Thermoseal and DQS were party to an overall agreement and/or concerted practice constituting a single infringement which comprised a number of elements that had as their object the fixing of prices and market sharing in the market for the supply of aluminium Spacer Bars in the UK.
557. In its reply to the Original Notice, EWS appeared to suggest that even if an infringement were established in this case (which EWS denies), it would not be sufficiently serious to warrant the imposition of a penalty, on account of the infringement's short duration:

*'The 1998 Act was not implemented to impose sanctions of a criminal nature on the basis of an isolated meeting lasting for less than an hour, which was attended in all innocence by members of a distributor network to hear proposals from their supplying manufacturer of options to increase sales of its own product by offering low prices'*⁴⁸⁶.

558. EWS' submissions on the facts of this case and the application of the relevant case law are discussed in sections I and II above. The fact that the agreement

⁴⁸² *Ibid*, paragraph 2.7.

⁴⁸³ Article 3 of the 2000 Penalties Order, as amended (by the 2004 Penalties Order).

⁴⁸⁴ 'OFT's guidance as to the appropriate amount of a penalty' (OFT423, December 2004), paragraph 2.4.

⁴⁸⁵ *Ibid*, paragraph 2.5.

⁴⁸⁶ EWS representations dated 6 October 2004, paragraph 1.10.

and/or concerted practice between the Parties was of short duration and only involved one meeting does not affect the OFT's finding that it infringed the Chapter I prohibition. Nor does the OFT consider that these factors are relevant to its assessment of the nature of the infringement for the purpose of determining the starting point at step 1 of the penalty calculation. Rather, the duration of the infringement is addressed below at step 2 of the calculation.

559. As noted above, the OFT considers price fixing and market sharing to be among the most serious infringements caught by the Chapter I prohibition. Moreover, it is incorrect to say that the Parties' involvement in the infringement was limited to the Meeting at which the agreement and/or concerted practice to fix prices and share the market for aluminium Spacer Bars was concluded. Rather, the Meeting was also followed by letters from EWS to the other three Parties confirming the actions agreed at the Meeting, and none of those Parties objected to their content or informed EWS that they would not take part in the actions agreed at the Meeting. The Parties also agreed to hold a second meeting two months later, one of the primary purposes of which was to continue and reinforce the agreement and/or concerted practice. The Parties' activities were only brought to an early conclusion by the intervention of the OFT.
560. There is no merit in the suggestion either that the short duration of the agreement and/or concerted practice means that it did not constitute an infringement of the Chapter I prohibition, or that the nature of the infringement was for that reason any less serious.
561. EWS further submitted in its Original Representations that competition in the market for the supply of aluminium Spacer Bars is *'exceptionally vigorous'*⁴⁸⁷.
562. Thermoseal also submitted in its Original Representations that *'Competition within the spacer bar market has always been, and still remains, fierce'*, and that it had *'gained nothing from the meeting'*⁴⁸⁸. In its Supplementary Representations, Thermoseal adds that *'Spacer bar prices were, and continue to be, strongly and vigorously negotiated by spacer bar customers with Thermoseal's sales representatives'*⁴⁸⁹ and that *'There are many distributors selling spacer bar in the UK, all of whom are chasing a dwindling customer base as sealed unit manufacturers consolidate'*⁴⁹⁰.
563. DQS also submitted in its Original Representations that *'The aluminium spacer bar market is highly competitive...'*⁴⁹¹.
564. The OFT is not arguing that competition in the market for aluminium Spacer Bars was not vigorous at the time of the infringement. Indeed, the OFT notes in paragraph 71 above that UKae's charging of particularly low prices for Spacer Bars

⁴⁸⁷ *Ibid*, paragraph 7.36.

⁴⁸⁸ Thermoseal representations dated 1 October 2004, paragraphs 27 and 35.

⁴⁸⁹ Thermoseal representations dated 20 December 2005, paragraph 24.

⁴⁹⁰ *Ibid*, paragraph 25.

⁴⁹¹ DQS representations dated September 2004, paragraph 6.4.

in the months preceding the Meeting represented the background for the Meeting and the actions agreed at it.

565. The degree of competition existing in the market at the time of the agreement and/or concerted practice does not affect the OFT's conclusion as to the nature of the infringement, which was clearly intended further to restrict competition between the Parties both through the allocation of customers/ market sharing and the fixing of prices.
566. The OFT wishes to make it clear that horizontal agreements and concerted practices between competitors are serious infringements of the Act. This is reflected in the level of the starting point for each of the Parties.

Nature of the product

567. The infringement relates to aluminium Spacer Bars for use in IG units. As described in detail above (see paragraphs 34 to 44), Spacer Bars are used to separate the panes of glass in a double-glazing system (windows and doors). They are held to the edges of the panes of the window or door using a sealant and are filled with a desiccant which absorbs any moisture that forms between the panes of glass.

