

Decision of the Competition and Markets Authority

Online resale price maintenance in the bathroom fittings sector

Case CE/9857-14

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

The names of individuals mentioned in the description of the infringement in the original version of this Decision have been removed from the published version on the public register. Names have been replaced by a general descriptor of the individual's role.

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1. INTRODUCTION

A. General

- 1.1 By this decision, of which Annexes A to E form an integral part (the Decision), the Competition and Markets Authority (CMA) has concluded that Ultra Finishing Limited¹ (Ultra) has infringed the prohibition imposed by section 2(1) (the Chapter I prohibition) of the Competition Act 1998 (the Act) and/or Article 101 of the Treaty on the Functioning of the European Union (TFEU).
- 1.2 This Decision is addressed to Ultra and its ultimate parent company Ultra Finishing Group Limited² (UFGL) (together, the Ultra Group). In this case, the CMA has applied Rule 10(2) of the CMA's procedural rules (the CMA Rules)³ and has addressed this Decision only to the Ultra Group and not to any of the counterparties to the agreements or concerted practices with Ultra.⁴

B. Summary of the relevant facts

- 1.3 In response to a number of complaints from Ultra's resellers about significant discounting of Ultra's products online, in 2009 Ultra introduced an online trading policy. The online trading policy required Ultra's resellers not to offer Hudson Reed or Home of Ultra⁵ branded products online below a maximum discount of 20% off the RRP for that product. Ultra made it clear to resellers that there would be consequences for failure to comply with the maximum discount, including reducing resellers' wholesale terms and withdrawal of Ultra's permission to use its copyrighted images on resellers' websites.⁶
- 1.4 Ultra withdrew the 2009 policy after a short time.⁷ However, in 2010 and 2011 it received further complaints from its customers that low online prices were increasing price competition between resellers and exerting downward pressure on the retail price of Ultra's products, whether sold online or offline.⁸ In response to these complaints, in February 2012 Ultra introduced trading guidelines relating to the online sales of its Hudson Reed and Ultra branded products.

¹ Company number 01869659.

² Company number 03958041.

³ The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (SI 2014/458).

⁴ See Annex E, paragraphs E.18 and E.19.

⁵ The brand name 'Home of Ultra' changed to 'Ultra' in July 2010. Question 13 of Ultra's response to section 26 notice dated 15 July 2015 (URN UC0117.1).

⁶ See Chapter 5, Section C and Annex C below.

⁷ See paragraph 5.18 and Annex C below.

⁸ See paragraphs 5.21 to 5.25 below.

- 1.5 The online trading guidelines were recommendations regarding the representation of Ultra's brands on resellers' websites, including images and logos. They also contained a 'recommendation', which was stated not to be legally binding, that online prices should be no lower than 25% off in-store RRP's for Hudson Reed or Ultra branded products.⁹
- 1.6 However, despite being described as a 'recommendation', the evidence demonstrates that the key objective of Ultra's online trading guidelines was to prevent resellers from selling or advertising Hudson Reed or Ultra branded products online below the 'recommended' online price.¹⁰ In addition, the evidence demonstrates that at least certain of Ultra's resellers (and distributors) understood that trading within Ultra's guidelines encompassed a requirement to price Hudson Reed and Ultra branded products online at or above the 'recommended' online price.¹¹
- 1.7 Ultra's online trading guidelines were implemented through a copyright licence for the use of Ultra's images, which it used as a mechanism to ensure that resellers signed up and adhered to the online trading guidelines.¹² The licence enabled Ultra to threaten to withdraw a reseller's rights to use Ultra images for online sales if a reseller set online prices below the recommended online price. The licence also reinforced the operation of the 'recommended' price, by preventing 'promotions' in relation to Hudson Reed or Ultra branded products.
- 1.8 Following the introduction of the online trading guidelines, Ultra regularly monitored resellers' websites to check that resellers were not selling or advertising Hudson Reed or Ultra branded products online below the recommended price. Further, Ultra threatened and/or took enforcement action if it found instances where resellers were selling or advertising Hudson Reed or Ultra branded products online below the recommended price. The three principal enforcement mechanisms included:
- 1.8.1 temporarily or permanently reducing the resellers' wholesale terms of supply
 - 1.8.2 temporarily or permanently ceasing supply of Hudson Reed or Ultra branded products

⁹ See Chapter 5, Section E below.

¹⁰ See Chapter 5, Sections D and E below, in particular paragraphs 5.59 to 5.61.

¹¹ See paragraphs 5.77 to 5.83 below.

¹² See paragraphs 5.27 to 5.38 and 5.58 to 5.76 below.

- 1.8.3 withdrawing a reseller's right to use images of Hudson Reed or Ultra branded products, or
 - 1.8.4 a combination of the above.¹³
- 1.9 In the light of the above, the CMA finds that, in the context of online sales, Ultra's 'recommendation' as to online prices in practice effectively restricted the ability for resellers to set online prices below a specified level and therefore amounted to resale price maintenance. This is specifically demonstrated in relation to three resellers, where the evidence shows that they:
- 1.9.1 set their online prices no lower than the 'recommended' online price, and/or
 - 1.9.2 amended their online prices in response to instructions from Ultra, so that they were no lower than the 'recommended' online price.¹⁴

C. Summary of the Infringements

- 1.10 In light of the CMA's findings of fact,¹⁵ the CMA has concluded that Ultra has infringed the Chapter I prohibition and/or Article 101 TFEU by participating in an agreement and/or concerted practice with certain of its resellers that had as its object the prevention, restriction or distortion of competition.¹⁶ Further, the CMA finds both Ultra and its ultimate parent company, UFGL, jointly and severally liable for the Infringements.¹⁷
- 1.11 Specifically, the CMA has concluded that:
- 1.11.1 From 7 February 2012 (at the latest) to 31 December 2012, Ultra and [Reseller 1]¹⁸ were party to an agreement and/or concerted practice that [Reseller 1] would not sell or advertise Hudson Reed or Ultra branded products online below a specified online price, which had as its object the appreciable prevention, restriction, or distortion of competition (through resale price maintenance) in relation to the supply of bathroom fittings in the UK¹⁹

¹³ See paragraph 5.11 below.

¹⁴ See paragraphs 5.130 to 5.192 below.

¹⁵ See Chapter 5 below.

¹⁶ See Chapter 6, Section D below.

¹⁷ See Chapter 3, Section B below.

¹⁸ [REDACTED]

¹⁹ See paragraph 6.26.

1.11.2 From 1 February 2012 (at the latest) to 28 August 2014, Ultra and [Reseller 2] were party to an agreement and/or concerted practice that [Reseller 2] would not sell or advertise Hudson Reed or Ultra branded products online below a specified online price, which had as its object the appreciable prevention, restriction, or distortion of competition (through resale price maintenance) in relation to the supply of bathroom fittings in the UK²⁰

1.11.3 From 1 February 2012 (at the latest) to 28 August 2014, Ultra and [Reseller 3] were party to an agreement and/or concerted practice that [Reseller 3] would not sell or advertise Hudson Reed or Ultra branded products online below a specified online price, which had as its object the appreciable prevention, restriction, or distortion of competition (through resale price maintenance) in relation to the supply of bathroom fittings in the UK²¹

(together, the Infringements).

D. Summary of the relevant market and economic context

1.12 The Infringements affect the supply of bathroom fittings within the UK.

1.13 The CMA finds that, for the purposes of this case:

1.13.1 the relevant product market for the Infringements is the supply of bathroom fittings, and

1.13.2 the relevant geographic market for the Infringements is at least the UK.²²

1.14 Competition for sales of bathrooms fittings takes place at both the upstream level (rival manufacturers competing for sales of their product to resellers) and the downstream level (rival resellers competing for sales to end users). At the downstream level, competition takes place both between different brands (inter-brand competition) and between different resellers of the same brand (intra-brand competition).²³

²⁰ See paragraph 6.31.

²¹ See paragraph 6.37.

²² See Annex B, paragraphs B.1 to B.20.

²³ See paragraphs 4.3 to 4.7.4.

- 1.15 The internet is a growing sales channel for the retail sale of bathroom fittings. The internet is an important driver of price competition between sales made through both online and offline channels, due to:
- 1.15.1 the increased transparency of prices on the internet, and
 - 1.15.2 the ability of resellers using the online sales channel to sell at lower prices.²⁴
- 1.16 The CMA finds that the prevention or restriction of resellers' ability to determine their own online resale prices, and in particular preventing or restricting discounting below a fixed level, would:
- 1.16.1 reduce price competition from online sales of bathroom fittings products
 - 1.16.2 reduce downward pressure on the retail price of bathroom fittings products, and
 - 1.16.3 thereby potentially result in higher prices to consumers.²⁵

²⁴ See paragraphs 4.8 to 4.21.

²⁵ See paragraphs 4.24 to 4.25.

2. GLOSSARY

Term	Definition
Act	The Competition Act 1998
Agreements	The agreements and/or concerted practices (in each case between Ultra and each Reseller) that the Reseller would not sell or advertise Hudson Reed or Ultra branded products online below the Recommended Online Price, as particularised in Chapter 6 of the Decision
Article 101	Article 101 TFEU
Board	Ultra's board of directors at the applicable time
[✂]	[✂]
CAT	Competition Appeal Tribunal
Chapter I prohibition	The prohibition imposed by section 2(1) of the Act
CJ	The Court of Justice of the European Union (formerly the European Court of Justice)
CMA	The Competition and Markets Authority
CMA Rules	The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (SI 2014/58)
Commission	The European Commission
Contact Record	Ultra's record of contacts with resellers as described in Chapter 5, Section F
Decision	This Decision, dated 10 May 2016
EA02	The Enterprise Act 2002
EU	The European Union
European Courts	Includes the CJ and the GC
Final Proposal	The final proposal sent to the Ultra Board for Ultra's 2012 online trading guidelines as described in Chapter 5, Section D and set out in full at Annex D
GC	The General Court of the European Union (formerly the Court of First Instance)
[✂]	[✂]
Infringements	The infringements of the Chapter I prohibition and/or Article 101 as particularised in paragraph 1.11

Market Price	The prevailing retail price of a particular product in the market
Master Spreadsheet	Ultra's master database of online sellers of Hudson Reed and Ultra branded products, as described in Chapter 5, Section F
OFT	The Office of Fair Trading
Online Discounting Restriction	The restriction on resellers selling or advertising Hudson Reed or Ultra branded products online below the Recommended Online Price set by Ultra, as described in Chapter 5, Section E
[✂]	[✂]
Outline Proposal	The outline proposal sent to the Ultra Board for Ultra's 2012 online trading guidelines as described in Chapter 5, Section D and set out in full at Annex D
Penalties Guidance	<i>Guidance as to the appropriate amount of a penalty</i> (OFT423, September 2012), adopted by the CMA Board
[✂]	[✂]
Recommended Online Price	The recommended retail price for online sales of Hudson Reed and Ultra branded products, set by Ultra at 25% below RRP's for 'in-store sales', as determined and amended by Ultra from time to time as described in Chapter 5, Section E
Relevant Period	1 February 2012 (at the latest) until 28 August 2014.
Resellers	[Reseller 1], [Reseller 2] and [Reseller 3] (each a Reseller)
Reseller Image Licence	The copyright licence to use images as described in Chapter 5, Section E
RPM	Resale Price Maintenance
RRP	Recommended Retail Price
Statement of Objections	The Statement of Objections dated 28 January 2016
TFEU	The Treaty on the Functioning of the European Union
Trading Guidelines	The recommendations for online trading set by Ultra, including the Online Discounting Restriction and other recommendations regarding the representation of Ultra's Hudson Reed and Ultra branded products

	on resellers' websites, with effect from 1 February 2012 as described in Chapter 5, Section E
Trading Guidelines Mailbox	The email account with the email address trading.guidelines@ultra-finishing.co.uk , as described in Chapter 5, Section E
Trueshopping	Trueshopping Limited, a company ultimately owned by UFGL
UFGL	Ultra Finishing Group Limited
Ultra	Ultra Finishing Limited, a company ultimately owned by UFGL
Ultra Group	Ultra and UFGL
VABER	Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 102, 23.4.2010), known as the Vertical Agreements Block Exemption Regulation.
[✂]	[✂]
2009 Online Discounting Agreement	The agreement issued by Ultra to certain resellers in 2009, pursuant to which resellers were instructed not to offer either Hudson Reed or Home of Ultra online at a discount greater than 20% from Ultra's RRP's, as described in Chapter 5, Section C and Annex C
2009 Online Discounting Policy	Ultra's online discounting policy with effect from 1 May 2009, as described in Chapter 5, Section C and Annex C

3. THE CMA'S APPROACH TO ASSESSING THE UNDERTAKING'S LIABILITY

A. The Ultra Group undertaking

- 3.1 Ultra is a UK-based manufacturer and supplier of bathroom fittings. In the UK, Ultra has manufacturing, warehousing and distribution facilities in Halifax and warehousing and distribution facilities at two sites in Bolton.²⁶ [REDACTED].²⁷
- 3.2 Ultra manufactures, supplies and imports various different bathroom fittings, including baths, sanitary ware, mirrors, cabinets, showers and taps. It owns several ranges, including Ultra,²⁸ Hudson Reed and Premier. Ultra had turnover of £32.8 million in 2012, £46.7 million in 2013 and £93.1 million in 2014.²⁹
- 3.3 Ultra is a private limited company registered at Companies House under company number 01869659 on 7 December 1984. During the period of the Infringements, the company directors from time to time were [Director], [Chief Executive Officer], [Director], [Director], [Director], [Director], [Director] and [Director].³⁰
- 3.4 Until 31 July 2012, Ultra was 100% owned by UFGL.³¹ UFGL now has an 83% shareholding in Ultra. The remaining 17% shareholding is held by [Director].
- 3.5 UFGL is a holding company with two main subsidiaries: Ultra (and its subsidiaries) and Trueshopping Limited (Trueshopping). Trueshopping is focused on online retail of bathroom heating products, including certain products supplied by Ultra, as well as homewares, garden, sports health and DIY products.³²
- 3.6 UFGL is a private limited company registered at Companies House under company number 03958041 on 28 March 2000. During the period of the Infringements, the company directors from time to time were [Director] and

²⁶ [REDACTED], page 10 (URN UD0686). A further site in Burnley was sold in January 2016.

²⁷ [REDACTED], page 10 (URN UD0686).

²⁸ The 'Home of Ultra' brand is the previous name of the 'Ultra' brand. See footnote 5 above.

²⁹ Turnover figures taken from Ultra audited accounts year end 31 December 2012 (URN U0001), Ultra audited accounts year end 31 December 2013 (URN U0002) and Ultra audited accounts year end 31 December 2014 (URN U0003). The 2014 figure includes the discontinued operations relating to the Mark Two business, which was placed in administration on 26 November 2014.

³⁰ Ultra audited accounts year end 31 December 2012 (URN U0001), Ultra audited accounts year end 31 December 2013 (URN U0002) and Ultra audited accounts year end 31 December 2014 (URN U0003).

³¹ Ultra Annual Return dated 28 May 2012 (URN U0009) and email from [Lawyer] (Shulmans LLP) to CMA dated 14 December 2015, noting that [Director] acquired a 17% shareholding in Ultra on 31 July 2012 (URN UC0192).

³² [REDACTED], page 8 (URN UD0686).

[Director].³³ During the period of the Infringements, UFGL was owned by [Director], who had a 100% shareholding in UFGL.

- 3.7 UFGL had turnover of £62.0 million in 2012, £87.8 million in 2013 and £134.5 million in 2014.³⁴

B. The CMA's approach to assessing the undertaking's liability

- 3.8 It is necessary for the CMA to identify the legal or natural persons who form part of the undertaking involved in an infringement in order to determine who is liable for that infringement.
- 3.9 The CMA finds that Ultra was directly involved in the Infringements from 1 February 2012 (at the latest) until 28 August 2014 (the Relevant Period).³⁵ In light of the CMA's conclusions in Chapter 6, Section B below, the CMA finds that Ultra is liable for the Infringements for the entire Relevant Period.
- 3.10 A parent company may be held jointly and severally liable for an infringement committed by a subsidiary company. Joint and several liability may be attributed to the parent where it can be shown that, at the time of the infringement, the parent company was able to and did exercise decisive influence over the conduct of the subsidiary, so that the two form part of a single economic undertaking for the purposes of the Chapter I prohibition and/or Article 101 TFEU.³⁶
- 3.11 Where a subsidiary is wholly owned, there is a presumption that its parent company exercised decisive influence over the subsidiary.³⁷
- 3.12 Until 31 July 2012,³⁸ Ultra was 100% owned by UFGL. This covers the period in which Ultra's 2012 online trading guidelines were conceived and adopted and the initial period of their implementation.³⁹
- 3.13 For the remainder of the Relevant Period, UFGL owned 83% of Ultra, with [Director], an individual, holding the remaining 17%. The CMA concludes that UFGL remained able to and did exercise decisive influence over Ultra after 31

³³ Appointment of [Director] as director 31 July 2014 (URN U0007).

³⁴ UFGL consolidated audited accounts year end 31 December 2012 (URN U0004), UFGL consolidated audited accounts year end 31 December 2013 (URN U0005) and UFGL consolidated audited accounts year end 31 December 2014 (URN U0006). The 2014 figure includes the discontinued operations relating to the Mark Two business, which was placed in administration on 26 November 2014.

³⁵ See Chapter 6, Section D below.

³⁶ See Annex A, paragraph A.16.

³⁷ See Annex A, paragraph A.17.

³⁸ Ultra Annual Return dated 28 May 2012 (URN U0009) and email from [Lawyer] (Shulmans LLP) to CMA dated 14 December 2015, noting that [Director] acquired a 17% shareholding in Ultra on 31 July 2012 (URN UC0192).

³⁹ See Chapter 5, Section D below.