Structure of the market

568. EWS is a manufacturer and distributor of aluminium Spacer Bars. It estimates that the total UK market for all spacer bars amounts to approximately 150 million metres per annum with an overall value of between £14 million and £16 million⁴⁹². As noted in paragraph 38 above, it has been estimated that 90 per cent of Spacer Bars supplied in the UK are made from aluminium. EWS is one of only two UK manufacturers supplying aluminium Spacer Bars; the other is UKae, the target of two of the three elements of the infringement. Between them, EWS and UKae manufacture [...] [C] (around half) of metal Spacer Bars supplied to customers (manufacturers of IG units) in the UK⁴⁹³ (the OFT considers that, for the purposes of this Decision, shares of metal Spacer Bars are a representative proxy for shares of the aluminium Spacer Bar market, given that the vast majority of metal Spacer Bars are constructed from aluminium). EWS estimates that [...] [C] per cent of metal Spacer Bars supplied to customers in the UK are manufactured by EWS⁴⁹⁴. Aluminium Spacer Bars not manufactured by EWS or UKae are imported, generally from Italy.
569. Although EWS does distribute some (approximately [...] [C] per cent in 2002) of its Spacer Bars directly to manufacturers of IG units, the majority of Spacer Bars are sold to such manufacturers via a network of distributors. The Parties to the infringement represent the majority (4 out of 6) of the principal UK distributors of aluminium Spacer Bars, with UKae being a fifth⁴⁹⁵.

⁴⁹² EWS representations dated 6 October 2004, paragraph 7.1.

⁴⁹³ *Ibid*, paragraph 7.9.

⁴⁹⁴ *Ibid*, paragraph 7.9.

⁴⁹⁵ *Ibid*, paragraph 7.23.

Market shares of the undertakings involved and entry conditions

570. It is clear from the information in the preceding two paragraphs that the Parties to the infringement represent a large proportion of the market for the supply of Spacer Bars. By its own estimates, EWS has approximately [...] [C] per cent of distribution, with Ulmke, Thermoseal and DQS having shares of distribution of approximately [...] [C] per cent, [...] [C] per cent and [...] [C] per cent respectively⁴⁹⁶. Thus, the Parties have a combined share of distribution of metal Spacer Bars in the UK of some [...] [C] (around 60) per cent. Altogether, the distributors of Spacer Bars in the UK supply around 3000 IG unit manufacturers⁴⁹⁷. Whilst barriers to entry into the distribution of aluminium Spacer Bars are likely to be fairly high, barriers to entry into the manufacturing of aluminium Spacer Bars are likely to be higher.

Effect on competitors and third parties, and damage to consumers

571. It would be extremely difficult, if not impossible, to estimate the actual effect that the overall agreement and/or concerted practice had or would have had on consumers, had it not been curtailed by the OFT's intervention. However, given that the overall agreement and/or concerted practice constituted price fixing and market sharing, the OFT considers it is likely to have had a significant effect on competitors, other third parties and consumers, if the infringement had not been brought to an end at an early stage by the OFT's intervention.

572. The infringement was capable of restricting price competition between the distributors of aluminium Spacer Bars for inclusion in an IG package. It is also likely that the arrangement would have enabled EWS to keep its distributors loyal to its own product, thereby making it more difficult for other aluminium Spacer Bar manufacturers to gain access to, or enhance their existing access to, customers. The infringement related to at least around [...] [C] per cent of Spacer Bar sales in the UK (comprising EWS' estimate of UKae's share of distribution of metal Spacer Bars⁴⁹⁸, added to the Parties' combined share of distribution of metal Spacer Bars in the UK (itself around 60 per cent)). Although Spacer Bars form a relatively small part of the overall cost of an IG unit to a consumer, it is to be expected that this restriction of competition would have had an effect on the cost of the unit to the final consumer.

Conclusion

573. Given the very serious nature of the infringement (price fixing and market sharing) and taking into account the other factors referred to above, the OFT has decided that the starting point should be around 70 per cent of the maximum possible starting point (i.e. around 7 per cent of the 'relevant turnover' of the undertakings), subject to a review of the individual position of each of the Parties.

⁴⁹⁶ *Ibid*, paragraph 7.23.

⁴⁹⁷ *Ibid*, paragraph 7.33.

⁴⁹⁸ *Ibid*, paragraph 7.23.

Step 2 – adjustment for duration

574. The starting point may be increased to take into account the duration of the infringement. Penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement⁴⁹⁹.
575. For the purposes of calculating penalties, the infringement lasted from at least early November 2002 (when Howard Worthington of EWS suggested to Martin Riley that the Parties should get together to discuss UKae's low prices – see paragraphs 75 and 79 above), and continued until at the latest either 18 December 2002 when the first leniency agreement was signed between the OFT and one of the Parties, or 14 January 2003 when EWS sent letters to at least two of the Parties (DQS and Thermoseal), as described in paragraph 526 above. The infringement therefore lasted for less than one year.
576. For the purpose of calculating the duration of an infringement, part years may be treated as full years⁵⁰⁰. The OFT will not in general reduce the penalty where an agreement and/or concerted practice lasted for less than one year, particularly where, as in this case, there is no evidence to suggest that the Parties abandoned the agreement and/or concerted practice prior to the OFT's intervention. Indeed, there were clear plans to hold a further meeting to discuss the same issues two months after the Meeting. It was agreed that the next meeting would be held at the same time, in the same place, on 15 January 2003, and this was confirmed in letters from EWS to each of the other three Parties⁵⁰¹. Furthermore, it was clear from that correspondence that this next meeting was to constitute, at least in part, a continuation and reinforcement of the agreements and/or concerted practices arising out of the first meeting – to Ulmke *'These [targets] can be added to at the next meeting'*; and to DQS *'it really would do your corner a great deal of justice if you did some homework and came up with a second list of where we should all attack'*.
577. In the circumstances, the OFT does not consider that any reduction in penalty for duration is appropriate at Step 2.

Step 3 - adjustment for other factors

578. The penalty may be adjusted as appropriate to achieve policy objectives, in particular the deterrence of infringing undertakings from engaging in anti-competitive practices⁵⁰². The OFT is of the view that deterrence is a very important policy objective in the glazing sector and intends adjusting the level of penalty for each infringing party to reflect this. The OFT makes the adjustment for deterrence in relation to each Party individually, as set out below.

⁴⁹⁹ *'OFT's guidance as to the appropriate amount of a penalty'* (OFT423, December 2004), paragraph 2.10.

⁵⁰⁰ *Ibid.*

⁵⁰¹ See paragraphs 131, 135 and 138 above.

⁵⁰² *'OFT's guidance as to the appropriate amount of a penalty'* (OFT423, December 2004), paragraph 2.11.

Step 4 – adjustment for further aggravating and mitigating factors

579. The basic amount of the financial penalty, adjusted as appropriate at steps 2 and 3, may be increased where there are other aggravating factors, or decreased where there are mitigating factors⁵⁰³. Below, the OFT has indicated where it has increased or decreased the amount to take into account any aggravating or mitigating factors.

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

580. The final amount of the penalty calculated according to the method set out above may not exceed 10 per cent of the worldwide turnover of the undertaking in its last business year. For this purpose, the last business year will be the one preceding the date on which the decision of the OFT is taken (i.e. **2005** in this case)⁵⁰⁴. The penalty will be adjusted if necessary to ensure that it does not exceed this maximum.

581. In addition, where an infringement ended prior to 1 May 2004 (as in this case), any penalty imposed in respect of an infringement of the Chapter I prohibition will, if necessary, be adjusted further to ensure that it does not exceed the maximum penalty applicable prior to 1 May 2004, i.e. 10 per cent of turnover in the UK of the undertaking in the financial year preceding the date when the infringement ended (multiplied pro rata by the length of the infringement where the length of the infringement was in excess of one year, up to a maximum of three years)⁵⁰⁵. In this case, as noted above in paragraph 526, the infringement is likely to have ended in December 2002 although it is possible that the infringement continued until January 2003. For the purposes of this adjustment, therefore, the OFT is carrying out a dual check against the Parties' total UK turnover figures for both **2001** and **2002**.

582. Finally, if a penalty or fine has been imposed by the European Commission, or by a court or other body in another Member State in respect of an agreement or conduct, the OFT must take that penalty or fine into account when setting the amount of a penalty in relation to that agreement or conduct. This is to ensure that where an anti-competitive agreement or conduct is subject to proceedings resulting in a penalty or fine in another Member State, an undertaking will not be penalised again in the United Kingdom for the same anti-competitive effects⁵⁰⁶. In this case there is no double jeopardy since no penalty has been imposed by the European Commission or by a court or other body in another Member State.

⁵⁰³ *Ibid*, paragraphs 2.14 to 2.16.

⁵⁰⁴ *Ibid*, paragraph 2.17.

⁵⁰⁵ *Ibid*, paragraph 2.18. See also paragraph 537 above.

⁵⁰⁶ *Ibid*, paragraph 2.20.

Penalty for EWS

Step 1 – Starting point

583. EWS' turnover in the relevant product and geographic markets (i.e. the supply of aluminium Spacer Bars in the UK) is [...] [C] in the undertaking's last business year (1 January 2005 to 31 December 2005). The maximum starting point is, therefore, [...] [C].

584. The OFT's conclusions regarding the seriousness of this infringement are set out at paragraphs 555 to 566 above. Taking into account the seriousness of this infringement, the potential effect of the infringement and EWS' position in the supply of aluminium Spacer Bars in the UK, the OFT considers a starting point of [...] [C] ([...] [C] per cent of relevant turnover) to be appropriate.