July 2012. In reaching this conclusion, the CMA has had regard to Annex A⁴⁰ and has considered a range of factors relating to the economic, organisational and legal links that tie Ultra to UFGL. In particular, the CMA notes the following:

- 3.13.1 From 31 July 2012 to the end of the Relevant Period, UFGL held an 83% shareholding in Ultra. As such, UFGL held the majority of the voting rights in Ultra.
- 3.13.2 [Director], who owns the remaining 17% shareholding in Ultra, [REDACTED].⁴¹
- 3.13.3 Ultra's accounts state that '*the company is controlled by its ultimate parent company [UFGL]*'.⁴²
- 3.13.4 UFGL's subsidiary, Trueshopping, sells some products supplied by Ultra as part of a wider portfolio.
- 3.13.5 UFGL files consolidated accounts which state that '*[UFGL] has 2 principal trading companies, [Ultra] and [Trueshopping]*'.⁴³
- 3.13.6 UFGL's strategic plan refers to Ultra as [REDACTED].⁴⁴
- 3.13.7 [Director] (who owned 100% of UFGL throughout the Relevant Period) was a director on the Boards of both Ultra and UFGL at the time of the Infringements.⁴⁵ [REDACTED].⁴⁶
- 3.13.8 The CMA considers that UFGL was, or should have been, aware of Ultra's online trading guidelines, including the communication of the recommended online price. For example, [Director] (a director and sole shareholder of UFGL at the time) was copied into Ultra's email of 9 December 2011 concerning the introduction of the online trading guidelines for Hudson Reed and Ultra branded products.⁴⁷ [REDACTED].⁴⁸

3.14 In the light of the above considerations, the CMA concludes that Ultra and its parent company, UFGL, formed a single economic entity for the purposes of

⁴⁰ See Annex A, paragraphs A.19 to A.21.

⁴¹ [REDACTED] (URN UD0857).

⁴² Ultra audited accounts year end 31 December 2014, page 36 (URN U0003).

⁴³ UFGL audited accounts year end 31 December 2014, page 3 (URN U0006).

⁴⁴ [REDACTED], page 8 (URN UD0686).

⁴⁵ See paragraphs 3.3 and 3.6 above.

⁴⁶ Email from [Lawyer] (Shulmans LLP) to CMA dated 15 December 2015, noting that [REDACTED] (URN UC0194) and email from [Lawyer] (Shulmans LLP) to CMA dated 14 December 2015, noting that [REDACTED] (URN UC0192).

⁴⁷ See paragraph 5.54 below.

⁴⁸ [REDACTED].

the Chapter I prohibition and/or Article 101 TFEU for the entire Relevant Period.

- 3.15 In the light of the above, the CMA finds UFGL jointly and severally liable, together with Ultra, for the Infringements throughout the Relevant Period.

4. INDUSTRY BACKGROUND

A. Introduction

4.1 The Infringements affect the supply of bathroom fittings within the UK.

4.2 The CMA finds that, for the purposes of this case:

4.2.1 the relevant product market for the Infringements is the supply of bathroom fittings, and

4.2.2 the relevant geographic market for the Infringements is at least the UK.⁴⁹

4.3 Competition for sales of bathrooms fittings takes place at both the upstream level (rival manufacturers competing for sales of their product to resellers) and the downstream level (rival resellers competing for sales to end users). At the downstream level, competition takes place both between different brands (inter-brand competition) and between different resellers of the same brand (intra-brand competition).

B. Sales channels and the importance of the internet

4.4 The upstream supply of bathroom fittings comprises a relatively large number of manufacturers offering a range of different bathroom fittings.⁵⁰

4.5 In addition to competition between rival manufacturers of branded bathroom fittings, an increasing source of competition comes from retailers offering own-brand or unbranded products.⁵¹ In some cases these are sourced from manufacturers,⁵² but in other cases retailers source product directly from factories outside the UK, for example, in China.⁵³

⁴⁹ See Annex B.

⁵⁰ For example, other than Ultra, key suppliers of baths and sanitary ware in 2012 were Ideal Standard, Sanitec (Twyford) and Roca, Jacuzzi, Bristan, Kohler, Dahll, Vitra, Porcelanosa, Villeroy and Boch, Lecico, Duravit and Laufen ([§]), based on AMA (Bathroom Market Report UK 2013-2017 Analysis, Fourteenth Edition, August 2013, page 48) (URN UD0257). (Also in URN UD0515). Other than Ultra, key suppliers of brassware in 2012 were Bristan, Ideal Standard, Pegler Yorkshire, Hansgrohe and Grohe, Samuel Heath, Twyford, Aqualisa, Roca, and Vitra ([§]), based on AMA report (Bathroom Market Report UK 2013-2017 Analysis, Fourteenth Edition, August 2013, pages 70 to 73) (URN UD0257). (Also in URN UD0515)

⁵¹ According to AMA, it is estimated that around 45% of all plumbing and heating products sold via the internet are own-label, illustrating its significance in this market sector. AMA (Internet Plumbing and Heating Market Report UK 2014-2018 Analysis, Third Edition, January 2014, page 49) (URN U0013).

⁵² For example, Ultra notes that its '*Premier brand is popular with online retailers as the products can be sold as customers' own label brands and offers great value for consumers*'. [§], page 47 (URN UD0686).

⁵³ According to AMA, many online plumbing retailers are moving away from more expensive UK and European products and towards a more cost effective global sourcing strategy. For example, many own-label plumbing products are sourced from China and the Far East. AMA (Internet Plumbing and Heating Market Report UK 2014-2018 Analysis, Third Edition, January 2014, page 50) (URN U0013).

- 4.6 Bathroom fittings are supplied to end users via merchants,⁵⁴ DIY multiples, bathroom specialists, internet retailers and other retailers such as grocery multiples, retail department stores and catalogue retailers.⁵⁵ At the wholesale level, there are a number of national and regional bathroom distributors that supply merchants and bathroom specialists.⁵⁶
- 4.7 At the downstream retail level, sales of bathroom fittings to end consumers are made through a range of sales channels, namely:
- 4.7.1 physical showrooms
 - 4.7.2 online sales
 - 4.7.3 telephone sales, and
 - 4.7.4 mail or catalogue order.

The growth of the online sales channel

- 4.8 Most resellers of bathroom fittings make sales to end consumers through a combination of one or more of the sales channels identified above, including via online sales. The UK has the highest rate of online purchasing in Europe⁵⁷

⁵⁴ According to AMA, the merchant sector is dominated by four national organisations that accounted for an estimated 75% of the total merchants' market in 2012, namely Travis Perkins, the Wolseley Group, the Saint-Gobain Group (including the brands Graham and Jewson) and the Grafton Group. Although continuing to focus on the trade sector, certain merchants have become more consumer-oriented. AMA (Bathroom Market Report UK 2013-2017 Analysis, Fourteenth Edition, August 2013, page 56) (URN UD0257).

⁵⁵ AMA (Bathroom Market Report UK 2013-2017 Analysis, Fourteenth Edition, August 2013, pages 55, 73 to 74, 86 to 87, 94 to 95 and 101) (URN UD0257), and AMA (Shower Market Report UK 2013-2017 Analysis, Fourteenth Edition, June 2013, pages 53 to 54, 84 to 85 and 96 to 97) (URN UD0256).

⁵⁶ AMA (Bathroom Market Report UK 2013-2017 Analysis, Fourteenth Edition, August 2013, page 57) (URN UD0257).

⁵⁷ According to AMA, 'In 2013, 72% of all users (32 million) had purchased goods or services over the internet. This compares to 61% of all users in 2009.' (Internet Plumbing and Heating Market Report UK 2014-2018 Analysis, Third Edition, January 2014, page 10) (URN U0013).

and the internet is a growing sales channel for the retail sale of bathroom fittings.⁵⁸

- 4.9 Some retailers sell predominantly over the internet.⁵⁹ Mintel estimated that specialist internet sellers and mail order together accounted for approximately 6% of bathroom fittings sales in 2013, while AMA estimated that specialist online sellers accounted for around 7% of sales of baths and sanitary ware and 8% of sales of shower controls in 2012.⁶⁰ However, the total value of online sales of bathroom fittings is likely to be significantly higher than sales recorded by online-only retailers, due to online sales made by 'bricks and clicks' retailers, that is, retailers offering their products for sale through both 'traditional' offline and online channels.⁶¹
- 4.10 In the Relevant Period, Ultra identified approximately [100-150] different websites selling Hudson Reed and Ultra branded products.⁶²

The impact of online sales on price competition

- 4.11 Price is an important factor influencing the customer's choice of retailer for a particular bathroom fitting (although it is not the only factor).⁶³ This is

⁵⁸ According to AMA, in 2013 the internet plumbing market saw a 13% increase in value from the previous year. AMA estimates that the market will grow by a further 50% between 2013 and 2018. AMA (Internet Plumbing and Heating Market Report UK 2014-2018 Analysis, Third Edition, January 2014, pages 8 to 9) (URN U0013). Moreover, according to AMA, *'The level of bathroom product sold via the internet has seen significant growth in the last 3-5 years.'* AMA (Shower Market Report UK 2013-2017 Analysis, Fourteenth Edition, June 2013, page 54) (URN UD0256). In addition, a 2013 Mintel survey found that 14% of customers that had a complete bathroom refitted in the previous three years had purchased online, either via an online bathroom retailer or via a platform such as eBay or Amazon. Similarly when the same survey asked about the factors considered important when deciding where to buy bathrooms fittings, 16% of purchasers stated that the option to shop online was one of their top three factors in deciding where to shop, and 27% said the option buy online mattered to them (listed as one of the top five factors) (Mintel Report, page 22 and Figure 10 page 21 (URN UD0510)).

⁵⁹ According to Mintel, *'there is a growing number of specific online bathroom e-tailers'* Mintel Report, page 76 (URN UD0510).

⁶⁰ Mintel Report, Figure 5, page 16 (URN UD0510). and AMA (Bathroom Market Report UK 2013-2017 Analysis, Fourteenth Edition, August 2013, page 55) (URN UD0257), and AMA (Shower Market Report UK 2013-2017 Analysis, Fourteenth Edition, June 2013, page 53) (URN UD0256).

⁶¹ For example, [Reseller] estimated that its online sales accounted for 7-8% of its sales of bathroom fittings and growing. In addition, once 'click and collect' sales were factored in this rose to around 15-20%. Note of call with [Reseller], paragraph 10 (URN U230010).

⁶² The *'Brand Management Summary'* worksheet recorded [100-150] sites selling Hudson Reed and Ultra products as at 22 May 2012 (Ultra spreadsheet titled *'Contact Record – Master Sheet'* (URN UD0135)).

⁶³ According to the Mintel Report, *'people are highly likely to look around for the best prices.'* 45% of internet users surveyed who refitted a bathroom or bought bathroom accessories in the last three years put getting *'the lowest prices for what I want'* in the top three factors that influence choice of retailer for bathroom fittings. This increases to 53% of internet users surveyed who have a bathroom but have not refitted in the last three years. (Mintel Report, Figures 10 and 11 (URN UD0510). The Mintel Report also noted that: *'[...] this market is not all about price. People want to be able to choose from a wide range of products and styles as well as wanting the convenience of being able to get everything done with one supplier'* (Mintel Report, page 101 (URN UD0510)).

particularly the case with sales made online, where customers are likely to be more price-sensitive.⁶⁴

- 4.12 Many resellers making sales online provide the facility for customers to buy products on a 'click-to-buy' basis. In the context of online 'click-to-buy' sales, the price advertised on the website or on price comparison tools is typically the price the customer will pay for that product. In other words, the advertised price and the sales price are the same.⁶⁵
- 4.13 This is supported by evidence obtained during the CMA's investigation which confirmed that final prices charged online by resellers of Ultra's Hudson Reed branded bathroom fittings were identical to the prices displayed on the homepages of those resellers. In particular, the CMA reviewed the websites of 16 resellers of bathroom fittings⁶⁶ to investigate whether:
- 4.13.1 each website was 'click-to-buy' ie it had the ability to process financial transactions, and
 - 4.13.2 the price displayed on the homepage of the website for a particular product⁶⁷ accurately represented the final sales price for that product.
- 4.14 This evidence shows that 14 of the 16 websites reviewed were 'click-to-buy'.⁶⁸ On each of these 'click-to-buy' websites, the price displayed when first arriving

⁶⁴ According to AMA, *'The internet is widely perceived as a way of finding lower priced products and bargains.'* AMA (Internet Plumbing and Heating Market Report UK 2014-2018 Analysis, Third Edition, January 2014, page 12) (URN U0013).

⁶⁵ The CMA acknowledges there may be occasions where the price displayed on the website is not the final price paid by the customer. In particular, certain resellers' websites have a facility which allows certain customers such as trade customers to access prices that are lower than those displayed on the 'public' website. However, the CMA notes that many customers purchasing online, including end consumers, will not have access to trade accounts. Additionally, on occasion a reseller may allow online customers to enter a discount code. However, evidence from resellers indicates that discount codes are only offered very infrequently (for example, [Reseller] told the CMA that it previously had this facility but removed it after a recent update (note of call with [Reseller], paragraph 16) (URN U140007); [Reseller] told the CMA that it could but did not issue discount codes (URN U30014.2); [Reseller] told the CMA that it did have discount codes but only used them around three times a year (URN U0003.1) (See questions at URN U150001.1); [Reseller] noted that less than 10% of sales involved discount codes as it was not something it does very often (URN U90002.1) (See questions at URN U90001.1); [Reseller] stated that it had never used discount codes (URN U100002.1) (See questions at URN U100001.1). In addition, the CMA notes that where a discount code applies to products sold by a particular reseller in general (eg 10% off taps), as opposed to Ultra products specifically, this would not mitigate the impact of any online pricing restriction on Ultra's products.

⁶⁶ Namely, [Reseller] (URN UC0085.1) and list of 'onliners' (URN UC0094.1) and [Reseller] [Reseller]. The CMA was unable to review the website of [Reseller] [Reseller].

⁶⁷ Hudson Reed Mono Square Single Ended Bath BMON006 1500x700x380 bath or equivalent proxy.

⁶⁸ [Reseller] was the only reseller that was not 'click-to-buy' (URN U0017). One of the 16 websites could not be accessed due to a technical error. See screenshots for following resellers: [Reseller] (URN U0015); [Reseller] (URN U0016); [Reseller] (URN U0018); [Reseller] (URN U0019); [Reseller] (URN U0020); [Reseller] (URN U0021); [Reseller] (URN U0022); [Reseller] (URN U0023); [Reseller] (URN U0024); [Reseller] (URN U0025); [Reseller] (URN U0026); [Reseller] (URN U0027); [Reseller] (URN U0028); [Reseller] (URN U0029).

on the relevant website page was the price the customer was asked to pay at the final checkout.⁶⁹

- 4.15 Internet searches therefore allow consumers easily to compare prices of different online sellers for a particular product and identify those that offer the lowest prices. This is further facilitated by online price comparison tools such as Google shopping, PriceRunner or idealo, that allow rapid comparison across multiple sellers (see Figure 1 below).⁷⁰
- 4.16 For resellers that make sales online, the CMA considers that this heightened price transparency means that the price on a reseller's website is a key focus in attracting online shoppers.⁷¹ Given the ease with which customers can buy online, search online and make price comparisons via comparison websites, price competition for individual branded products online is likely to be particularly intense.

⁶⁹ See screenshots for the following resellers: [Reseller] (URN U0015); [Reseller] (URN U0016); [Reseller] (URN U0018); [Reseller] (URN U0019); [Reseller] (URN U0020); [Reseller] (URN U0021); [Reseller] (URN U0022); [Reseller] (URN U0023); [Reseller] (URN U0024); [Reseller] (URN U0025); [Reseller] (URN U0026); [Reseller] (URN U0027); [Reseller] (URN U0028); [Reseller] (URN U0029).

⁷⁰ This is supported by comments made by [Employee] of [Reseller] in an email to Ultra in 2011: 'You have to remember that once a customer has made a decision to buy a product, their ultimate purchase will be price based, this does not involve images only price. They may have views the product in their local showroom, or even visited your website to view the products that research has already taken place, so to restrict the use of your images is completely useless, customers no longer seek an image just the cheapest price! The google shopping feed has become the "Compare the market" facility, and is growing in popularity as the most focused way to search for the best price. As you can see images are of no importance here as they are all the same, what is important is price [...]'. Email from [Employee] of [Reseller] to [Employee] of Ultra, dated 3 September 2011 (URN UD0161).

⁷¹ According to AMA, 'Many internet plumbing websites have a price comparison facility so that the customer can ensure the best price. As a result, it is important for online retailers to continuously monitor marketplace pricing to remain competitive. Online tools such as Brand View may help online retailers achieve this'. AMA (Internet Plumbing and Heating Market Report UK 2014-2018 Analysis, Third Edition, January 2014, page 70). (URN U0013). Also see, for example, [Reseller]'s response to the CMA's letter of 13 May 2015, question 1: 'Online retailers compete in the retail supply of bathroom fittings primarily on price.' and question 3 'Comparison services allow customers to shop around easily, making it straightforward to compare prices for specific brands. This further increases the emphasis on competition on price online.' (URN U20069.1), Question 3 of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U130006.1) (See questions at URN U130001.1): 'Price comparison sites are the reason the internet is so competitive. Any changes in price are seen instantly, and most customers click on the cheapest link first. This constant deflation of prices means that companies like us are always sacrificing margin for better visibility, otherwise the damage to our website traffic would be detrimental to the business', Question 3 of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U140009.1) (See questions at URN U140003.1): 'Google shopping has been good and bad for online shopping. Comparison shopping has made it very easy for a company to gain business by being the cheapest seller. Google allows consumers to easily sort sellers by low to high. The issue with this, is that a number of sellers have appeared over the years offering the same product at cheaper and cheaper prices in order to maintain the position of being the cheapest and gain the sale'; Question 3 of [Reseller]'s response to 26 notice dated 8 May 2015 (URN U110010.1) (See questions at URN U110003.1) 'Shopping comparisons on Google shopping has resulted in suppliers with the lowest prices being selected much more often', Question 1 of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U100002.1) (See questions at URN U100001.1): 'Online sales have had a significant impact on the competition in the retail supply of bathroom fittings in the past five year (sic). Due to increase (sic) visibility and availability of the product on web (sic), the customer has found it easier to compare prices and opt for the cheapest offer.'

Figure 1: Result from Google Shopping comparison⁷²



Price competition between online and offline sales channels

4.17 The internet is also an important driver of price competition between sales made through both online and offline channels (ie via physical showrooms or over the telephone). There are two reasons for this:

- 4.17.1 the increased transparency of prices on the internet, and
- 4.17.2 the ability of resellers using the online sales channel to sell at lower prices.