Step 2 – Adjustment for duration

585. The OFT has outlined at paragraphs 574 to 576 above how it proposes to calculate any adjustment for duration. No adjustment is necessary in this case since the infringement lasted for less than one year. For the reasons set out in paragraph 576 above, the OFT does not consider it appropriate to reduce the penalty at this step to reflect the fact that the infringement lasted for less than one year. The penalty for EWS at the end of this step is therefore [...] [C].

Step 3 – Adjustment for other factors

586. In previous decisions the OFT has indicated that where a party's relevant turnover represents a relatively low proportion of its total turnover, the penalty figure reached at the end of Step 2 might not represent a significant sum for that party. In such a case the OFT considers it appropriate to increase the party's penalty at this stage to a sum significant enough to the party to act as a sufficient deterrent, having regard to its total turnover⁵⁰⁷.

587. EWS' turnover in the relevant market represents around [...] [C] per cent of its total UK turnover, and around [...] [C] per cent of its total worldwide turnover. The OFT therefore considers that a multiplier of [...] [C] should be applied at this stage to deter both EWS and other undertakings from participating in similar infringements in the future. The basic amount therefore stands at [...] [C] at the end of Step 3.

Step 4 – Adjustment for further aggravating factors

588. The OFT is of the view that although it is common for distributors to complain to a manufacturer about the aggressive pricing of other manufacturers / distributors and to ask the manufacturer to take action, EWS should have resisted the temptation to arrange the Meeting to discuss market sharing and price fixing strategies to combat that threat. In addition, the OFT emphasises that EWS should not have encouraged its distributors to engage in any horizontal contact.

⁵⁰⁷ See, for example, Decision No. CA98/1/2004, '*Collusive tendering in relation to contracts for flat-roofing services in the West Midlands*', dated 16/03/04, paragraph 395.

589. It is clear from the evidence presented in paragraphs 222 to 386 above that EWS called the Meeting at the Quality Hotel and asked the distributors to bring lists of UKae customers to the Meeting. It encouraged the distributors to attend where they had doubts that others would take part (see Mr Riley's statement at paragraph 79 above). It told at least one of the distributors before the Meeting that the purpose of bringing lists of UKae customers was to share the market (see Mr Paterson's statement at paragraph 87 above). Howard Worthington of EWS led the discussion of customer allocation at the Meeting (see paragraph 104 above). EWS then confirmed individual targets to distributors after the Meeting, and it calculated revised input prices for the other three Parties, from which would follow the precise figures at which they would attempt to target the UKae customers. The inevitable conclusion from the evidence is that EWS used its position as a leading player in the market to influence the other three Parties to join it in a concentrated attack on UKae's market position.
590. The OFT concludes that even if EWS was not the leader or instigator of the infringement, given the above evidence, it is clear that EWS played a significant role in most of the activities constituting the overall agreement and/or concerted practice. The OFT regards these actions as an aggravating factor and increases the basic amount of the penalty by [...] [C] per cent. In determining this level of increase, the OFT has taken into account the fact that it was not EWS but Thermosteel that proposed the non-compete / price fixing arrangement in relation to Other Customers (see paragraph 614 below).
591. The OFT takes the view that Mr Worthington represented senior management of EWS. Mr Worthington was Managing Director of EWS during the period of the infringement and was responsible for the day to day running of the business. The involvement of senior management is sufficiently serious to warrant taking this into consideration as a further aggravating factor. The OFT regards this as an aggravating factor and increases the basic amount of the penalty by a further [...] [C] per cent.

Step 4 – Adjustment for further mitigating factors

592. The OFT is normally minded to give a reduction in a penalty when a party has co-operated with its investigation. EWS has provided proper and timely responses to the OFT's requests for information during the investigation. The OFT considers in the light of this mitigating factor that it is appropriate to reduce the amount of the penalty by [...] [C] per cent.

Step 4 – Conclusion

593. As a result, the total percentage added to the penalty for aggravating factors is [...] [C] per cent. The total percentage deducted for mitigating circumstances is [...] [C] per cent. The OFT therefore [...] [C] the basic amount of the penalty by [...] [C] per cent. The penalty for EWS stands at £490,050 at step 4.