Increased transparency of online prices

4.18 Many consumers will use the internet as a search and comparison tool, regardless of where they ultimately purchase the bathroom fitting.⁷³ The increased transparency of available prices on the internet creates a 'reference price' for both online and offline sales,⁷⁴ empowering consumers to demand a better deal from the offline channels by, for example, requesting a showroom to 'price-match' an offer made online.⁷⁵

Lower prices available online

4.19 Retailers that make sales solely or predominantly online tend to operate with lower overheads (eg the cost of establishing and maintaining physical

⁷² URN U0014.

⁷³ Mintel notes 'the growth of smartphone ownership has put internet access into people's hands. It means that they can quickly and easily look at websites, pick up information (including price comparisons) and shop online. We also expect the roll out of superfast broadband to help make online shopping even easier and more convenient. Even so, buying bathrooms is a complex purchase that requires many layers of decisions. And expertise also comes into play. So this complexity means that for many, online activity is reserved for browsing and gathering ideas, before entering into discussions and planning with a retailer.' Mintel Report, page 42 (URN UD0510).

⁷⁴ This is supported by comments by Mintel: 'These days it is a simple matter for people to shop around for the best prices and deals. The advent of online shopping makes it quick and easy to compare products from a wide range of different suppliers. So it is unsurprising that people talk of getting the lowest prices for what they want... So it is vital that retailers carefully position themselves as competitive, that they entice people in with good value entry-priced lines and that they offer to price match.' Mintel Report, page 101 (URN UD0510).

⁷⁵ For example, [Reseller], a bricks and mortar retailer, confirmed to the CMA that it would attempt to match or beat the price offered by other retailers: 'If we can match or beat and the overall order is profitable, we usually will'. (Question 6 of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U90002.1) (See questions at URN U90001.1)). Similarly, [Reseller] stated 'We will always attempt to match or beat prices by other retailers wherever possible and where our buying prices will allow' (Question 6 of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U110010.1) (See questions at URN U110003.1)). According to AMA, 'There is easier identification of lowest prices and best time to buy. Internet users are using online tools to monitor prices automatically. [...] Users are also shopping online for better prices whilst in a physical store' and 'Internet users now demand a seamless shopping experience regardless of the channel used. Customers want to buy the same product online that they saw in the store at the same (or lower) price.' (AMA (Internet Plumbing and Heating Market Report UK 2014-2018 Analysis, Third Edition, January 2014, page 11) (URN U0013)).

premises and staff costs) than rivals selling through bricks and mortar showrooms.⁷⁶ Therefore, retailers solely or predominantly selling online are often able to offer lower prices than retailers focused on 'offline' sales channels. This is true also for 'bricks and clicks' retailers, which may still enjoy a lower cost base than pure bricks and mortar retailers due to the ability to locate showrooms in lower cost parts of the UK, but use the internet to compete for national sales.⁷⁷

4.20 Evidence obtained during the CMA's investigation demonstrates that prices for bathroom fittings sold via offline channels are constrained by lower prices available online.⁷⁸ For example:⁷⁹

4.20.1 [Employee] of [Reseller] sent an email to Ultra on 6 November 2010, which stated: *'we feel the investment we have made in the showroom is having diminished margins and loss of sales due to the level of internet discounting that is being allowed to happen currently. As a seller in the future we would like to see margin protection and a maximum discount policy of somewhere in the region of 25%...*⁸⁰

4.20.2 [Marketing Director] of Ultra stated in interview with the CMA that *'showrooms were particularly unhappy about the [...] state of some of the customers who were selling and the heavy discounts they*

⁷⁶ According to AMA, *'A significant reason given for this phenomenal channel growth is that online suppliers can offer plumbing products at much lower prices than other channels of distribution. Without showroom or warehousing facilities; overhead costs are much lower. Also many specialists can buy direct from the manufacturer, cutting the cost of the 'middle man' such as a plumbing distributor.'* AMA (Internet Plumbing and Heating Market Report UK 2014-2018 Analysis, Third Edition, January 2014, page 23). (URN U0013). See also, Question 1 of [Reseller]'s response to the CMA's letter of 13 May 2015 (URN U20069.1) *'Online retailers do not incur the same overhead costs as a bricks-and-mortar retailer, meaning that the online retailers are able to offer lower prices. Some online retailers, [...], also hold a larger stock than showrooms tend to, meaning online retail is more competitive than bricks-and-mortar retail in terms of delivery times.'* Question 1 of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U100002.1) (See questions at URN U100001.1): *'...it is quite obvious that online sellers generally have a lower cost base'*; and Question 1 of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U130006.1) (See questions at URN U130001.1): *'Due to the competitive nature of selling on the internet, and the relatively low start-up costs (if you use a channel such as eBay or Amazon UK) the competition is fierce compared to 5 years ago. This has meant a drop in margins, to ensure companies remain competitive within the market.'*

⁷⁷ For example, according to [Reseller], *'Online comparison has made it easier however to exploit general arbitrage in a country, i.e. cost base will be lower in North east of the country compared to South east thus online sellers would like to set shop up North. Thereby providing the best possible price to the end user.'* Question 3 of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U100002.1) (See questions at URN U100001.1) and [Reseller], *'By selling online, a company can offer the goods they sell to the whole country and allow the consumer more choice as to where they buy from rather than just local showrooms which was the traditional model'* Question 1 of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U140009.1) (See questions at URN U140003.1).

⁷⁸ For example, [Reseller] noted, *'[...] essentially if a customer sees an Ultra item in a showroom that they like, if they can buy it online cheaper than they will.'* Question 2 of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U90002.1) (See questions at URN U90001.1).

⁷⁹ See further examples at paragraph 5.21 below.

⁸⁰ Email from [Employee] ([Reseller]) to [Sales and Marketing Director] (Ultra) dated 6 November 2010 (URN UD0177).

were giving. They were concerned about that because they felt they couldn't compete'.⁸¹

- 4.21 Further, the evidence demonstrates that the Online Discounting Restriction was introduced at least partly in response to low retail prices by businesses selling online putting pressure on the prices and margins of Ultra's bricks and mortar retailers. For example, internal slides prepared by Ultra's marketing team stated that Ultra's reasons for its decision to introduce a policy in relation to online sales of its products included:

'Declining Hudson Reed Sales in to Showrooms

Heavy discounting by online customers – showrooms can't compete and are shying away from promoting the brands

Displays are required to create consumer demand.⁸² (Emphasis added by CMA).

⁸¹ Transcript of interview with [Marketing Director] (Ultra), dated 19 August 2015, page 27, lines 8–11 (URN UC0161.1).

⁸² Internal Ultra slides titled '*Ensuring the long term success of our brands*', undated (URN UD0152).

Manufacturers' reactions to online sales

4.22 The CMA has reasonable grounds to suspect that, in addition to Ultra, a number of other manufacturers of bathroom fittings in the sector have, over recent years, attempted to prevent or reduce price competition from online sales through arrangements similar in nature to the Infringements.⁸³ This is based on evidence obtained by the CMA during the course of this investigation. For example:

4.22.1 the initial complaint about Ultra noted that *'[t]here are many companies doing this in the bathroom industry but the instigators of this practise [sic] were Ultra Finishing'*⁸⁴

4.22.2 minutes dated 15 September 2011 from meetings held between Ultra and certain distributors and resellers refer to other manufacturers having implemented online pricing policies, namely [Supplier], [Supplier], [Supplier] and [Supplier]⁸⁵

4.22.3 in an email to Ultra on 12 December 2011, [Employee] of [Reseller] noted: *'[Reseller] is seriously on board when it comes to price restrictions, we strongly support [Supplier], [Supplier], to name but a few'*⁸⁶

4.23 This is also consistent with comments made in the trade press.⁸⁷

C. Conclusion on sales channels and the importance of the internet

4.24 In summary, the ability to sell or advertise products at discounted prices on the internet can intensify price competition between retailers. The increased transparency and reduced search costs from the internet result in increased price competition. Greater price competition increases retailers' incentives to act efficiently and pass on costs savings to consumers in the form of lower retail prices. In turn, this enables consumers to obtain better value for money.

⁸³ As regards the CMA's approach to scoping the investigation, see Annex E, Section B below.

⁸⁴ Email from complainant reseller to the CMA dated 25 July 2013 titled 'Anti Competition Report' (URN U10001).

⁸⁵ Ultra minutes from meetings with customers dated 15 September, titled *'Hudson Reed (online discounting meetings'* (URN UD0160).

⁸⁶ Email from [Employee] ([Reseller]) to Trading Guidelines Mailbox (Ultra) dated 12 December 2011 (URN UD0762).

⁸⁷ For example, one article noted that *'Price fixing remains rife throughout the bathroom industry to protect showrooms against web dealers, according to accusations made to kbbreview by an online industry source'*, Kitchen Bedroom & Bathroom Review article, *'Bathroom suppliers in new price fixing allegations'*, dated 1 August 2013 (URN U10003.1).

- 4.25 Therefore, any prevention or restriction of resellers' ability to determine their own online resale prices, and in particular preventing or restricting discounting below a fixed level, would:
- 4.25.1 reduce price competition from online sales of bathroom fittings products
 - 4.25.2 reduce downward pressure on the retail price of bathroom fittings products, and
 - 4.25.3 thereby potentially result in higher prices to consumers.

5. RELEVANT FACTS

A. Introduction

5.1 This Chapter presents the key evidence relied upon by the CMA in reaching its finding that Ultra has infringed the Chapter I prohibition and/or Article 101 TFEU. The following Section (**Section B**) provides a summary of that evidence, which is set out in detail in the remainder of this Chapter as follows:

5.1.1 the historical background to the Infringements: the 2009 Online Discounting Policy (**Section C**)

5.1.2 the development of Ultra's 2012 online trading guidelines (**Section D**)

5.1.3 the implementation of the Trading Guidelines, including the Online Discounting Restriction (**Section E**)

5.1.4 monitoring and enforcement by Ultra of resellers' compliance with the Online Discounting Restriction (**Section F**), and

5.1.5 reseller understanding and conduct: adherence to the Online Discounting Restriction (**Section G**)

5.2 The CMA has based its findings principally on evidence obtained from key contemporaneous internal Ultra documents, including:

5.2.1 draft and final proposals for Ultra's online trading guidelines, as prepared by Ultra's marketing team for approval by Ultra's board of directors (the Board)

5.2.2 scripts for Ultra's marketing team to use when communicating the online trading guidelines to its resellers

5.2.3 various matrices prepared by Ultra's marketing team throughout the Relevant Period that identified resellers that sold Hudson Reed or Ultra branded products online, and recorded resellers' compliance with the online trading guidelines and contact made with that reseller, and

5.2.4 internal email correspondence between, from or to Ultra's marketing team in relation to the introduction, operation or enforcement of the online trading guidelines.

- 5.3 The CMA has also relied on contemporaneous email evidence between Ultra and its resellers in relation to the introduction, operation or enforcement of the online trading guidelines to demonstrate the understanding and conduct of certain resellers in response to the guidelines.
- 5.4 Where relevant, the CMA has also relied on information obtained directly from Ultra or its resellers from responses to formal requests for information sent under section 26 of the Act, and transcripts of interviews with employees of Ultra or its resellers that were involved in the Infringements during the Relevant Period.
- 5.5 Table 1 below sets out the employees of Ultra and UFGL referred to in the remainder of this Chapter. The employees' names and roles are listed to facilitate an understanding of the evidence.

Table 1: Ultra and UFGL employees⁸⁸

[Marketing Director]	Marketing Director (January 2013 to present) Marketing Director Designate (January 2011 to January 2013) Marketing Manager (prior to January 2011)
[Marketing Executive]	Marketing Executive in the Relevant Period
[Managing Director]	Managing Director of Ultra in the Relevant Period
[Sales and Marketing Director]	Sales and Marketing Director of Ultra in the Relevant Period
[Director]	Director of Ultra (28 May 1991 to present) Director of UFGL (28 March 2000 to present)
[National Sales Manager]	National Sales Manager
[Area Sales Manager]	Area Sales Manager
[Marketing Executive]	Senior Marketing Executive/Marketing Executive (February 2011 to present)
[Marketing Assistant]	Marketing Assistant in the Relevant Period
[Sales Agent]	Sales Agent (January 2001 to August 2008) Marketing Director (April 2000 to January 2001)

⁸⁸ Questions 1 and 8 of Ultra's response to section 26 notice dated 15 July 2015 (URN UC0117.1) and transcript of interview with [Marketing Director] (Ultra) dated 19 August 2015, page 8, lines 13 to 21 (URN UC0161.1).

B. Summary of relevant facts

- 5.6 In response to a number of complaints from Ultra's resellers about significant discounting of Ultra's products online, in 2009 Ultra introduced an online trading policy. The online trading policy required Ultra's resellers not to offer Hudson Reed or Home of Ultra⁸⁹ branded products online below a maximum discount of 20% off the RRP for that product. Ultra made it clear to resellers that there would be consequences for failure to comply with the maximum discount, including reducing resellers' wholesale terms and withdrawal of Ultra's permission to use its copyrighted images on resellers' websites.⁹⁰
- 5.7 Ultra withdrew the 2009 policy after a short time.⁹¹ However, in 2010 and 2011 it received further complaints from its customers that low online prices were increasing price competition between resellers and exerting downward pressure on the retail price of Ultra's products, whether sold online or offline.⁹² In response to these complaints, in February 2012 Ultra introduced trading guidelines relating to the online sales of its Hudson Reed and Ultra branded products.⁹³
- 5.8 The online trading guidelines were recommendations regarding the representation of Ultra's brands on resellers' websites, including images and logos. They also contained a 'recommendation', which was stated not to be legally binding, that online prices should be no lower than 25% off in-store RRP's for Hudson Reed or Ultra branded products.⁹⁴
- 5.9 However, despite being described as a 'recommendation', the evidence demonstrates that the key objective of Ultra's online trading guidelines was to prevent resellers from selling or advertising Hudson Reed or Ultra branded products online below the 'recommended' online price.⁹⁵ In addition, the evidence demonstrates that at least certain of Ultra's resellers (and distributors) understood that trading within Ultra's guidelines encompassed a requirement to price Hudson Reed and Ultra branded products online at or above the 'recommended' online price.⁹⁶
- 5.10 Ultra's online trading guidelines were implemented through a copyright licence for the use of Ultra's images, which it used as a mechanism to ensure that resellers signed up and adhered to the online trading guidelines.⁹⁷ The licence

⁸⁹ The 'Home of Ultra' brand is the previous name of the 'Ultra' brand. See footnote 5 above.

⁹⁰ See Section C and Annex C below.

⁹¹ See paragraph 5.18 and Annex C below.

⁹² See paragraphs 5.21 to 5.25 below.

⁹³ See Section E below.

⁹⁴ See Section E below.

⁹⁵ See Section D and Section E below, in particular, paragraphs 5.59 to 5.61.

⁹⁶ See paragraphs 5.77 to 5.83 below.

⁹⁷ See paragraphs 5.27 to 5.38 and 5.58 to 5.76 below.

enabled Ultra to threaten to withdraw a reseller's rights to use Ultra images for online sales if a reseller set online prices below the recommended online price. The licence also reinforced the operation of the 'recommended' price, by preventing 'promotions' in relation to Hudson Reed or Ultra branded products.

- 5.11 Following the introduction of the online trading guidelines, Ultra regularly monitored resellers' websites to check that resellers were not selling or advertising Hudson Reed or Ultra branded products online below the recommended price. Further, Ultra threatened and/or took enforcement action if it found instances where resellers were selling or advertising Hudson Reed or Ultra branded products online below the recommended price. The three principal enforcement mechanisms included:⁹⁸

- 5.11.1 temporarily or permanently reducing the reseller's wholesale terms of supply
- 5.11.2 temporarily or permanently ceasing supply of Hudson Reed or Ultra branded products
- 5.11.3 withdrawing the reseller's right to use images of Hudson Reed or Ultra branded products, or
- 5.11.4 a combination of the above.

- 5.12 In the light of the totality of the evidence set out in this Chapter, the CMA finds that, in the context of online sales, Ultra's 'recommendation' as to online prices in practice effectively restricted the ability for resellers to set online prices below a specified level and therefore amounted to resale price maintenance. This is specifically demonstrated in relation to three resellers, where the evidence shows that they:

- 5.12.1 set their online prices no lower than the 'recommended' online price, and/or
- 5.12.2 amended their online prices in response to instructions from Ultra, so that they were no lower than the 'recommended' online price.⁹⁹

⁹⁸ See paragraphs 5.94 and 5.95 below.

⁹⁹ See paragraphs 5.130 to 5.192 below.

C. Historical background to the Infringements: the 2009 Online Discounting Policy

- 5.13 The CMA finds that Ultra has infringed the Chapter I prohibition and/or Article 101 TFEU from 1 February 2012 (at the latest) to 28 August 2014.¹⁰⁰ Consequently, the CMA is not making a finding that Ultra infringed the Chapter I prohibition and/or Article 101 TFEU prior to 1 February 2012. However, the evidence demonstrates that Ultra introduced an online trading policy in May 2009, which had the express objective of preventing resellers from offering Hudson Reed or Ultra branded products below a certain discount off the RRP.¹⁰¹ This Section therefore summarises events that took place prior to 1 February 2012, as they provide relevant context for later events and are important to aid understanding of the motivation for Ultra's actions within the Relevant Period.
- 5.14 In response to complaints from a range of customers about significant discounting of Ultra's products online, dating back to as early as 2006, Ultra instructed certain resellers not to offer Hudson Reed or Home of Ultra¹⁰² branded products online at discounts of more than 20% off the Recommended Retail Price (RRP), with effect from 1 May 2009 (the 2009 Online Discounting Policy).¹⁰³
- 5.15 As part of the 2009 Online Discounting Policy, Ultra resellers were required to sign up to an 'On-Line Discounting Agreement' (the 2009 Online Discounting Agreement) in order to receive CDs of images of Ultra products and a spreadsheet containing product codes, descriptions and RRP's.¹⁰⁴ The 2009 Online Discounting Agreement stated:
- 'Under this policy, no Ultra customers shall offer either Hudson Reed or Home of Ultra online, via whatever medium, at a discount greater than 20% from our suggested retail prices.'*¹⁰⁵
- 5.16 Ultra monitored resellers' compliance with the 2009 Online Discounting Policy. This included monitoring resellers' online sales prices and recording on a spreadsheet whether or not resellers were 'complying'.¹⁰⁶ Ultra also

¹⁰⁰ See paragraph 7.2 below.