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

594. The penalty imposed by the OFT may not exceed 10 per cent of the worldwide turnover of the undertaking in the business year preceding the date on which the OFT makes its decision (i.e **2005**)⁵⁰⁸. EWS' worldwide turnover for 2005 is [...] [C]. Therefore, its penalty must not exceed [...] [C]. As the penalty does not exceed this amount, no adjustments are necessary in this regard.
595. In addition, in this case the penalty imposed by the OFT may not exceed the maximum penalty applicable prior to 1 May 2004, i.e. 10 per cent of turnover in the UK of the undertaking in the financial year preceding the date when the infringement ended (multiplied pro rata by the length of the infringement where the length of the infringement was in excess of one year, up to a maximum of three years). In this case, as noted above in paragraph 581, the OFT has carried out a dual check against the Parties' total UK turnover figures for both **2001** and **2002**. EWS' total UK turnover for 2001 was £27,764,673 and for 2002 it was £25,586,399. The penalty does not exceed 10 per cent of either of these amounts. Additionally, as noted above in paragraph 582, there is no double jeopardy in this case.
596. The financial penalty for EWS is consequently set at £490,050.

Penalty for Ulmke

Step 1 – Starting point

597. Ulmke's turnover in the relevant product and geographic markets (i.e. the supply of aluminium Spacer Bars in the UK) is [...] [C] in the undertaking's last business year (1 January 2005 to 31 December 2005). The maximum starting point is therefore [...] [C].
598. The OFT's conclusions regarding the seriousness of this infringement are set out at paragraphs 555 to 566 above. The OFT notes that Ulmke was a party to an overall agreement and/or concerted practice to fix prices and share the market for aluminium Spacer Bars in the UK. Taking into account the seriousness of this infringement, the potential effect of the infringement and the extent of Ulmke's involvement in the infringement a starting point of [...] [C] ([...] [C] per cent of relevant turnover) is considered appropriate.

Step 2 – Adjustment for duration

599. The OFT has outlined at paragraphs 574 to 576 above how it proposes to calculate any adjustment for duration. No adjustment is necessary in this case since the infringement lasted for less than one year. For the reasons set out in paragraph 576 above, the OFT does not consider it appropriate to reduce the penalty at this step to reflect the fact that the infringement lasted for less than one year. The penalty for Ulmke at the end of this step is therefore [...] [C].

⁵⁰⁸ The 2000 Penalties Order, SI2000/309 as amended.

Step 3 – Adjustment for other factors

600. In previous decisions the OFT has indicated that where a party's relevant turnover represents a relatively low proportion of its total turnover, the penalty figure reached at the end of Step 2 might not represent a significant sum for that party. In such a case the OFT considers it appropriate to increase the party's penalty at this stage to a sum significant enough to the party to act as a sufficient deterrent, having regard to its total turnover.

601. Ulmke's turnover in the relevant market represents around [...] [C] per cent of its total UK turnover, and around [...] [C] per cent of its total worldwide turnover. The OFT considers that a multiplier of [...] [C] should be applied at this stage to deter both Ulmke and other undertakings from participating in similar infringements in the future. The penalty therefore stands at [...] [C] at the end of Step 3.

Step 4 – Adjustment for further aggravating factors

602. The OFT takes the view that, although the Meeting was organised and led by EWS, which also asked Ulmke to bring a list of UKae customers to the Meeting, Ulmke should have resisted the temptation to engage in any agreement or concerted practice with its competitors of this nature.

603. The OFT takes the view that Mr Riley and Mr Hollingsworth represented senior management of Ulmke. Mr Riley and Mr Hollingsworth were joint Managing Directors of Ulmke during the period of the infringement and were responsible for the day to day running of the business. The involvement of senior management is sufficiently serious to warrant taking this into consideration as a further aggravating factor. The OFT regards this as an aggravating factor and increases the basic amount of the penalty by [...] [C] per cent.

Step 4 – Adjustment for further mitigating factors

604. The OFT is normally minded to give a reduction in a penalty when a party has co-operated with its investigation. However, as Ulmke benefits from the leniency programme and as a condition of being granted leniency Ulmke undertook to co-operate fully with the OFT, the OFT does not consider that there should be an additional reduction in the penalties under this head to reflect general co-operation.

Step 4 – Conclusion

605. As a result, the total percentage added to the penalty for aggravating factors is [...] [C] per cent. There is no mitigation. The OFT therefore increases the basic amount of the penalty by [...] [C] per cent. The penalty for Ulmke stands at £333,300 at step 4.

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

606. The penalty imposed by the OFT may not exceed 10 per cent of the worldwide turnover of the undertaking in the business year preceding the date on which the

OFT makes its decision (i.e **2005**)⁵⁰⁹. Ulmke's worldwide turnover for 2005 is [...] [C]. Therefore, its penalty must not exceed [...] [C]. As the penalty does not exceed this amount, no adjustments are necessary in this regard.

607. In addition, in this case the penalty imposed by the OFT may not exceed the maximum penalty applicable prior to 1 May 2004, i.e. 10 per cent of turnover in the UK of the undertaking in the financial year preceding the date when the infringement ended (multiplied pro rata by the length of the infringement where the length of the infringement was in excess of one year, up to a maximum of three years). In this case, as noted above in paragraph 581, the OFT has carried out a dual check against the Parties' total UK turnover figures for both **2001** and **2002**. Ulmke's total UK turnover for 2001 was £13,441,732 and for 2002 it was £13,075,872. The penalty does not exceed 10 per cent of either of these amounts. Additionally, as noted above in paragraph 582, there is no double jeopardy in this case.