¹⁰¹ See Annex C, paragraph C.5.

¹⁰² The 'Home of Ultra' brand is the previous name of the 'Ultra' brand. See footnote 5 above.

¹⁰³ See Annex C, paragraphs C.1 to C.5.

¹⁰⁴ See Annex C, paragraph C.6.

¹⁰⁵ See Annex C, paragraph C.6.

¹⁰⁶ See Annex C, paragraphs C.9 and C.10.

encouraged resellers to report to Ultra any other resellers that were not complying.¹⁰⁷

- 5.17 Ultra made it clear to its resellers that there would be consequences for failure to comply with the 2009 Online Discounting Policy. For example, Ultra threatened in writing that any resellers found to be disregarding the 2009 Online Discounting Policy would have their terms reduced¹⁰⁸ and Ultra would withdraw its permission for the reseller to use Ultra's copyrighted images on their websites. Evidence provided to the CMA demonstrates that Ultra did carry out this threat on at least one occasion.¹⁰⁹
- 5.18 Due to a number of resellers continuing to offer Hudson Reed and Ultra products online with discounts greater than 20% off RRP, Ultra withdrew the 2009 Online Discounting Policy in August 2009.¹¹⁰
- 5.19 Further detail on the 2009 Online Discounting Policy and the 2009 Online Discounting Agreement is set out in Annex C.

D. Development of Ultra's 2012 online trading guidelines

- 5.20 This Section sets out Ultra's conduct between the withdrawal of the 2009 Online Discounting Policy and the introduction of new online trading guidelines, which came into effect on 1 February 2012. The evidence demonstrates that:
- 5.20.1 Ultra continued to receive complaints from its customers in relation to online discounting of Ultra's products, and this was the rationale for considering various means of addressing resellers' complaints, including the introduction of a policy to regulate online discount levels.
- 5.20.2 Ultra's marketing team prepared a proposal for the introduction of online trading guidelines in relation to Hudson Reed and Ultra branded products, which was approved by the Board.
- 5.20.3 The key objective of the proposed online trading guidelines was to impose a maximum discount for online sales of 25% off RRP for

¹⁰⁷ See Annex C, paragraphs C.11 to C.14.

¹⁰⁸ The reference to 'terms' was the trading terms agreed between Ultra and each reseller, and included the wholesale/cost price at which Ultra would supply product to the reseller. Ultra has confirmed that a 'reduction in terms' means that, instead of being supplied at the more common wholesale/cost price of [~~30~~] off RRP, resellers would instead be given a less generous discount of (say) [~~30~~] % off RRP, thereby increasing the wholesale/cost price of the product(s). Question 9 (a) of Ultra's response to section 26 notice dated 20 February 2015 (URN UC0080.1). This was also confirmed by [Marketing Director] (Ultra) in interview. Transcript of interview with [Marketing Director] (Ultra) dated 19 August 2015, page 25, lines 5 to 8 (URN UC0161.1).

¹⁰⁹ See paragraphs C.15 to C.18.

¹¹⁰ See paragraph C.19.

in-store sales of Hudson Reed and Ultra branded products, which would be communicated to resellers as a 'recommended' online price.

- 5.20.4 The online trading guidelines would be implemented by way of a copyright licence for the use of images of Hudson Reed and Ultra branded products. The licence would be used as a mechanism to ensure that resellers signed up and adhered to the proposed online trading guidelines, by using the licence to withdraw Ultra's permission to use images of its products.

The rationale for the introduction of the online trading guidelines

- 5.21 Following the withdrawal of the 2009 Online Discounting Policy, Ultra received further complaints from customers about online discounting of Ultra's products. This is evidenced by contemporary email communications between November 2010 and September 2011. Complaints were received both from resellers that sold Ultra's products predominantly offline, and those that also made sales online. In particular, concerns were expressed that low prices available online were increasing price competition between resellers and exerting downward pressure on the retail price of Ultra's bathroom fittings products sold both online and offline. For example:

- 5.21.1 On 6 November 2010, [Employee] of [Reseller], an Ultra reseller, emailed [Sales and Marketing Director], [National Sales Manager] and [Area Sales Manager]¹¹¹ of Ultra to inform them that it had decided to '*step back from the Hudson Reed /Ultra rat race on the internet*'. It stated: '***we feel the investment we have made in the showroom is having diminished margins and loss of sales due to the level of internet discounting that is being allowed to happen currently. As a seller in the future we would like to see margin protection and a maximum discount policy of somewhere in the region of 25%***'.¹¹² (Emphasis added by CMA)
- 5.21.2 On 16 February 2011, [Sales and Marketing Director] of Ultra sent [Managing Director] (Managing Director of Ultra) a fax dated 15 February 2011 from [Reseller] ([✂]).¹¹³ [Reseller]'s fax enclosed a complaint it had received from [Reseller] (a retailer supplied by

¹¹¹ Question 9 of Ultra's response to section 26 notice dated 15 July 2015 (URN UC0117.1).

¹¹² Email from [Employee] ([Reseller]) to [Sales and Marketing Director] (Ultra) dated 6 November 2010 (URN UD0177).

¹¹³ Email from [Sales and Marketing Director] (Ultra) to [Managing Director] (Ultra) dated 16 February 2011 (URN UD0169).

[Reseller]) about another retailer's ([Reseller]) online discounts. In the fax to [Sales and Marketing Director] of Ultra, [Reseller] stated:

*'These crazy prices are been [sic] sent to me more & more. And alot [sic] of retailers are saying it's not worth there [sic] while to sell Ultra products as it is being so heavily discounted [by] [Reseller]. This is causing [Reseller]/Ultra to loose [sic] business [...]'.*¹¹⁴

- 5.21.3 On 1 July 2011, [Employee] of [Reseller], sent an email to [Sales and Marketing Director] and [Employee] of Ultra which stated:

*'[Sales and Marketing Director] again we are under pressure on price from people online [...] I look forward to your response, I dont [sic] want to get into a price war, If We [sic] have to we will do less [X]% across the board until end of August, and on the wastes we will do less [X]%'.*¹¹⁵

- 5.21.4 On 18 July 2011, [National Sales Manager] of Ultra sent [Sales and Marketing Director] of Ultra an email which stated:

*'please find comments from customers with internet concerns relating to Hudson Reed, [Reseller] (you as a company need to make your mind up are you backing showrooms or internet sites I try to stay clear of giving your brochure out). [Reseller] (don't push Hudson Reed we used to spend hours pushing the product only to lose the business to internet accounts). **Both [Reseller] and [Reseller] at [X] are reluctant to display either Hudson Reed or Ultra in their showrooms due to customers just using as a viewing point to go away and purchase the product on line. I am not saying they don't buy the brands but certainly don't promote them. The bulk of their sales are from the premier [sic] range where they can hide the manufacture of the product [sic]. You won't find our brochure in any of the four showrooms. [Reseller] bathrooms has told me he is stopping doing HR and Ultra because of the internet and the fact he can't make any money on it when other people kill the price. I could go on and on but I think you get the picture'.***¹¹⁶ (Emphasis added by CMA)

¹¹⁴ Fax from [Employee] ([Reseller]) to [Sales and Marketing Director] (Ultra) dated 15 February 2011 (URN UD0169).

¹¹⁵ Email from [Employee] ([Reseller]) to [Sales and Marketing Director] (Ultra) dated 1 July 2011 (URN UD0170).

¹¹⁶ Email from [National Sales Manager] (Ultra) to [Sales and Marketing Director] (Ultra) dated 18 July 2011 (URN UD0159).

- 5.21.5 On 3 September 2011, [Employee] of [Reseller] sent an email to [National Sales Manager] of Ultra, which stated:

*'Hudson Reed is not a brand that we would promote [...] as we are not competitive [sic] at all on prices. **There are internet retail outlets that are simply butchering your prices to the point where it is impossible to compete. [...] I know this is something that you are currently addressing and you mentioned that an idea was to restrict the use of your images should any internet retailers not adhere to the suggested selling terms**'.*¹¹⁷
(Emphasis added by CMA)

- 5.22 In the light of these complaints, during 2011 Ultra considered various means of addressing resellers' concerns about online discounting, including:

5.22.1 introducing an online sales ban on resellers in respect of an in-store only, exclusive Hudson Reed brand in order to win market share from *'competitors who are [o]nline without procedures in place to control aggressive discounting'*,¹¹⁸ and

5.22.2 introducing a policy to regulate online discount levels.¹¹⁹

- 5.23 Ultra sought feedback from its customers on the most appropriate strategy to address the issue of online discounting. According to the record of conversations with these resellers,¹²⁰ a number of Ultra's resellers considered the best way to control online discounting would be to set a maximum online discount for Ultra's products and to monitor resellers' compliance with the policy.¹²¹

¹¹⁷ Email from [Employee] ([Reseller]) to [National Sales Manager] (Ultra) dated 3 September 2011 (URN UD0161).

¹¹⁸ Email from [National Sales Manager] (Ultra) to [Sales and Marketing Director] (Ultra), dated 18 July 2011 (URN UD0159). The option was discussed by the Board on 15 February 2011 (see Board meeting minutes dated 15 February 2011 (URN UD0013)) and 21 June 2011 (see Board meeting minutes dated 21 June 201 (URN UD0004)).

¹¹⁹ In interview, [Marketing Director] (Ultra) confirmed that *'a favoured option for quite a while'* was a high-street-only brand but that it would require a lot of investment to build a brand from scratch. [Marketing Director] (Ultra) confirmed that the high-street-only brand was the *'only other main contender'* that Ultra considered in addition to the online trading guidelines. Transcript of interview with [Marketing Director] (Ultra) dated 19 August 2015, page 17, lines 4 to 13 (URN UC0161.1).

¹²⁰ Ultra minutes from meeting with customers dated 15 September 2011, titled *'Hudson Reed (online discounting meetings)'* (URN UD0160).

¹²¹ *'[Reseller] [...] Their preferred route was the policing option, they felt 25% was a reasonable discount [...] [Reseller] [...] They believe we should reduce the number of online resellers and therefore introduce control on discounting [...] [Reseller] [Employee] [...] The best way to manage discounts is by restrictions ie buying terms, credit facilities and the most powerful one being supply. A structured approach with clear criteria and a consequence of no supply is their preferred route. They believe [Supplier] have the way they manage it spot on- they have cherry picked who they want to deal with and they all adhere to discount structure, but more importantly they police it. [...] They believe we need a person dedicated to monitoring the activity of internet retailers and immediately act upon any that are not abiding by their rules. [...] They would however be very keen*

- 5.24 The above documentary evidence is corroborated by information provided by Ultra during interviews with the CMA. For example, [Marketing Director] of Ultra confirmed in interview that: *'showrooms were particularly unhappy about the [...] state of some of the customers who were selling and the heavy discounts they were giving. They were concerned about that because they felt they couldn't compete'*.¹²²
- 5.25 Similarly, [Marketing Executive] of Ultra also confirmed to the CMA in interview that Ultra had received complaints from customers about resellers making sales online and decided to take action in response to such complaints.¹²³

Ultra's proposed online trading guidelines

- 5.26 Contemporaneous internal Ultra documents demonstrate that, in October 2011, Ultra's marketing team prepared a proposal for the introduction of online trading guidelines in relation to Hudson Reed and Ultra branded products. The proposal was approved by the Board on or around 18 October 2011. The proposal itself, and related internal email correspondence, demonstrates that the key objective of the proposed online trading guidelines was to impose a maximum discount for online sales of 25% off RRP's for in-store sales of Hudson Reed and Ultra branded products, which would be communicated to resellers as a 'recommended' online price.
- 5.27 Internal email evidence further demonstrates that Ultra decided to implement the online trading guidelines by way of a copyright licence for the use of images of Hudson Reed and Ultra branded products. The rationale for using the copyright licence was to provide Ultra with a mechanism to ensure that resellers signed up and adhered to the proposed online trading guidelines, by using the licence as a basis for withdrawing Ultra's permission to use images of its products.¹²⁴

to support selling HR as one of our preferred online retailers if we introduce a successful pricing method'. Ultra minutes from meeting with customers dated 15 September 2011, titled 'Hudson Reed (online discounting meetings)' (URN UD0160). [Reseller]'s comments in the minutes are corroborated by its email to Ultra dated 3 September 2011 (see paragraphs 5.21.5 and 5.135) (URN UD0161).

¹²² Transcript of interview with [Marketing Director] (Ultra) dated 19 August 2015, page 27, lines 8 to 11 (URN UC0161.1).

¹²³ *'I think there was [sic] [...] various complaints from retailers about certain online customers as well. [...] So, I think they were under some pressure from the retailers who knew some websites were devaluing the brands and therefore I think that's why they decided in the businesses to take on the project'*. Transcript of interview with [Marketing Executive] (Ultra) dated 19 August 2015, page 13, lines 4 to 9 (URN UC0160.1).

¹²⁴ Further evidence regarding resellers' compliance is set out in Section G.

- 5.28 On 5 October 2011, [Marketing Director] sent an email to the Board attaching a document entitled '*Online brand management – outline proposal*' (the Outline Proposal). The email stated:

'Following the last Board meeting please find an outline proposal of how Marketing plan to implement the max discount of 25% off our RRP's online. Please note it is subject to obtaining legal advice on various points [...].'¹²⁵ (Emphasis added by CMA)

- 5.29 On 14 October 2011, [Marketing Director] sent a further email to the Board with the subject heading '*Management of online customers - final proposal*' attaching a revised version of the Outline Proposal (the Final Proposal).¹²⁶ The email stated:

'Further to various meetings, and obtaining legal advice, please find revised version for Tuesday's Board meeting'.¹²⁷ (Emphasis added by CMA)

- 5.30 There are a number of differences in wording between the Outline Proposal and the Final Proposal. Both proposals are set out in full in Annex D, with all differences highlighted. Changes were made to the Outline Proposal following the receipt of legal advice by Ultra.¹²⁸ For example, the Outline Proposal set out the following objective for the online trading guidelines:

'To implement an online pricing policy to ensure the long term success of the Hudson Reed and Ultra brands.

The maximum discount off RRP's [sic] to be 25% to ensure showrooms can be compete [sic] and are encouraged to promote the brand'.¹²⁹ (Emphasis added by CMA)

¹²⁵ Email from [Marketing Director] (Ultra) to the Board, dated 5 October 2011, titled '*Online brand Management – outline proposal*' (URN UD0087).

¹²⁶ Email from [Marketing Director] (Ultra) to the Board, dated 14 October 2011 titled '*Management of online customers- final proposal*' attaching document titled '*Online Brand Management -5.10.11*' (URN UD0148). The original version provided by Ultra had pages missing and Ultra submitted a replacement version in May 2015 (URN UD0842).

¹²⁷ Email from [Marketing Director] (Ultra) to the Board, dated 14 October 2011 titled '*Management of online customers- final proposal*' attaching document titled '*Online Brand Management -5.10.11*' (URN UD0148).

¹²⁸ Transcript of interview with [Marketing Director] (Ultra) dated 19 August 2015, page 20, lines 20 to 25, confirms the '*Objective*' changed due to legal advice (URN UC0161.1). Also the cover email (attaching the Outline Proposal) from [Marketing Director] (Ultra) to the Board dated 5 October 2011 stated: '*outline proposal [...] is subject to obtaining legal advice on various points*' (URN UD0087).

¹²⁹ Email from [Marketing Director] (Ultra) to the Board, dated 5 October 2011, titled '*Online brand Management – outline proposal*', attaching the Outline Proposal (URN UD0087).

- 5.31 In contrast, the objective in the Final Proposal did not describe the online policy as a *'pricing policy'* or refer to a maximum discount level but instead focused on *'recommendations'*:

'To implement an online policy to ensure the long term success of the Hudson Reed and Ultra brands.

*Various recommendations to be made to online accounts to ensure showrooms can compete and are encouraged to promote the brand.*¹³⁰

- 5.32 In addition, the Final Proposal included language that was not included in the Outline Proposal regarding Ultra *'recommending'* prices for its products:

*'We would provide sales advice and **suggest we recommend the right price for products is a maximum of 25% off our retail prices**'.*¹³¹ (Emphasis added by CMA)

- 5.33 Moreover, the Final Proposal did not include the following paragraph that was present in the Outline Proposal:

*'5) Some concerns by the team that they will be involved in illegal practises [sic] relating to price fixing need to be addressed. **We propose to complete majority of communication verbally, however clarification of what we can and can't say and what, if anything, we can put in writing is essential** – legal advice required.*¹³² (Emphasis added by CMA).

- 5.34 The other differences between the Outline Proposal and the Final Proposal are set out in Annex D. Having considered the Outline Proposal and the Final Proposal, the CMA considers that, notwithstanding the changes in wording, the substance of Ultra's proposals for its online trading guidelines remained largely unchanged. In particular, both versions envisaged Ultra recommending to resellers that the online price for Hudson Reed and Ultra branded products should be no lower than 25% off Ultra's published RRP list, and that Ultra would take action against resellers which did not act in accordance with Ultra's *'recommendations'*. The CMA considers that the changes were designed to make it less explicit that the key objective of Ultra's online brand

¹³⁰ Email from [Marketing Director] (Ultra) to the Board, dated 14 October 2011 titled *'Management of online customers- final proposal'* attaching document titled *'Online Brand Management -5.10.11'* (URN UD0148). The original version provided by Ultra had pages missing and Ultra submitted a replacement version in May 2015 (URN UD0842).

¹³¹ Email from [Marketing Director] (Ultra) to the Board, dated 14 October 2011 titled *'Management of online customers- final proposal'* attaching document titled *'Online Brand Management -5.10.11'* (URN UD0148). The original version provided by Ultra had pages missing and Ultra submitted a replacement version in May 2015 (URN UD0842).

¹³² Email from [Marketing Director] (Ultra) to the Board, dated 5 October 2011, titled *'Online brand Management – outline proposal'* (URN UD0087).

management policy was to control online discounting, but that objective still remained.¹³³ For example, the Final Proposal stated:

*'We must not link any consequences to customers [sic] selling out prices. [...] Verbally we could suggest "you don't adhere to our recommendations for selling online". We need to outline all recommendations for selling products online and not just focus on discounts.'*¹³⁴

5.35 The terms of the proposed online trading guidelines were set out in a similar way in Ultra internal slides dated 21 October 2011, which were prepared by [Marketing Director] of Ultra for internal sales meetings and were also provided to the Board.¹³⁵ The slides reiterated Ultra's reasons for its decision to introduce a policy in relation to online sales of its products:

- ‘ - *Declining Hudson Reed Sales in to Showrooms*
- ***Heavy discounting by online customers – showrooms can't compete and are shying away from promoting the brands***
- *Displays are required to create consumer demand.*¹³⁶ (Emphasis added by CMA).

5.36 The key elements of the proposed online trading guidelines, as set out in the Final Proposal and other contemporaneous documentary evidence, were as follows:

- 5.36.1 To introduce the online trading guidelines to Ultra's resellers as a set of recommendations regarding the representation of Ultra's Hudson Reed and Ultra brands online, including images.¹³⁷
- 5.36.2 To contact all online customers by telephone in November 2011 to verbally advise them of the new guidelines.¹³⁸

¹³³ Transcript of interview with [Marketing Director] (Ultra) dated 19 August 2015 page 20, lines 22 to 25, confirms the 'Objective' changed due to legal advice (URN UC0161.1). Also the cover email (attaching the Outline Proposal) from [Marketing Director] (Ultra) to the Board dated 5 October 2011 stated: 'outline proposal [...] is subject to obtaining legal advice on various points' (URN UD0087).

¹³⁴ Email from [Marketing Director] (Ultra) to the Board, dated 14 October 2011 titled 'Management of online customers- final proposal' attaching document titled 'Online Brand Management -5.10.11' (URN UD0148). The original version provided by Ultra had pages missing and Ultra submitted a replacement version in May 2015 (URN UD0842).

¹³⁵ Questions 15a to d of Ultra's response to section 26 notice dated 15 July 2015 (URN UC0117.1).

¹³⁶ Internal Ultra slides titled 'Ensuring the long term success of our brands', undated (URN UD0152).

¹³⁷ Page 1 of the Final Proposal (URN UD0148) and (URN UD0842) and page 3 of internal Ultra slides titled 'Ensuring the long term success of our brands', undated (URN UD0152).

¹³⁸ Page 1 of the Final Proposal (URN UD0148) and (URN UD0842) and page 4 of internal Ultra slides titled 'Ensuring the long term success of our brands', undated (URN UD0152).

- 5.36.3 To send all online customers a contract and a price list including a 'recommended' online price or discount of 25% off 'retail prices'.¹³⁹
- 5.36.4 To monitor online customers' compliance with the new online trading guidelines (including adherence to the new recommended online price) throughout December 2011 and January 2012.¹⁴⁰
- 5.36.5 To obtain online customers' compliance with the new online trading guidelines from 1 February 2012.¹⁴¹
- 5.36.6 To take enforcement action against online customers that did not comply with the online trading guidelines, including by setting online prices lower than the recommended online price. The envisaged enforcement included:
- Customers that failed to bring their websites 'in line' in February 2012 would have supply of Hudson Reed or Ultra branded products withheld (referred to as being put 'on stop'), until their websites were rectified.¹⁴²
 - Customers that had a few products discounted 'incorrectly' (ie set below the recommended online price) in February 2012 would have their wholesale terms reduced, with a credit given if they correct their website within 48 hours.¹⁴³
 - After February 2012, customers that had a few products discounted 'incorrectly' (ie set below the recommended online price) would be informed, and after two days their wholesale terms would be reduced if they failed to resolve the issue. A credit would, however, be given if 'every effort' was made by the customer to correct their website.¹⁴⁴

¹³⁹ Pages 1 - 3 of the Final Proposal (URN UD0148) and (URN UD0842) and page 3 and 4 of internal Ultra slides titled '*Ensuring the long term success of our brands*', undated (URN UD0152).

¹⁴⁰ Page 2 of the Final Proposal (URN UD0148) and (URN UD0842). The CMA considers that this included monitoring adherence to the new recommended online price in light of page 2 of the Outline Proposal which stated in relation to December 2011: '*Can we include "an example online marketing price" ie a column on price list which is our new retail price less 25%? This will remove a lot of activity and confusion in February with miscalculations causing "minor offences" [...] We make a follow up call to confirm receipt. Focus will be on making it as easy as possible for customers to make updates.*' (emphasis added by CMA). Email from [Marketing Director] (Ultra) to the Board, dated 5 October 2011, titled '*Online brand Management – outline proposal*' (URN UD0087).

¹⁴¹ Pages 1 and 2 of the Final Proposal (URN UD0148) and (URN UD0842).

¹⁴² Referred to as a 'major offence', page 2 of the Final Proposal (URN UD0148) and (URN UD0842).

¹⁴³ Referred to as a 'minor offence', pages 2 and 3 of the Final Proposal (URN UD0148) and (URN UD0842).

¹⁴⁴ Referred to as a 'minor offence', page 3 of the Final Proposal (URN UD0148) and (URN UD0842).

- After February 2012, customers that paid no attention to Ultra's 'recommendations' would have their wholesale terms reduced either on a temporary or permanent basis, depending on whether this was a first, second or third 'offence'.¹⁴⁵

5.37 Ultra confirmed that the Board approved the implementation of the Final Proposal with no suggested amendments on or around 18 October 2011.¹⁴⁶

5.38 The Final Proposal did not set out the exact form the online trading guidelines would take. Following legal advice, Ultra decided to implement the online trading guidelines by way of a copyright licence. Ultra initially envisaged using the copyright licence as a mechanism to ensure that resellers signed up and adhered to Ultra's proposed online trading guidelines, by using the licence to withdraw permission to use images of Ultra's products. This is demonstrated by an email from [Marketing Director] of Ultra on 16 November 2011 to members of the marketing team:

*'Following the meeting the morning with our lawyer, we have concluded that the most sensible route will be to progress with a copyright licence that we ask customers to sign. This gives the benefit of it being a legally binding contract that shows customers we are serious and encourage them to come into line. **We can use this contract as a reason to affect terms and supply if they don't sign or if they do sign it we can pick them up on any of the numerous points.** [...]*

*We will also send this contract to all distributors [sic] online customers. **Should they not adhere to the policy we can then tackle them with a legal letter relating to withdrawal of permission to use our images (as we will not be able to directly affect terms or supply).***

We will send the images/data sheets out on receipt of the signed contract. [...].¹⁴⁷ (Emphasis added by CMA)

¹⁴⁵ Referred to as a 'major offence', page 3 of the Final Proposal (URN UD0148) and (URN UD0842) and pages 2 and 3 of the Outline Proposal, email from [Marketing Director] (Ultra) to the Board, dated 5 October 2011, titled 'Online brand Management – outline proposal', (URN UD0087).

¹⁴⁶ Email from [Marketing Director] (Ultra) to the Board, dated 14 October 2011 titled 'Management of online customers- final proposal' attaching document titled 'Online Brand Management -5.10.11' (URN UD0148). This refers to the Board meeting taking place 'next Tuesday', ie 18 October 2011. Ultra confirmed to the CMA that the Final Proposal was adopted by the Board and no changes were suggested. Question 10(a) of Ultra's response to section 26 notice dated 20 February 2015 (URN UC0080.1).

¹⁴⁷ Email from [Marketing Director] (Ultra) to [Marketing Executive] (Ultra), [Marketing Executive] (Ultra) and [Employee] (Ultra), titled 'Update' dated 16 November 2011 (URN UD0176).

E. The implementation of the Trading Guidelines, including the Online Discounting Restriction

- 5.39 The evidence set out in this Section demonstrates that, in November and December 2011, Ultra contacted its resellers to inform them that Ultra would be introducing new trading guidelines for sales of its Hudson Reed and Ultra branded products online (the Trading Guidelines).¹⁴⁸ The Trading Guidelines were recommendations regarding the representation of Ultra's brands on resellers' websites, including images and logos. They centred on a '*recommendation*', which was '*not legally binding*', that online prices should be no lower than 25% off in-store RRP's for Hudson Reed or Ultra branded products (the Recommended Online Price).¹⁴⁹ The Trading Guidelines came into effect from 1 February 2012.
- 5.40 The evidence set out below further demonstrates that the '*recommendation*' regarding prices was not, in practice, a recommendation, but effectively restricted the ability for Ultra's resellers to set online prices below the Recommended Online Price. The evidence shows that Ultra threatened and/or took enforcement action if it found instances where resellers were selling or advertising Hudson Reed or Ultra branded products online below the Recommended Online Price, using three principal enforcement mechanisms.¹⁵⁰
- 5.41 For the remainder of this Chapter, the CMA will refer to the '*recommendation*' that online prices should be no lower than the Recommended Online Price as the Online Discounting Restriction.
- 5.42 The evidence demonstrates that the Trading Guidelines were communicated to resellers verbally in the first instance.¹⁵¹ Subsequently, Ultra sent resellers a copyright licence to use Ultra's images (the Reseller Image Licence) and a price list containing the Recommended Online Price.¹⁵² The Reseller Image Licence served two purposes, by providing:
- 5.42.1 a vehicle through which Ultra asked resellers to confirm their support for the Trading Guidelines by signing the Reseller Image Licence (for the initial roll-out of the Trading Guidelines), and
 - 5.42.2 a mechanism through which Ultra forced resellers to bring their websites 'into line' (for the ongoing enforcement of the Trading

¹⁴⁸ See paragraphs 5.45 to 5.57 below.

¹⁴⁹ See paragraphs 5.58 to 5.61 below.

¹⁵⁰ See Section F below.

¹⁵¹ See paragraphs 5.45 to 5.50 below.

¹⁵² See paragraphs 5.51 to 5.57 below.

Guidelines). In particular, the Reseller Image Licence enabled Ultra to threaten to withdraw a reseller's rights to use Ultra images for online sales if a reseller set online prices below the Recommended Online Price.¹⁵³

- 5.43 The Reseller Image Licence also reinforced the operation of the Recommended Online Price, by preventing 'promotions' in relation to Hudson Reed or Ultra branded products.¹⁵⁴
- 5.44 The evidence also demonstrates that at least certain resellers understood that the Trading Guidelines related not just to the presentation of Hudson Reed and Ultra branded products online, but also included the Online Discounting Restriction.¹⁵⁵

Initial communication of the Trading Guidelines

- 5.45 Internal Ultra documents demonstrate that, in November 2011, Ultra identified each of its resellers that sold Hudson Reed or Ultra products online and contacted them to introduce the Trading Guidelines. Ultra prepared a script for its marketing team to assist them to explain the content of the Trading Guidelines, which would be followed up in writing during December 2011.
- 5.46 The proposed action is confirmed by an email from [Marketing Director] of Ultra to [Marketing Executive], [Marketing Executive] and [Employee] of Ultra on 16 November 2011, which noted that:

*'The December email will therefore be an outline of our trading guidelines, relevant price list and a request to sign the contract [the Reseller Image Licence]. We can spell out **we will only deal with customers from 1st Feb who have signed and are adhering to the contract and are [sic] online trading guidelines. Verbally we can highlight the more important points!***'¹⁵⁶ (Emphasis added by CMA)

- 5.47 The script used by the marketing team for the initial calls in November 2011 stated:

'Initial Scripts for November 2011

[...] We're currently in the process of contacting customers who sell our products online to inform them of our new recommendations for online trading.

¹⁵³ See paragraphs 5.62 to 5.70 below.

¹⁵⁴ See paragraphs 5.71 to 5.76 below.

¹⁵⁵ See paragraphs 5.77 to 5.83 below.

¹⁵⁶ Email from [Marketing Director] (Ultra) to [Marketing Executive] (Ultra), [Marketing Executive] (Ultra) and [Employee] (Ultra), titled 'Update' dated 16 November 2011 (URN UD0176).

Similar to the recent guidelines introduced by [Supplier], we will be looking for all customers to represent our brands online in a consistent way by 1st February 2012. This means that you should make sure that you:

- clearly represent the Hudson Reed and Ultra brand on your website and, in particular, on any images used*
- do not in any way alter the colour, design, shape or size of any Hudson Reed or Ultra logo on any marketing or promotional materials we provide to you*
- market our Hudson Reed & Ultra products appropriately and in particular that you do not edit any of our images*
- all product codes displayed on your website are correct and accurately reflect the actual stock code of the product*
- do not use our trade mark or logo in a way which could confuse customers or make them mistake our products with a third party's products.*

At Ultra Finishing we know that while the internet is a powerful tool it can present its own challenges. One of these problems is how to maintain the aura of quality and high standards customers have come to associate with Hudson Reed & Ultra products while still meeting customer's expectations on value. Getting the price right is key.

We have pondered long and hard about this and have come up with some recommended online sale prices. In addition, as a base line we recommend that the maximum online discount should not exceed 25% of the RRP for in-store sales. We hope these pricing guidelines will help you strike a balance between quality and value which is at the heart of our business, but you are of course free to set your own prices.

We would like to offer our support in helping you achieve any changes you feel are necessary to your website, so we will send you all the information you may need by the week commencing 5th December 2011.¹⁵⁷ (Emphasis added by CMA)

- 5.48 [Marketing Executive] of Ultra confirmed during interview that this script was used as a basis for conversations with Ultra's resellers, stating that:

¹⁵⁷ 'Proposed guidelines scripts for outbound calls' (URN UD0089).

- 5.48.1 he was tasked with identifying Ultra's customers that sold Hudson Reed and/or Ultra branded products online,¹⁵⁸ and
- 5.48.2 the marketing team then called each of those customers in November 2011 to explain the Trading Guidelines, using the script set out above as a basis for the call.¹⁵⁹
- 5.49 Despite the reference in the script to the resellers remaining free to set their own prices, the CMA infers from the totality of the evidence set out in Chapter 5¹⁶⁰ that Ultra used these initial conversations with resellers to emphasise verbally that a fundamental aspect of the Trading Guidelines was the requirement for online sales prices to be set at or above the Recommended Online Price.
- 5.50 This inference is supported by evidence obtained from [Marketing Director] of Ultra in interview, in which she confirmed that Ultra took legal advice on the scripts used for verbal communications with customers, as well as the communications in writing.¹⁶¹ However, she acknowledged that '*[t]he advice that we were given at the time was [✂] [...] we were probably far too direct.*'¹⁶²

Written communication of the Trading Guidelines

- 5.51 Internal Ultra emails demonstrate that, in December 2011, Ultra sent an email to all resellers selling Hudson Reed and Ultra branded products online at the time.¹⁶³ The email contained '*important information relating to the new trading guidelines which are being introduced with full implementation by 1st February 2012*',¹⁶⁴ and attached:

¹⁵⁸ Transcript of interview with [Marketing Executive] (Ultra) dated 19 August 2015 page 15, lines 1 to 12 (URN UC0160.1). In addition, the Final Proposal stated '*All online sellers to be identified via search engines and from our system*', page 1 of the Final Proposal (URN UD0148) and (URN UD0842).

¹⁵⁹ Transcript of interview with [Marketing Executive] (Ultra) dated 19 August 2015 (URN UC0160.1) page 15, lines 1 to 12. Note also that the email sent from Ultra to resellers dated 9 December 2011 (see paragraph 5.54 below) referred to their '*recent telephone conversation*', corroborating that all (or at least the majority) of the recipients of that email had been previously contacted by the marketing team.

¹⁶⁰ In particular, see paragraphs 5.34, 5.46, 5.78, 5.110 and Annex D ('Timetable December 2011 to Spring/Summer 2012' of the Final Proposal).

¹⁶¹ Transcript of interview with [Marketing Director] (Ultra) dated 19 August 2015, page 16, lines 19-22 (URN UC0161.1).

¹⁶² Transcript of interview with [Marketing Director] (Ultra) dated 19 August 2015, page 16, lines 22-25 (URN UC0161.1).

¹⁶³ As identified by Ultra's internet research referred to at paragraph 5.48 above. See further paragraph 5.55 below regarding the recipients of this email.

¹⁶⁴ [Director] (a director and the sole shareholder of UFGL), among others, was blind copied into the email. Email from Trading Guidelines Mailbox (Ultra) to Trading Guidelines addressees, dated 9 December 2011, attaching the Reseller Image Licence and Price List (URN UD0742). See also internal Ultra email with the same content sent from [Marketing Executive] (Ultra) to [Marketing Executive] (Ultra) earlier on 9 December 2011 titled '*RE. Test E-mail – Hudson Reed & Ultra Trading Guidelines*' (URN UD0022) and version of email as received by [Reseller] (URN U30007.4H).

- 5.51.1 the Reseller Image Licence, that is, the copyright licence for the use of Hudson Reed and Ultra images, brands and trademarks, and
- 5.51.2 a price list, dated February 2012, which set out the RRP's and Recommended Online Price for the sale of Hudson Reed and Ultra branded products online.
- 5.52 On or before 9 December 2011,¹⁶⁵ Ultra set up an email account with the email address trading.guidelines@ultra-finishing.co.uk (the Trading Guidelines Mailbox). The Trading Guidelines Mailbox was set up (i) to send blanket emails to online customers, and (ii) as a central point to which customers could send emails relating to the Trading Guidelines. Ultra confirmed that access to the Trading Guidelines Mailbox was given to [Marketing Executive] and [Marketing Director] of Ultra.¹⁶⁶
- 5.53 On 9 December 2011, the Trading Guidelines Mailbox was used to send an email to all resellers selling Hudson Reed and Ultra branded products online at the time.¹⁶⁷
- 5.54 The subject heading of the email was 'Hudson Reed & Ultra Trading Guidelines' and stated:

'As discussed in our recent telephone conversation, please find below important information relating to the new trading guidelines which are being introduced with full implementation by 1st February 2012.'

Copyright Licence To Use Images

Attached is a specimen of the copy of the contract which will be sent to you in the post next week. It sets out terms which will apply to the use of Hudson Reed and Ultra images, brands and trademarks. It is a requirement of maintaining authorised reseller status that this is entered into and must be completed and signed by all customers. Following receipt of a signed copy of the contract we will be in a position to release images, line drawings, and technical information for products found in the February 2012 brochure. If we do not receive a signed copy, we will be unable to authorise any further images/information to be used on your website.