Leniency

608. Ulmke was granted 100 per cent immunity from financial penalties under the OFT's leniency programme provided it complied with the conditions set out in paragraph 3.9 of the Guidance⁵¹⁰. The OFT is satisfied that Ulmke has complied with the conditions for leniency and the financial penalty is reduced to zero.

Penalty for Thermoseal

Step 1 – Starting point

609. Thermoseal's turnover in the relevant product and geographic markets (i.e. the supply of aluminium Spacer Bars in the UK) is [...] [C] in the undertaking's last business year (1 January 2005 to 31 December 2005). The maximum starting point is therefore [...] [C].

610. The OFT's conclusions regarding the seriousness of this infringement are set out at paragraphs 555 to 566 above. The OFT notes from this that Thermoseal was a party to an overall agreement and/or concerted practice to fix prices and share the market for aluminium Spacer Bars in the UK. Taking into account the seriousness of this infringement, the potential effect of the infringement and the extent of Thermoseal's involvement in the infringement a starting point of [...] [C] ([...] [C] per cent of relevant turnover) is considered appropriate.

Step 2 – Adjustment for duration

611. The OFT has outlined at paragraphs 574 to 576 above how it proposes to calculate any adjustment for duration. No adjustment is necessary in this case since the infringement lasted for less than one year. For the reasons set out in paragraph 576 above, the OFT does not consider it appropriate to reduce the penalty at this step to reflect the fact that the infringement lasted for less than one year. The penalty for Thermoseal at the end of this step is therefore [...] [C].

⁵⁰⁹ The 2000 Penalties Order, SI2000/309 as amended.

⁵¹⁰ 'OFT's guidance as to the appropriate amount of a penalty' (OFT423, December 2004), paragraph 3.9.

Step 3 – Adjustment for other factors

612. In previous decisions the OFT has indicated that where a party's relevant turnover represents a relatively low proportion of its total turnover, the penalty figure reached at the end of Step 2 might not represent a significant sum for that party. In such a case the OFT considers it appropriate to increase the party's penalty at this stage to a sum significant enough to the party to act as a deterrent.

613. Thermoseal's turnover in the relevant market represents around [...] [C] per cent of its total UK turnover, and around [...] [C] per cent of its total worldwide turnover. The OFT therefore considers that a multiplier of [...] [C] should be applied at this stage to deter both Thermoseal and other undertakings from participating in similar infringements in the future. The penalty therefore stands at [...] [C] at the end of Step 3.

Step 4 – Adjustment for further aggravating factors

614. The OFT notes the admission by Mr Paterson of Thermoseal that at the Meeting, he proposed the non-compete / price fixing arrangement in relation to Other Customers (see paragraph 325 above). This admission is corroborated in the statements given by the two witnesses from Ulmke. By making this suggestion, Mr Paterson's role in the infringement constituted an element of leadership. The OFT regards this as an aggravating factor and increases the basic amount of the penalty by [...] [C] per cent.

615. The OFT takes the view that, although the Meeting was organised and led by EWS, which also asked Thermoseal to bring a list of UKae customers to the Meeting, Thermoseal should have resisted the temptation to engage in any agreement or concerted practice with its competitors of this nature. The OFT takes the view that Mr Paterson was part of the senior management of Thermoseal⁵¹¹. The involvement of senior management is sufficiently serious to warrant taking this into consideration as a further aggravating factor. The OFT regards this as an aggravating factor and increases the basic amount of the penalty by [...] [C] per cent.

Step 4 – Adjustment for further mitigating factors

616. The OFT is normally minded to give a reduction in a penalty when a party has co-operated with its investigation. However, as Thermoseal benefits from the leniency programme and as a condition of being granted leniency Thermoseal undertook to co-operate fully with the OFT, the OFT does not consider that there should be an additional reduction in the penalties under this head to reflect general co-operation.

Step 4 – Conclusion

617. As a result, the total percentage added to the penalty for aggravating factors is [...] [C] per cent. There is no mitigation. The OFT therefore increases the basic

⁵¹¹ See Gwain Paterson's statement, 19 September 2003, paragraph 4, in which he states '*My role as Group Managing Director includes formulating company strategy and policy as outlined in Thermoseal's business plan and I am also involved in most aspects of the daily running of the company including supplier and customer issues*'.

amount of the penalty by [...] [C] per cent. The penalty for Thermoseal, therefore, stands at £380,700 at step 4.