¹⁶⁵ Ultra has stated that "The mailbox was set up around January 2012 (we cannot provide the exact date)." See Question 7(c) of Ultra's response to section 26 notice dated 20 February 2015 (URN UC0080.1). However, evidence on the CMA's file indicates that the mailbox was in use on 9 December 2011, so the CMA infers that it was set up on or before 9 December 2011.

¹⁶⁶ Question 7(c) of Ultra's response to section 26 notice dated 20 February 2015 (URN UC0080.1).

¹⁶⁷ As identified by Ultra's internet research referred to at paragraph 5.48 above. See further paragraph 5.55 below regarding the recipients of this email.

Price List – February 2012

*I have also attached an advanced preview of all retail prices for February 2012 accompanied by a column showing the **recommended retail price for online sales**. Please be aware that all online prices detailed in the file are a recommendation only and are not legally binding.*¹⁶⁸ (Emphasis added by CMA)

- 5.55 Although the CMA does not have a copy of each email of 9 December 2011 as received by each individual customer, on 9 December 2011, [Marketing Director] of Ultra forwarded her email issuing the Reseller Image Licence and the price list to the Board, informing the Board that the email had been sent to ‘*all businesses selling HR & Ultra products online*’ and that ‘*Overall feedback remains positive*’.¹⁶⁹ In addition, during the CMA’s investigation Ultra produced copies of approximately [250-300] signed Reseller Image Licences,¹⁷⁰ which included licences signed by the vast majority of customers selling Ultra’s Hudson Reed and Ultra branded products online.¹⁷¹
- 5.56 Pursuant to the Reseller Image Licence attached to the email dated 9 December 2011, Ultra granted resellers a non-exclusive, non-transferable licence to use its images and trademarks in the UK for the sole purposes of the promotion and resale of Ultra products.¹⁷² The Reseller Image Licence also applied to the use of ‘Prior Images’. This covered images supplied by Ultra to resellers prior to the date of the Reseller Image Licence, thereby making existing images already in the possession of resellers subject to the new Reseller Image Licence conditions.

¹⁶⁸ [Director] (a director and the sole shareholder of UFGL), among others, was blind copied into the email. Email from Trading Guidelines Mailbox (Ultra) to Trading Guidelines addressees, dated 9 December 2011, attaching the Reseller Image Licence and Price List (URN UD0742). See also internal Ultra email with the same content sent from [Marketing Executive] (Ultra) to [Marketing Executive] (Ultra) earlier on 9 December 2011 titled ‘*RE. Test E-mail – Hudson Reed & Ultra Trading Guidelines*’ (URN UD0022) and version of email as received by [Reseller] (URN U30007.4H).

¹⁶⁹ Email from [Marketing Director] (Ultra) to the Board dated 9 December 2011 (URN UD0036).

¹⁷⁰ Question 8(c) of Ultra’s response to section 26 notice dated 20 February 2015 (URN UC0080.1).

¹⁷¹ Spreadsheet titled ‘*Full List of Online Customers – All sent the Image Licence*’ (URN UD0229). Ultra also produced copies of Reseller Image Licences signed by distributors supplying products to resellers, and resellers including Hudson Reed and/or Ultra products in their sales brochures. Correspondence with distributors suggests that Ultra’s primary intent was to require its customers selling Hudson Reed and/or Ultra products online to sign the Reseller Image Licence. Its rationale for also requiring customers not selling online to sign the Reseller Image Licence was to ensure that Ultra appeared to be treating all customers equally. For example, on 9 December 2011 [Marketing Director] (Ultra) sent an email to [Employee] ([Reseller]) ([X]), forwarding the email referred to at paragraph 5.54 above, noting that ‘*[t]o appear unbiased we need all customers using images for any purposes (brochures etc) to sign the contract*’, Email from [Marketing Director] (Ultra) to [Employee] ([Reseller]) dated 9 December 2011 (URN UD0037). Similarly worded emails, forwarding the original email sent on 9 December 2011, were also sent to [X] including [Employee] ([Reseller]) (URN UD0039) and [Employee] ([Reseller]) (URN UD0040).

¹⁷² Clause 1.1 of the Reseller Image Licence, attached to email from Trading Guidelines mailbox (Ultra) to Trading Guidelines addressees, dated 9 December 2011 (URN UD0742).

5.57 The price list attached to the email dated 9 December 2011 set out the Recommended Online Price for resale of Hudson Reed and Ultra branded products (set at 25% below the column of general RRP's (including VAT)). An extract of the Hudson Reed price list from February 2012 is below.¹⁷³

[✂]

The link between the Trading Guidelines, the Online Discounting Restriction and the Reseller Image Licence

5.58 The CMA acknowledges that the Trading Guidelines (as verbally communicated to resellers in November 2011)¹⁷⁴ and the price list attached to the email dated 9 December 2011 did not refer to the Online Discounting Restriction, describing the Recommended Online Price as a '*recommendation only*' and '*not legally binding*'.¹⁷⁵ Similarly, the Reseller Image Licence did not refer to the Trading Guidelines or the Online Discounting Restriction. However, the CMA considers that the totality of the evidence demonstrates that:

- 5.58.1 controlling online prices via the Online Discounting Restriction was the key objective of the Trading Guidelines
- 5.58.2 the purpose of the Reseller Image Licence was to provide:
 - a vehicle through which Ultra asked resellers to confirm their support for the Trading Guidelines (for the initial roll-out), and
 - a mechanism through which Ultra forced resellers to bring their websites 'into line' if they set online prices below the Recommended Online Price, and
- 5.58.3 the content of the Reseller Image Licence reinforced the operation of the Online Discounting Restriction, by preventing 'promotions' in relation to Hudson Reed or Ultra branded products.

The key objective of the Trading Guidelines: controlling online prices

5.59 Despite Ultra's purported shift of emphasis away from prices in the Final Proposal compared with the Outline Proposal, the evidence demonstrates that

¹⁷³ Price list attached to email from Trading Guidelines Mailbox (Ultra) to Trading Guidelines addressees, dated 9 December 2011 (URN UD0742).

¹⁷⁴ *Proposed guidelines scripts for outbound calls* (URN UD0089). See paragraphs 5.45 and 5.47 above.

¹⁷⁵ Email from Trading Guidelines Mailbox (Ultra) to Trading Guidelines addressees, dated 9 December 2011 (URN UD0742).

controlling resellers' online discounting remained the key objective of the Trading Guidelines. For example:

- 5.59.1 An email exchange in November 2011 demonstrates Ultra's continued focus on online prices as part of the Trading Guidelines. On 11 November 2011, [Employee] of [Reseller], emailed to [Employee] of Ultra and noted:

'On another note I'm very pleased about Ultra pushing this max 25% discount online, if it works then we would certainly spend time on adding a fuller HR catalogue'.¹⁷⁶ (Emphasis added by CMA)

[Employee] of Ultra forwarded this email to [Marketing Director] of Ultra on the same day, asking: *'Is it worth making contact with him to reaffirm the "guidelines"'.¹⁷⁷* [Marketing Director] of Ultra responded to [Employee] of Ultra on the same day, noting:

'He has picked up the main headline regarding our recommended pricing which is the current objective'.¹⁷⁸ (Emphasis added by CMA)

- 5.60 Later internal Ultra documents also demonstrate that the Trading Guidelines were focused on bringing online prices 'into line'. For example:

- 5.60.1 On 15 December 2011, [Marketing Director] of Ultra sent an email to [Employee] of [Reseller] entitled '**Trading Guidelines**':

'I notice you are using an out of date retail price that is too low (as your "was" price). The effect is your actual online selling prices does [not] equate to approx. 25% off the current RRP (Current RRP £381, with 25% discount gives £285.75 and you are selling at £284.65) [...] We will also release product images and prices for all the new launches in the Feb 12 brochures mid Jan to the customers who will be supporting the brands online'.¹⁷⁹

The CMA also notes that on 1 February 2012 [Sales and Marketing Director] of Ultra sent an email to [Employee] of [Reseller]

¹⁷⁶ Email from [Employee] ([Reseller]) to [Employee] (Ultra) dated 11 November 2011 (URN UD0083).

¹⁷⁷ Email from [Employee] (Ultra) to [Marketing Director] (Ultra), dated 11 November 2011 (URN UD0083).

¹⁷⁸ Email from [Marketing Director] (Ultra) to [Employee] (Ultra), dated 11 November 2011 (URN UD0083).

¹⁷⁹ Email from [Marketing Director] (Ultra) to [Employee] ([Reseller]) dated 15 December 2011 (URN UD0084).

threatening to put its account ‘on stop’ because its website was not compliant with the Trading Guidelines.¹⁸⁰

- 5.60.2 On 13 February 2012, [Marketing Director] of Ultra sent an email titled ‘*Showrooms & displays*’ to Ultra’s national sales team informing them that Ultra was ‘*in a strong position overall with the online project*’ and noting that prices that were ‘*out of line*’ were ‘*being addressed*’.¹⁸¹

‘When you are in a Showroom you can Google search any code and the overall picture will now be extremely positive. You can change the Showrooms [sic] previous perceptions by proving the situation to them. (Please be aware I am not saying there won’t be the odd price out of line, they are being addressed however we can focus on the big picture).’¹⁸² (Emphasis added by CMA)

- 5.61 In addition, the CMA has numerous examples of Ultra monitoring resellers’ online prices and taking enforcement action against resellers where online prices were lower than the Recommended Online Price, on the grounds that the products were being displayed outside Ultra’s ‘recommendations’ (see further Section F below).

The purpose of the Reseller Image Licence

- 5.62 The evidence provided to the CMA demonstrates that, in the bathroom fittings sector, the ability to display images of products for sale online is important.¹⁸³
- 5.63 The evidence set out below (and as set out in Chapter 5 generally) demonstrates that the Reseller Image Licence served two purposes by providing:
- 5.63.1 a vehicle through which Ultra asked resellers to confirm their support for the Trading Guidelines by signing the Reseller Image Licence (for the initial roll-out of the Trading Guidelines), and
- 5.63.2 a mechanism through which Ultra forced resellers to bring their websites ‘into line’ (for the ongoing enforcement of the Trading Guidelines). In particular, the Reseller Image Licence gave Ultra a mechanism through which it could threaten to withdraw a reseller’s

¹⁸⁰ See further paragraph 5.106 below. Email from [Sales and Marketing Director] (Ultra) to [Employee] ([Reseller]) dated 1 February 2012, titled ‘*Online Trading Guidelines*’ (URN UD0046).

¹⁸¹ Email from [Marketing Director] (Ultra) to the National Sales Team titled ‘*Showrooms & displays*’, dated 13 February 2012 (URN UD0002).

¹⁸² Email from [Marketing Director] (Ultra) to the National Sales Team (Ultra) titled ‘*Showrooms & displays*’, dated 13 February 2012 (URN UD0002).

¹⁸³ See paragraphs 5.66 to 5.68 below.

rights to use Ultra images for online sales if a reseller set online prices below the Recommended Online Price.

- 5.64 The CMA notes that Ultra's correspondence, both internal and with Ultra's resellers, frequently referred to the Reseller Image Licence in conjunction with the Trading Guidelines, including the Online Discounting Restriction. For example:

- 5.64.1 On 8 December 2011, [Marketing Director] of Ultra sent an email to [Area Sales Manager] (Area Sales Manager) of Ultra about the impact of the Trading Guidelines on the online prices of [Reseller], [REDACTED]:

*'Any Ultra product has been discounted by no more than [REDACTED] (as you know others are discount [sic] up to [REDACTED] currently). **Once the new trading guidelines come in to effect [Reseller] will adhere to them on all their sites. They will be treated exactly the same and will have to sign a contract. The [REDACTED] [Reseller's domain name] has been selling Hudson Reed but they don't sell much as the discount is [REDACTED] and at the moment as you know most onlineers are discounting by a lot more. If they continue with Hudson Reed on the site they will [REDACTED] off RRP from 1st Feb.***¹⁸⁴ (Emphasis added by CMA)

- 5.64.2 On 8 December 2011, [Marketing Director] of Ultra sent an email to [Managing Director] and [Sales and Marketing Director] of Ultra about a reseller, noting:

*'I spelled it out he must sign the contract and there are no loop holes regarding the trading guidelines but we are prepared to discuss how our two business go forward together as we absolutely want to continue our working relationship (but **only on the terms of the new trading guidelines**).*¹⁸⁵ (Emphasis added by CMA)

- 5.64.3 On 19 December 2011, [Marketing Director] of Ultra sent an email to the Board, which attached a summary of resellers that had returned a signed Reseller Image Licence. She noted:

¹⁸⁴ Email from [Marketing Director] (Ultra) to [Area Sales Manager] (Ultra) dated 8 December 2011 (URN UD0081).

¹⁸⁵ Email from [Marketing Director] (Ultra) to [Managing Director] (Ultra) and [Sales and Marketing Director] (Ultra) dated 8 December 2011 (URN UD0060).

*'If there is a contract back it is marked "y". [...] They were all sent out recorded delivery Friday 9th December. [...] There is still quite a strong backlash that they lost sales last time¹⁸⁶ and we left them high and dry when we abandoned it. **Some other feedback (by a handful of accounts) is they will sign but won't change their prices until they see others have moved.** [...] For those who don't sign we propose to contact them early/mid Jan and advise their terms will be changed to less [X]% indefinitely unless we have proof of their support and a returned contract (dated a week later). **For those who have signed the contract, we will speak to them throughout Jan seeking as much proof as possible their domains will be updated.** Any who are wavering we give them notice their account will be "on stop" 1st Feb if they don't comply. **We verbally tell them why but any communication in writing is linked to contract.** The original categorising of minor and major offences still stand (and related consequences).'*¹⁸⁷ (Emphasis added by CMA)

- 5.64.4 On 5 January 2012, in response to [Marketing Director] forwarding the email of 9 December 2011 that attached the Reseller Image Licence and price list for February 2012, [Employee] of [Reseller] replied to [Marketing Director] of Ultra, demonstrating an understanding that the Reseller Image Licence related to the Trading Guidelines and, specifically, the Online Discounting Restriction:

*'we are concerned about the level of discounts available on Ultra products. These discounts, in some cases up to 42% do not make it us [sic] very competitive. **At present we are only offering a 20% discount so are already trading within your guidelines.** [...] **We agree in principal to signing up to the your [sic] copyright licence to use images.** However we would like some clarity in regards to discounts and trading practices.'*¹⁸⁸ (Emphasis added by CMA)

¹⁸⁶ The CMA infers from the context of this email that the reference to 'last time' refers to the 2009 Online Discounting Policy, described at paragraphs 5.13 to 5.18 above and Annex C below, which was abandoned after approximately three months. See paragraph 5.83 below for a similar example of [Marketing Director] (Ultra) reporting to [Managing Director] (Ultra) and [Sales and Marketing Director] (Ultra) about a reseller's 'concerns that [Ultra] wouldn't implement it properly like last time and would then back track'.

¹⁸⁷ Email from [Marketing Director] (Ultra) to the Board (Ultra) dated 19 December 2011, titled 'Onliners update', dated 19 December 2011 (URN UD0079). 'Major' and 'minor' offences were described in the Outline Proposal and the Final Proposal (see paragraph 5.36.6 above and Annex D).

¹⁸⁸ Email from [Employee] ([Reseller]) to [Marketing Director] (Ultra) dated 5 January 2012 (URN UD0058).

[Marketing Director] responded to [Employee] of [Reseller] on the same day explaining the purpose of the Trading Guidelines:

*'The objective is to protect customers like yourself by introducing the trading guidelines. [...] The guidelines will be managed in a way other manufacturers have done successfully via a Copyrights licence contract.'*¹⁸⁹

- 5.65 The link between the Reseller Image Licence and the Trading Guidelines is further demonstrated by an email sent from [Marketing Executive] of Ultra in January 2012 to all customers who had not returned a signed copy of the Reseller Image Licence.¹⁹⁰ This email noted that, by signing the Reseller Image Licence (referred to as the '*Trading Guidelines contract*'), resellers were providing confirmation that they supported the Trading Guidelines:

*'After numerous unsuccessful attempts to contact you regarding the sign and return of our Trading Guidelines contract (attached), it is with deep regret that I write this email to give you advance notice of actions to be taken on your account [...] By signing the contract you are providing confirmation that you support us with the upcoming changes, if you do not sign we will have to assume you do not. If we do not have a copy by this date we will take the necessary steps to permanently reduce your account terms [...] Going forward any customers who have signed the contract will have to provide proof prior to the 1st Feb, that the brands are represented appropriately.'*¹⁹¹ (Emphasis added by CMA)

- 5.66 Moreover, [Marketing Director] of Ultra confirmed to the CMA that the Reseller Image Licence was linked to Ultra's monitoring of resellers' online prices:

*'There were obviously quite a lot of daily checks on the retail prices and the recommended prices that were going on, just so we could understand the position of - - of the copyright licence agreement and what impact we were making. We were also looking at the branding, had people got the logos on there [...]'*¹⁹²

¹⁸⁹ Email from [Marketing Director] (Ultra) to [Employee] ([Reseller]) dated 5 January 2012 (URN UD0058).

¹⁹⁰ Ultra confirmed that the recipients of this email were all customers who had not returned a signed copy of the Reseller Image Licence. Question 8.5 of Ultra's response to section 26 follow up notice dated 19 November 2014 (URN UC0055.1).

¹⁹¹ Email from [Marketing Executive] (Ultra) to undisclosed recipients (undated), titled '*IMPORTANT: Trading Guidelines*' (URN UD0117).

¹⁹² Transcript of interview with [Marketing Director] (Ultra) dated 19 August 2015, page 66, lines 1 to 5 (URN UC0161.1).

5.67 The evidence provided to the CMA demonstrates that, in the bathroom fittings sector, the ability to display images of products for sale online is important. Retailers need access to high-quality images and technical information in order to better inform consumers' understanding and choice of products. For example:

- [Reseller] stated: *'It is very important to have images of products when selling online as the consumers is [sic] not in store where they can view the product and make an informed choice. Therefore product image is vital/crucial for online shopping to survive and work'*.¹⁹³
- [Reseller] stated: *'High quality images are critical to online retail of bathroom products; the quality of the image affects the customers' interests and the price achieved for that product'*¹⁹⁴ and *'[Reseller] were entirely reliant on the imagery supplied by manufacturers and the vast majority of their product offering was branded product. Withholding images effectively meant that the product had to be removed from the website and not sold.'*¹⁹⁵
- [Reseller] stated: *'If a supplier refuses to grant product images then it will mean we will be at a competitive disadvantage to sell that product online.'*¹⁹⁶
- [Reseller] stated: *'If we don't have images it's virtually impossible to sell the products'*.¹⁹⁷
- [Reseller] stated: *'[i]mages are required as customers will always use these to be sure of what they are buying'*.¹⁹⁸
- [Marketing Director] of Ultra stated in interview with the CMA that: *'from an online customer's point of view, the more information they have on a product, the more likely they are -- they're going to sell it. [...] there's a lot more information that you want to be able to give a customer base to sell the product accurately, but your image is your first step. I can't imagine*

¹⁹³ See answer to Question 5(a) of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U30014.2).

¹⁹⁴ See answer to Question 5(a) of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U20069.1).

¹⁹⁵ See answer to Question 5(c) of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U20069.1)

¹⁹⁶ See answer to Question 5(c) of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U100002.1) (See questions at URN U100001.1).

¹⁹⁷ See answer to Question 5(a) of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U150003.1) (See questions at URN U150001.1).

¹⁹⁸ See answer to Question 5(a) of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U110010.1) (See questions at URN U110003.1).

*anyone buying anything off anywhere – I wouldn't, personally – without a picture.*¹⁹⁹

- 5.68 In the light of the above, the CMA considers that not being able to display images (for example, due to a manufacturer refusing to either supply images and technical information, or preventing the reseller from procuring their own images in the absence of images provided by the manufacturer) would have a negative effect on a reseller's ability to sell branded bathroom fittings products online.²⁰⁰
- 5.69 As such, the CMA considers that Ultra's resellers had an incentive to sign the Reseller Image Licence in order to obtain permission to use Ultra's images in online sales of Hudson Reed or Ultra branded products.
- 5.70 In the light of the importance of images to a reseller's ability to sell online, the CMA considers that threats of, and actual, withdrawal of image rights was an effective enforcement mechanism, among others, by which to obtain reseller compliance with the Online Discounting Restriction.²⁰¹

The content of the Reseller Image Licence as a means of reinforcing the Online Discounting Restriction

- 5.71 As well as providing a mechanism to obtain resellers' agreement to the Online Discounting Restriction and to enforce it, the CMA considers that the content of the Reseller Image Licence itself was used to restrict resellers from offering prices below the Recommended Online Price without Ultra's prior consent. At the very least, the CMA considers that the content of the Reseller Image Licence reinforced the Online Discounting Restriction by restricting resellers from offering a promotion, such as an additional percentage discount from the advertised price.
- 5.72 Clauses 4.6 and 4.18 of the Reseller Image Licence stated:

¹⁹⁹ Transcript of interview with [Marketing Director] (Ultra) dated 19 August 2015, page 36, lines 1 to 6 (URN UC0161.1).

²⁰⁰ The CMA notes comments made by [Employee] ([Reseller]) in interview that '*without an image you can still sell a product*'. Transcript of interview with [Employee] ([Reseller]) dated 10 September 2015, page 80, line 22, (URN U20124.1) and similar views expressed in an email to [National Sales Manager] (Ultra), dated 3 September 2011 (URN UD0161). The CMA acknowledges that it is technically possible to sell a product online without an image (eg by searching for a known product code); however, the evidence demonstrates that images are important to consumers' ability to search and select a product online and resellers' ability to market their offerings.

²⁰¹ See further paragraphs 5.110 to 5.117 below.

- 5.72.1 Clause 4.6: *'The Reseller shall not use the Images or the Trademarks in connection with any Promotional Offer without the prior written consent of Ultra Finishing'*.²⁰²
- 5.72.2 Clause 4.18: *'The Reseller shall not use any other images of the Products other than the Images designated from time to time by Ultra in connection with the resale of the Products (or any other products).'*
- 5.73 A breach of Clause 4.6 could result in Ultra withdrawing the reseller's rights to use images of Ultra's Hudson Reed and Ultra branded products.²⁰³ In addition, contemporaneous email evidence demonstrates that Ultra considered that the Reseller Image Licence could require the reseller to withdraw all Hudson Reed and Ultra branded products from sale unless they could be specifically excluded from promotions:
- 'If the promotion is purely to give a product prominence on your site and you are displaying a current retail price and the branding/look of the image is unaffected this would in principle be okay. **If the promotion is to give free products (ie free rad valves with a radiator) or any such similar activity, I suspect this may be a sticking point. In this instance it may be necessary for you to remove the Hudson Reed and Ultra products from your website until you can exclude our products from any such promotions'***.²⁰⁴ (Emphasis added by CMA)
- 5.74 In light of the importance of images to a reseller's ability to sell online,²⁰⁵ the CMA considers that resellers had an incentive not to offer *'Promotional Offers'* within the meaning of Clause 4.6 of the Reseller Image Licence. This interpretation is supported by evidence obtained in interview.²⁰⁶

²⁰² 'Promotional Offer' was defined in Clause 1.1 as *'any promotional offer made by the Reseller in connection with the sale or supply of the Products'*. Clause 1.1 further defined 'Products' as *'the products distributed and sold by Ultra Finishing for resale by the Reseller from time to time.'* Reseller Image Licence attached to email from Trading Guidelines Mailbox (Ultra) to Trading Guidelines addressees, dated 9 December 2011 (URN UD0742). Ultra has confirmed that, to the best of its knowledge, no customer requested written consent to use images in connection with a 'Promotional Offer'. Question 20 of Ultra's response to section 26 notice dated 15 July 2015 (URN UC0117.1).

²⁰³ Clause 3.2.1 of the Reseller Image Licence empowered Ultra to terminate the licence with immediate effect if the reseller is in breach of any of its obligations under the Reseller Image Licence, upon which the Reseller must immediately cease using the images and the trademarks to which the Reseller Image Licence applied (clause 3.4.1) Reseller Image Licence attached to email from Trading Guidelines Mailbox (Ultra) to Trading Guidelines addressees, dated 9 December 2011 (URN UD0742).

²⁰⁴ Email from [Marketing Director] (Ultra) to [Employee] ([Reseller]), dated 6 January 2012 (URN UD0057).

²⁰⁵ See paragraphs 5.67 to 5.68 above.

²⁰⁶ [Marketing Executive] of Ultra explained his understanding of Clause 4.6 of the Reseller Image Licence as follows: *'I think there are a lot of websites nowadays [...] they run big 20 per cent off, 30 per cent off promotions, so I imagine it was related to that'*. When asked what was meant by *'Promotional Offer'*, [Marketing Executive] explained, *'an additional 10 per cent, 20 per cent or a free product. That's how I'd interpret that clause. [...]*

- 5.75 Moreover, Clause 4.18 of the Reseller Image Licence prevented resellers from circumventing Clause 4.6 by displaying their own images in connection with ‘*Promotional Offers*’. This is because Clause 4.18 of the Reseller Image Licence prohibited resellers from using their own images to sell Ultra products, rather than Ultra-supplied images.²⁰⁷
- 5.76 Therefore, the CMA considers that Clause 4.6 of the Reseller Image Licence also reinforced the Online Discounting Restriction by restricting resellers from offering prices below the Recommended Online Price using a promotion, such as an additional percentage discount from the advertised price.

Reseller understanding of the Trading Guidelines

- 5.77 Although not explicit in Ultra’s written communication of the Trading Guidelines,²⁰⁸ the evidence demonstrates that at least certain resellers understood that the Trading Guidelines related not just to the presentation of Hudson Reed and Ultra branded products online, but also included the Online Discounting Restriction.
- 5.78 For example, contemporaneous email correspondence between Ultra and its resellers demonstrates that Ultra had expressly communicated the ‘recommended’ online maximum discount of 25% off RRP when introducing the Trading Guidelines:

- 5.78.1 On 10 November 2011, [Employee] of [Reseller] sent [Managing Director] of Ultra an email referring to Ultra’s ‘25% target’:

*‘Thanks to both you and [Sales and Marketing Director] for your time yesterday. I’m certainly looking forward to developments and hope the 25% target works out.’*²⁰⁹ (Emphasis added by CMA)

Obviously one of the parts was –we’d provided a, a retail price list—[...] and had these recommended online prices [...] that weren’t legally binding [...] I imagine that was ...on top of that, so that was in addition to that’. Transcript of interview with [Marketing Executive] (Ultra) dated 19 August 2015, page 25 lines 2; 9 to 12; page 26, lines 1 to 2; 8 to 9; 11 to 12 and lines 14 to 17 (URN UC0160.1).

²⁰⁷ See paragraph 5.72.2 above. In any event, not all resellers have the ability to take their own images of products. For example, [Reseller] stated ‘*if we are listing 5,000 products, we cannot take our own pictures*’. Question 5(a) of [Reseller]’s response to section 26 notice dated 8 May 2015, page 2 (URN U90002.1) (See questions at URN U90001.1).

²⁰⁸ See paragraph 5.54 above.

²⁰⁹ Email from [Employee] ([Reseller]) to [Managing Director] (Ultra), dated 10 November 2011 (URN UD0181).

- 5.78.2 On 11 November 2011, [Employee] of [Reseller], referred in an email to [Employee] of Ultra to the ‘*max 25% discount online*’:
- ‘On another note I’m very pleased about Ultra pushing this max 25% discount online, if it works then we would certainly spend time on adding a fuller HR catalogue’.*²¹⁰ (Emphasis added by CMA)
- 5.78.3 On 5 January 2012, [Employee] of [Reseller] ([X]) sent an email to its sales representatives to assist them in explaining the Trading Guidelines to retailers supplied by [Reseller]:²¹¹
- ‘The guidelines relate not only to the correct use of images but also a recommendation they promote a maximum online discount of 25% off the current RRP (this is a recommendation only and is not legally binding)’.*²¹² (Emphasis added by CMA)
- 5.78.4 On 6 February 2012, [Reseller], sent an email to [Marketing Director] of Ultra including links to a number of resellers’ websites where prices were stated to not be up to date.²¹³
- 5.79 This was confirmed by evidence obtained during the CMA’s investigation. For example:
- 5.79.1 [Reseller] stated that, in order to have rights to use Ultra’s images on its website, it was required by Ultra to ‘*set the discount rates for 25% off list on our web site*’,²¹⁴ and
- 5.79.2 [Reseller] informed the CMA that ‘*Ultra group certainly insisted that, we along with all their other customers, sign or agree to a contract that would grant us image rights on the back of sticking to their price guide of RRP with a maximum discount of 25% to be offered to customers*’.²¹⁵
- 5.80 Further, the evidence demonstrates that at least certain resellers (and distributors) understood that trading within Ultra’s guidelines encompassed a

²¹⁰ Email from [Employee] ([Reseller]) to [Employee] (Ultra) dated 11 November 2011 (URN UD0083).

²¹¹ [Marketing Director] (Ultra) helped [Employee] ([Reseller]) to draft the email. Email from [Marketing Director] (Ultra) to [Employee] (Ultra) dated 5 January 2012 (URN UD0054).

²¹² Email from [Employee] ([Reseller]) to sales reps dated 5 January 2012 (URN UD0054).

²¹³ Email from [Employee] ([Reseller]) to [Marketing Director] (Ultra) dated 6 February 2012 (URN UD0099).

²¹⁴ Question 2.13 of [Reseller]’s response to section 26 notice dated 23 October 2014: What if anything the retailer communicated to Ultra they would do in response to the applicable request(s) or instruction(s). [Reseller]’s response to question 2.13 was provided by email to the CMA dated 15 May 2015 (URN U80009) (See questions at URN U80001.1).

²¹⁵ Email from [Employee] ([Reseller]) to CMA dated 13 May 2015 (URN U40013). See further paragraph 5.191.2.

requirement to price Hudson Reed and Ultra branded products online no lower than the Recommended Online Price:

- 5.80.1 An email to Ultra dated 21 November 2011 from [X], [Reseller], shows that [X] understood Ultra's policy was to not permit discounts of 50% off:

*'I have spoken to all my internet customers and everyone is in agreement with your new policy. You will not have any issues from this end. Just let me know when to get them to change, they have all asked for a 30 day period to change prices. **They all did however mention one company giving 50% off [Reseller]. Maybe you or [Marketing Executive] could look into this.**'*²¹⁶
(Emphasis added by CMA).

- 5.80.2 An email from [Employee] of [Reseller] to [Marketing Director] of Ultra, dated 6 February 2012, titled 'Trading Guidelines update' contained website links to another retailer, [Reseller], displaying up to 40% off Hudson Reed products.²¹⁷

- 5.80.3 On 10 January 2012 [Employee] of [Reseller] sent an email to Ultra's Trading Guidelines Mailbox, noting:

*'Just to advise that we at [X] have **begun the task of editing our prices to comply with your trading guidelines.** [...] My chances of selling any Ultra or Hudson Reed for the next 2 weeks are virtually nil as **I am now a good 20-30% more expensive than a huge number of internet retailers** so I will stress what I stressed before xmas which is that I hope this will be vigorously [sic] enforced for non-compliant retailers come February the 1st.'*²¹⁸
(Emphasis added by CMA)

- 5.80.4 Further, on 3 February 2012, [Employee] of [Reseller] sent another email to [Marketing Executive] of Ultra at the Trading Guidelines mailbox to inform him that prices on the websites of [Reseller] had been changed:

*'[Reseller] – I've had 2 lads go through these this afternoon. They have found a handful of glaring omissions which have been corrected. **They have found many where the RRP ends in 25p***

²¹⁶ Email from [Employee] ([Reseller]) to [Marketing Director] (Ultra) dated 21 November 2011 (URN UD0082).

²¹⁷ Email from [Employee] ([Reseller]) to [Marketing Director] (Ultra) dated 6 February 2012 (URN UD0106).

²¹⁸ Email from [Employee] ([Reseller]) to Trading Guidelines Mailbox (Ultra), dated 10 January 2012 (URN UD0765).

or 75p etc where they have been rounded down. Whilst I accept these need to be spot on I don't think they especially concern you or other sellers of HR & Ultra. [...] I think it is to be expected that in the coming months everybody who sells HR online will "grass" on each other and you can absolutely guarantee that if I have missed one then someone will find it and subsequently bring it to your attention'.²¹⁹ (Emphasis added by CMA)

5.81 In addition, during the CMA's investigation one reseller, [Reseller], confirmed that it was instructed by Ultra not to sell Ultra's products online below a specified level.²²⁰

5.82 Finally, the evidence demonstrates that at least certain resellers understood that a request from Ultra to make changes to their websites to ensure compliance with the Trading Guidelines required a change to the reseller's online prices. For example:

5.82.1 On 3 February 2012 at 12:55,²²¹ [Employee] of [Reseller] sent an email to [Marketing Director] of Ultra reporting retailers not adhering to the Trading Guidelines, including [Reseller]. [Marketing Director] of Ultra responded at 19:19 on 3 February 2012, noting in relation to [Reseller] that *'everything has now been corrected' and 'for them to have any products outside the guidelines is completely unacceptable.'*²²²

5.82.2 Later on 3 February 2012, at 21:54, [Employee] of [Reseller] sent a further email noting:

'I couldn't resist taking a look to see if prices were tumbling after hours... I've taken screen shots for proof as below... all captured around 9.30pm Friday.

*One random product, 3 definite violations of the guidelines!'*²²³

5.82.3 A related email dated 6 February 2012 from [Employee] of [Reseller] to [Marketing Director] of Ultra again reported the online pricing of [Reseller]:

²¹⁹ Email from [Employee] ([Reseller]) to [Marketing Executive] of Ultra (Trading Guidelines Mailbox) dated 3 February 2012 (URN UD0711).

²²⁰ See Question 1 of [Reseller]'s response to section 26 notice dated 23 October 2014 (URN U70003.1).

²²¹ Email from [Employee] ([Reseller]) to [Marketing Director] (Ultra) dated 3 February 2012 (URN UD0252B).

²²² Email from [Marketing Director] (Ultra) to [Employee] ([Reseller]) dated 3 February 2012 (URN UD0252F).

²²³ Email from [Employee] ([Reseller]) to [Marketing Director] (Ultra) dated 3 February 2012 (URN UD0252F).

*'I notice [Reseller] are **still too cheap on Amazon @ 29%** (FLU305) Are they going to **come into line** soon?' ²²⁴*

[Marketing Director] of Ultra replied to [Employee] of [Reseller] on the same day:

'Totally despair but this should be sorted now'.²²⁵ (Emphasis added by CMA)

- 5.82.4 [Marketing Director] of Ultra forwarded [Employee] of [Reseller]'s email above to [Director] of Ultra and UFGL and [Employee] of [Reseller] on 6 February 2012, asking them to *'confirm when sorted'*.²²⁶

[Employee] of [Reseller] replied to [Marketing Director] of Ultra on the same day: *'Our price for this item is £77 +4 delivery taking it to £81. Is that an issue?'²²⁷* [Marketing Director] of Ultra responded on 6 February 2012: *'YES!'²²⁸* (Emphasis added by CMA)

- 5.82.5 On 9 February 2012, [Marketing Director] of Ultra asked [Employee] of [Reseller] to *'please make the necessary changes as discussed'*.²²⁹ [Reseller]'s response of 10 February 2012 shows that the reseller understood that the *'changes'* referred to in [Marketing Director] of Ultra's email were about the prices displayed on its website:

*'I have been looking at various products on the internet last night and this morning and there are loads of online shops with lower prices than mine??? **Surly [sic] I don't have to raise my price by 20%?**'²³⁰* (Emphasis added by CMA)

- 5.83 Finally, an email sent on 8 December 2011 from [Marketing Director] of Ultra to [Managing Director] and [Sales and Marketing Director] of Ultra, suggests at least one reseller, [Reseller], understood the Trading Guidelines to be of a similar nature to the 2009 Online Discounting Policy, which expressly

²²⁴ Email from [Employee] ([Reseller]) to [Marketing Director] (Ultra) dated 6 February 2012 (URN UD0252F).

²²⁵ Email from [Marketing Director] (Ultra) to [Employee] ([Reseller]) dated 6 February 2012 (URN UD0252F).

²²⁶ Email from [Marketing Director] (Ultra) to [Director] (Ultra) and [Employee] ([Reseller]), dated 6 February 2012 (URN UD0111).