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

618. The penalty imposed by the OFT may not exceed 10 per cent of the worldwide turnover of the undertaking in the business year preceding the date on which the OFT makes its decision (i.e. **2005**)⁵¹². Thermoseal's worldwide turnover for 2005 is [...] [C]. Therefore, its penalty must not exceed [...] [C]. As the penalty does not exceed this amount, no adjustments are necessary in this regard.

619. In addition, in this case the penalty imposed by the OFT may not exceed the maximum penalty applicable prior to 1 May 2004, i.e. 10 per cent of turnover in the UK of the undertaking in the financial year preceding the date when the infringement ended (multiplied pro rata by the length of the infringement where the length of the infringement was in excess of one year, up to a maximum of three years). In this case, as noted above in paragraph 581, the OFT has carried out a dual check against the Parties' total UK turnover figures for both **2001** and **2002**. Thermoseal's total UK turnover for 2001 was £8,903,882 and for 2002 it was £10,331,893. The penalty does not exceed 10 per cent of either of these amounts. Additionally, as noted above in paragraph 582, there is no double jeopardy in this case.

Leniency

620. Thermoseal was granted a 40 per cent reduction in the level of a financial penalty under the OFT's leniency programme provided it complied with certain conditions. The OFT is satisfied that Thermoseal has complied with the conditions for leniency and the financial penalty is therefore reduced to £228,420.

Penalty for DQS

Step 1 – Starting point

621. DQS' turnover in the relevant product and geographic markets (i.e. the supply of aluminium Spacer Bars in the UK) is [...] [C] in the undertaking's last business year (1 January 2005 to 31 December 2005). The maximum starting point is therefore [...] [C].

622. The OFT conclusions regarding the seriousness of this infringement are set out at paragraphs 555 to 566 above. The OFT notes from this that DQS was a party to an overall agreement and/or concerted practice to fix prices and share the market for aluminium Spacer Bars in the UK. Taking into account the seriousness of this infringement, the potential effect of the infringement and the extent of the involvement of DQS in the infringement a starting point of [...] [C] ([...] [C] per cent of relevant turnover) is considered appropriate.

⁵¹² The 2000 Penalties Order, SI2000/309 as amended.

Step 2 – Adjustment for duration

623. The OFT has outlined at paragraphs 574 to 576 above how it proposes to calculate any adjustment for duration. No adjustment is necessary in this case since the infringement lasted for less than one year. For the reasons set out in paragraph 576 above, the OFT does not consider it appropriate to reduce the penalty at this step to reflect the fact that the infringement lasted for less than one year. The penalty for DQS at the end of this step is therefore [...] [C].

Step 3 – Adjustment for other factors

624. In previous decisions the OFT has indicated that where a party's relevant turnover represents a relatively low proportion of its total turnover, the penalty figure reached at the end of Step 2 might not represent a significant sum for that party. In such a case the OFT considers it appropriate to increase the party's penalty at this stage to a sum significant enough to the party to act as a deterrent.

625. DQS' turnover in the relevant market represents around [...] [C] per cent of its total UK turnover, and around [...] [C] per cent of its total worldwide turnover. The OFT therefore considers that a multiplier of [...] [C] should be applied at this stage to deter both DQS and other undertakings from participating in similar infringements in the future. The basic amount therefore stands at [...] [C] at the end of Step 3.

Step 4 – Adjustment for further aggravating factors

626. The OFT takes the view that, although the Meeting was organised and led by EWS, which also asked DQS to bring a list of UKae customers to the Meeting, DQS should have resisted the temptation to engage in any agreement or concerted practice with its competitors of this nature.

627. The OFT notes that Jim Sander of DQS attended the Meeting of the Parties on 20 November 2002. DQS has submitted in its Supplementary Representations that although Jim Sander attended the Meeting, at the time of the infringement he *'was not involved in the operational and trading side of DQS' business*⁵¹³. During DQS' oral representations in support of its Supplementary Representations, Jim Sander confirmed that *'Due to [his] lack of knowledge of the market and products [he] had no input into discussions in the main meeting'*⁵¹⁴.

628. The OFT takes the view that Jim Sander represented senior management of DQS. Mr Sander was a Director of Precision Concepts Limited and (together with his family) held majority shareholdings in both DQS and Precision Concepts Limited. He was also Managing Director of DQS at the time of the infringement and was responsible for the day to day running of the business. The OFT considers that even if he had relatively little knowledge of the workings of the business, his presence at the Meeting of the Parties during which the agreement was concluded, and the fact that at that time he did not publicly distance himself from

⁵¹³ DQS representations dated 22 December 2005, paragraph 5.8.

⁵¹⁴ DQS oral representations dated 9 January 2006, page 13.

that agreement, constitutes involvement in the infringement. The involvement of senior management is sufficiently serious to warrant taking this into consideration as a further aggravating factor. The OFT regards this as an aggravating factor and increases the basic amount of the penalty by [...] [C] per cent.

Step 4 – Adjustment for further mitigating factors

629. The OFT is normally minded to give a reduction in a penalty when a party has co-operated with its investigation. DQS has noted in its Supplementary Representations that *'All documents and additional information that the OFT has requested have been provided promptly and without delay'*⁵¹⁵. The OFT considers in the light of this mitigating factor that it is appropriate to reduce the amount of the penalty by [...] [C] per cent.

630. DQS has made representations that since the commencement of the OFT's investigation, its holding company has issued a Compliance Booklet to all of DQS' employees and the other companies within the PBM group. It states that *'This booklet demonstrates DQS' commitment to ensuring that its employees and those of the other companies within its group comply with the Act'*⁵¹⁶. The OFT considers in the light of this mitigating factor that it is appropriate to reduce the amount of the penalty by a further [...] [C] per cent.

631. DQS has also made representations regarding its financial position. For example, in its Supplementary Representations DQS states *'The OFT is requested to pay particular regard to the serious financial difficulties faced by DQS in recent months. DQS operates in an extremely difficult market and is suffering from a prolonged downturn in trade'*⁵¹⁷.

632. In paragraph 2.11 of the Guidance, the OFT states that consideration may be paid to the special characteristics, including the size and financial position of the undertaking in question⁵¹⁸. Whilst the OFT notes that DQS' financial position has deteriorated in the years since the infringement, at the same time its relevant turnover (upon which the penalty is based) has also reduced, from [...] [C] in 2003 to [...] [C] in 2005. DQS is, therefore, already benefiting from a reduction in the penalty by reason of its turnover in the relevant market having declined since the date of the infringement. Furthermore, no representations have been made regarding the financial position of DQS' ultimate parent, Precision Concepts Limited. As noted in paragraph 3 above, Precision Concepts Limited is equally liable for the participation of DQS in the infringement. The OFT does not therefore consider that any reduction in penalty to take account of DQS' financial position is appropriate in this case.

⁵¹⁵ DQS representations dated 22 December 2005, paragraph 5.31.

⁵¹⁶ DQS representations dated September 2004, paragraph 5.7.

⁵¹⁷ DQS representations dated 22 December 2005, paragraph 5.30.

⁵¹⁸ *'OFT's guidance as to the appropriate amount of a penalty'* (OFT423, December 2004), paragraph 2.11.

Step 4 – Conclusion

633. As a result, the total percentage added to the penalty for aggravating factors is [...] [C] per cent. The total percentage deducted for mitigating circumstances is [...] [C] per cent. The OFT therefore makes [...] [C] adjustment to the penalty at step 4. The penalty for DQS stands at £180,000 at step 4.

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

634. The penalty imposed by the OFT may not exceed 10 per cent of the worldwide turnover of the undertaking in the business year preceding the date on which the OFT makes its decision (i.e 2005)⁵¹⁹. DQS' worldwide turnover for 2005 is [...] [C]. Therefore, its penalty must not exceed [...] [C]. As the penalty does not exceed this amount, no adjustments are necessary in this regard.

635. In addition, in this case the penalty imposed by the OFT may not exceed the maximum penalty applicable prior to 1 May 2004, i.e. 10 per cent of turnover in the UK of the undertaking in the financial year preceding the date when the infringement ended (multiplied pro rata by the length of the infringement where the length of the infringement was in excess of one year, up to a maximum of three years). In this case, as noted above in paragraph 581, the OFT has carried out a dual check against the Parties' total UK turnover figures for both 2001 and 2002. DQS' total UK turnover for 2001 was £12,430,000 and for 2002 it was £19,539,000. The penalty does not exceed 10 per cent of either of these amounts. Additionally, as noted above in paragraph 582, there is no double jeopardy in this case.

636. The financial penalty for DQS is consequently set at £180,000.

Payment of penalty

637. The OFT therefore requires the Parties to pay the following penalties in respect of the infringement:

- EWS £490,050;
- Thermo seal £228,420; and
- DQS £180,000.

638. In the case of the penalty imposed on EWS, the requirement to pay the penalty is also addressed to its ultimate parent company, Laird, which the OFT holds jointly and severally liable for payment of EWS' penalty. Equally, in the case of the penalty imposed on DQS, the requirement to pay the penalty is also addressed to its ultimate parent company, Precision Concepts Limited, which the OFT holds jointly and severally liable for payment of DQS' penalty.

639. The penalties must be paid to the OFT within two months of the date of this Decision, that is, by close of banking business on 29 August 2006. If a penalty is not paid within the deadline specified above, and either an appeal against the imposition or amount of that penalty has not been made or such an appeal has

⁵¹⁹ The 2000 Penalties Order, SI2000/309 as amended.

been made and determined in the OFT's favour, the OFT may commence proceedings to recover the amount as a civil debt.

Vincent Smith

Director, Competition Enforcement

28 June 2006

Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London EC4Y 8JX