²²⁷ Email from [Employee] ([Reseller]) to [Marketing Director] (Ultra) and [Director] (Ultra), dated 6 February 2012 (URN UD0111).

²²⁸ Email from [Marketing Director] (Ultra) to [Employee] ([Reseller]) and [Director] (Ultra), dated 6 February 2012 (URN UD0111).

²²⁹ Email from [Marketing Director] (Ultra) to [Employee] ([Reseller]) dated 9 February 2012 (URN UD0016).

²³⁰ Email from [Employee] ([Reseller]) to [Marketing Director] (Ultra) dated 10 February 2012 (URN UD0016) and provided by [Reseller] in its response to section 26 notice dated 23 October 2014 (URN U60007.4).

instructed resellers not to sell Ultra's products at a discount of more than 20% off RRP:

*'I have answered all their questions regarding [...] How we will manage it (these were most of [Employee]'s **concerns that we wouldn't implement it properly like last time and would then back track**) [...] Again, I reassured him we will act swiftly and did spell out how we would manage it. We covered it will come down to those with the best online marketing SEO skills who will sell more and the increase in profit should offset some of this. I suggested for those customers he has who purely buy on price he puts unbranded Premier product on there and sells at an aggressive price point. [...].'*²³¹ (Emphasis added by CMA).

Conclusion on the implementation of the Trading Guidelines, including the Online Discounting Restriction

- 5.84 The Trading Guidelines were recommendations regarding the representation of Ultra's brands on resellers' websites, including images and logos, to take effect from 1 February 2012. The Trading Guidelines centred on the Online Discounting Restriction, which required resellers to set their online prices at or above the Recommended Online Price.
- 5.85 The evidence demonstrates that the Trading Guidelines were communicated to resellers verbally in the first instance. Subsequently, Ultra sent to resellers the Reseller Image Licence and a price list containing the Recommended Online Price. The Reseller Image Licence provided a vehicle through which Ultra asked resellers to confirm their support for the Trading Guidelines by signing the Reseller Image Licence, and a mechanism through which Ultra forced resellers to bring their websites 'into line'.
- 5.86 The Reseller Image Licence also reinforced the operation of the Recommended Online Price, by preventing 'promotions' in relation to Hudson Reed or Ultra branded products.
- 5.87 The evidence also demonstrates that at least certain resellers understood that the Trading Guidelines related not just to the presentation of Hudson Reed and Ultra branded products online, but also included the Online Discounting Restriction.

²³¹ Email from [Marketing Director] (Ultra) to [Managing Director] (Ultra) and [Sales and Marketing Director] (Ultra) dated 8 December 2011 (URN UD0060).

F. Monitoring and enforcement by Ultra of resellers' compliance with the Online Discounting Restriction

5.88 This Section sets out evidence which demonstrates that Ultra:

- 5.88.1 monitored resellers' agreement to the Online Discounting Restriction, and
- 5.88.2 took enforcement action against any reseller that did not sign the Reseller Image Licence and/or update their websites so that prices for online sales of Hudson Reed and Ultra branded products were no lower than the Recommended Online Price.

Monitoring

5.89 Internal Ultra emails confirm that Ultra considered that signing the Reseller Image Licence confirmed a reseller's support in principle for the Trading Guidelines.²³²

5.90 In line with this, throughout the Relevant Period, Ultra created and maintained various spreadsheets²³³ which monitored resellers' adherence to the Trading Guidelines. This included:

- 5.90.1 The Master Spreadsheet: This was created when [Marketing Executive] first identified which resellers were selling Hudson Reed and Ultra branded products online. The Master Spreadsheet contained a list of resellers indicating which resellers had signed the Reseller Image Licence, comments about the account and actions taken by Ultra.²³⁴
- 5.90.2 The Contact Record: This was a record of contacts made with resellers in relation to their compliance with the Trading Guidelines. The Contact Record comprised the following worksheets:
 - 'Contact Record – Master Sheet'
 - 'Accounts Reduced to Less [✂]%'
 - 'Accounts Put On Stop'

²³² See paragraph 5.65 above.

²³³ Transcript of interview with [Marketing Executive] (Ultra) dated 19 August 2015, page 31, lines 1 to 4 (URN UC0160.1).

²³⁴ *Trading Guidelines – Master- record of all online customers'* (URN UD0018).

- *'Letters to be sent'* and
- *'Brand Management Summary'*.

The *'Master Sheet'* worksheet was dated November 2011 and recorded which accounts did not adhere to Ultra's *'recommendations for selling online'*.²³⁵ The sheet listed all accounts selling Hudson Reed and Ultra online. Against each account Ultra recorded whether the Reseller Image Licence had been sent to the account,²³⁶ the date a signed version of the Reseller Image Licence had been received by Ultra, and whether the reseller's website was *'inline'*.²³⁷

- 5.91 The CMA understands from the totality of the evidence in Chapter 5 that the reference to *'inline'* meant compliant with the Trading Guidelines, and specifically with the Online Discounting Restriction. This is supported by the fact that the term *'in line'* was used by Ultra in relation to the 2009 Online Discounting Policy which included an explicit instruction to resellers not to offer discounts greater than a fixed percentage off RRP.²³⁸
- 5.92 The fact that Ultra was specifically monitoring resellers' online sales prices to check their actual or intended compliance with the Online Discounting Restriction is also supported by the Contact Record. This records a number of comments about various resellers' *'Intentions for Updating Website'*.²³⁹ For example:
- 5.92.1 *'[Employee] [Reseller] will have everything in line by 1st. Will leave it a week, then move. Call 30/01 - Still on track.'*
- 5.92.2 *'[Employee] [Reseller] happy. Making the changes as we speak. ...wants a brochure. Will call tomorrow if not received mailing with brochure tomorrow 26/01/2011 [sic].'*

²³⁵ Ultra spreadsheet titled *'Contact Record – Master Sheet'* (URN UD0135).

²³⁶ In interview, [Marketing Director] (Ultra) confirmed that the reference to 'contract' in the spreadsheet refers to the Reseller Image Licence. Transcript of interview with [Marketing Director] (Ultra) dated 19 August 2015, page 73, lines 22 to 23 (URN UC0161.1).

²³⁷ Ultra spreadsheet titled *'Contact Record – Master Sheet'* (URN UD0135). [Marketing Executive] confirmed in interview that the spreadsheet was *'where we could record any customers we'd actually got in touch with, who had the contract'*. Transcript of interview with [Marketing Executive] (Ultra) dated 19 August 2015, page 32, lines 21-22 (URN UC0160.1).

²³⁸ *'All you need to do to revert to your previous terms and have access to our images is to fall in line with our online trading policy of offering no more than 20% discount from our suggested retail prices'*. Email from [Sales and Marketing Director] (Ultra) to [Employee] [company unknown] dated 15 May 2009, titled: *'On-Line Discounting'* (URN UD0141). Given the content of this email, the CMA infers that [Employee] was working for a reseller.

²³⁹ Ultra spreadsheet titled *'Contact Record – Master Sheet'* (URN UD0135).

- 5.92.3 *'[Marketing Director] has sorted this out direct with [Employee] [Reseller]. Checks to be made on 31st January.'*
- 5.92.4 *'Very encouraging. Spoke to [Contact at reseller] who can change the prices at the push of a button. **They have had prices set at 25%.** Call 30/01 – [Contact at reseller] will update RRP's to feb prices as currently he has done the discount to old RRP's.'*
- 5.92.5 *'[Contact at reseller] at [reseller] is onboard. He currently on [sic] discounts at [X]% anyway, happy to mke [sic] the changes by 1st feb. If they can't be changed in time, he will remove products until they do. 30/01 - site updated'. '[Contact at reseller] **joked about testing the system on 3rd of Jan by increasing to [X]%. I** advised the consequences [sic] of doing this, explained we have a good relationship with us [sic] and will tow the line. I think we should ring back 30th to see how he's doing. 30/01/12 Called and spoke to [Contact at reseller], he is sorting out the RRP's [sic].'*
- 5.92.6 *'[Contact at reseller] only has a few HR & Ultra products online, he will ensure he updates. 30/01/12 Spoke to [Contact at reseller], he is updating now, using the new price list. Clarified maximum discounts and advised that images should also be updated ASAP.'*
- 5.92.7 *'Need to check next week – [Contact 1 at reseller] in process of adding HR & Ultra to site. 30/01/12 **25% discount in place** but a couple of RRP's [sic] slightly out, spoke to [Contact 2 at reseller] and e-mailed her price list again'.*
- 5.92.8 *'See e-mail from [Contact at reseller]. [Reseller] have started updating the prices. Should be complete by 11/11/2012. 30/01/12 **25% discount in place** - Spoke to [Contact at Reseller], on with changes, asked for new brochures on PDF'.*

(Emphasis added by CMA)

- 5.93 Evidence obtained during the CMA's investigation also confirms that Ultra monitored resellers' ongoing compliance with the Trading Guidelines, including in particular compliance with the Online Discounting Restriction. For example:

- 5.93.1 [Marketing Director] of Ultra confirmed that [Marketing Executive] of Ultra was responsible for monitoring resellers' ongoing compliance

with the Trading Guidelines.²⁴⁰ This included monitoring which resellers had signed and returned the Reseller Image Licence.²⁴¹

5.93.2 [Marketing Director] of Ultra further confirmed that [Marketing Executive] of Ultra was focused specifically on monitoring resellers' online prices. For example, she stated that [Marketing Executive] of Ultra *'was looking at the actual retail prices and, obviously, the discounts that were being shown online.'*²⁴²

5.93.3 In interview, [Marketing Executive] of Ultra confirmed to the CMA that Ultra was checking resellers' websites for compliance with the Trading Guidelines throughout the Relevant Period on a regular basis:

*'[...] someone on a daily basis will go into the websites and do spot checks as well as just obviously having a look at, at Google as well. [...] I think, to start with, it was daily after implementation. [...] So, it carried on right until last year [2014], I think, some time.'*²⁴³

5.93.4 [Marketing Executive] of Ultra's recollection was that Ultra checked 20 products on 20 to 50 websites each day by entering the product code into the search bar on the reseller's website.²⁴⁴ [Marketing Director] of Ultra told the CMA that, while Ultra was checking a number of aspects of resellers' websites, including branding and logos, it was also checking the discounts offered by resellers, and the extent of compliance with the Online Discounting Restriction. [Marketing Director] of Ultra stated in interview:

'There were obviously quite a lot of daily checks on the retail prices and the recommended prices that were going on, just so we could understand the position of - - of the copyright licence agreement

²⁴⁰ See paragraph 5.93.4 below.

²⁴¹ Transcript of interview with [Marketing Executive] (Ultra) dated 19 August 2015, page 15, lines 14 to 15 and page 16, lines 6 to 7 (URN UC0160.1): *'Obviously, the job then in January was to chase in all the people who hadn't signed the contracts'; and 'it was mainly my [...] role to introduce the guidelines'.*

²⁴² Transcript of interview with [Marketing Director] (Ultra) dated 19 August 2015 page 69, lines 10 to 13 (URN UC0161.1). See also page 67, lines 11-13 (*'he had spreadsheets where he was actually looking at specific customers, and sort of what products they were selling and sort of the retail price and the [...] discount they were giving'*); page 68, lines 15 to 21 (*'he was looking at one specific part of that project ... potentially linked to the pricing aspect of it. He was obviously involved in some conversation as around the marketing of it and the products and so on, [...]. [Marketing Executive]'s involvement would be specifically on pricing checks'*) and page 74, line 22 (*'he was specifically, in his role, looking at pricing'*).

²⁴³ Transcript of interview with [Marketing Executive] (Ultra) dated 19 August 2015, page 35, line 25 and page 36, lines 1 to 2 and lines 6 to 8 (URN UC0160.1).

²⁴⁴ Transcript of interview with [Marketing Executive] (Ultra) dated 19 August 2015, page 36, lines 14 to 17 and page 41, lines 3 to 4 (URN UC0160.1)

*and what impact we were making. We were also looking at the branding, had people got the logos on there [...].*²⁴⁵

*‘But we, obviously, gave the recommendation – that we said isn’t legally binding – it’s to give 25 per cent off. So we wanted to understand how much customers had [...] implemented that, and that’s what [Marketing Executive] was looking at. So he would be looking at our retail price plus the discounts that onliners were giving’.*²⁴⁶

Enforcement

5.94 This section describes the three principal enforcement mechanisms used by Ultra in respect of the Trading Guidelines. In particular, the evidence demonstrates that Ultra threatened resellers that did not return a signed Reseller Image Licence with:

- 5.94.1 temporarily or permanently reducing the reseller’s wholesale terms of supply²⁴⁷
- 5.94.2 temporarily or permanently ceasing supply of Hudson Reed or Ultra branded products,²⁴⁸ or
- 5.94.3 withdrawing the reseller’s right to use images of Hudson Reed or Ultra branded products.²⁴⁹

5.95 Where resellers had signed the Reseller Image Licence, Ultra then also monitored resellers’ websites to check that resellers making sales online were in compliance with the Trading Guidelines, which included compliance with the Online Discounting Restriction. Ultra threatened (and took) enforcement action if it found instances of non-compliance with the Online Discounting Restriction. The three principal enforcement mechanisms used were:

- 5.95.1 temporarily or permanently reducing the reseller’s wholesale terms of supply²⁵⁰

²⁴⁵ Transcript of interview with [Marketing Director] (Ultra) dated 19 August 2015, page 66, lines 1 to 5 (URN UC0161.1). See also page 66, lines 21 to 25 where [Marketing Director] (Ultra) confirmed that Ultra’s monitoring activities continued until the start of the CMA’s investigation.

²⁴⁶ Transcript of interview with [Marketing Director] (Ultra) dated 19 August 2015, page 71, lines 13 to 17 (URN UC0161.1).

²⁴⁷ See paragraphs 5.101 to 5.103 below.

²⁴⁸ See paragraphs 5.104.1, 5.104.3, 5.105 and 5.107 below.

²⁴⁹ See paragraph 5.114 below.

²⁵⁰ See paragraphs 5.98 and 5.101 below.

- 5.95.2 temporarily or permanently ceasing supply of Hudson Reed or Ultra branded products²⁵¹
- 5.95.3 withdrawing the reseller's right to use images of Hudson Reed or Ultra branded products,²⁵² or
- 5.95.4 a combination of the above.²⁵³
- 5.96 Internal Ultra correspondence demonstrates Ultra's intention to take enforcement action against any reseller that did not sign the Reseller Image Licence or update their websites to comply with the Trading Guidelines. For example:
- 5.96.1 On 24 October 2011, [Marketing Director] sent [Sales and Marketing Director] and [National Sales Manager] of Ultra an email referring to ways to '*manage the new online policy*', stating:
- 'I had a conversation with [National Sales Manager] on Friday where he raised two points the **pitfalls of repeatedly using the on stop as a method of managing customers not meeting our recommendations**. I reassured him this would only be used once and then we would use terms, and on the 3rd occasion their original terms would not be reinstated. He was also concerned ongoing terms of less [X]% may not be enough to deter the customer from continuing to discount. Please can you confirm if this is the case? I have no problem with changing this to less [X]% or less [X]% if necessary'*.²⁵⁴ (Emphasis added by CMA)
- 5.96.2 Further on 19 December 2011, [Marketing Director] of Ultra emailed the Board to update them on progress of the introduction of the Trading Guidelines, and noted:
- 'For those who don't sign we propose to contact them early/mid Jan and **advise their terms will be changed to less [X]% indefinitely unless we have proof of their support and a returned contract [...]** For those who have signed the contract we will speak to them throughout Jan seeking as much proof as possible their domains will be updated. **Any who are wavering we give them notice their account will be on "stop" 1st Feb if they***

²⁵¹ See paragraphs 5.96.2, 5.97, 5.98, 5.104.1 to 5.104.3 and 5.106 to 5.109 below.

²⁵² See paragraphs 5.110 to 5.112 and 5.115 to 5.117 below.

²⁵³ See paragraph 5.104.3 and 5.116 below.

²⁵⁴ Email from [Marketing Director] (Ultra) to [Sales and Marketing Director] (Ultra) and [National Sales Manager] (Ultra) dated 24 October 2011 (URN UD0088).

don't comply. We verbally tell them why but any communication in writing is linked to contract'.²⁵⁵ (Emphasis added by CMA)

- 5.97 In January 2012, Ultra contacted its resellers making sales online by telephone to check they would comply with the Trading Guidelines on or before 1 February 2012.²⁵⁶ The script prepared by Ultra for calls with resellers indicates that Ultra made it clear to resellers in January 2012 (at the latest) that there would be consequences for failure to comply with the Trading Guidelines from 1 February 2012. The script stated:

'This is a follow up support call to ensure that you're on track to complete any changes to your website which are needed to make sure it complies with our new online trading guidelines by February 1st? [...]

Customer unhappy, it's apparent they are not on target for February 1st – "[...] We know that the internet is an important tool for businesses to reach customers and would hope that you would work with us to make sure that our products are being sold in accordance with the principles and standards which have made Ultra Finishing what it is today. Our new online trading guidelines are designed to help us achieve this aim. From February 1st 2011 [sic], we only want to work with customers who represent our brands correctly online. Unfortunately, if you are not able to comply with our new online trading guidelines, we will need to reassess our relationship with you and potentially put your account on STOP".²⁵⁷ (Emphasis added by CMA)

- 5.98 On 1 February 2012, Ultra again contacted its resellers making sales online to confirm that the Trading Guidelines were now in effect.²⁵⁸ The script for calls between Ultra and its resellers on 1 February 2012 again made clear to resellers that there would be consequences for not complying with the Trading Guidelines. Such consequences included ceasing supply of Hudson Reed and Ultra branded products (referred to as putting an account on 'stop') for a 'major offence', and reducing a reseller's wholesale terms of supply for a 'minor offence', which would remain in effect until websites were compliant:

'All accounts will be checked for compliance

Customers [sic] website is non-compliant

²⁵⁵ Email from [Marketing Director] (Ultra) to the Board (Ultra) dated 19 December 2011, titled 'Onliners update', dated 19 December 2011 (URN UD0079).

²⁵⁶ Proposed guidelines scripts for outbound calls (URN UD0089).

²⁵⁷ Proposed guidelines scripts for outbound calls (URN UD0089).

²⁵⁸ Proposed guidelines scripts for outbound calls' (URN UD0089).

Major Offence – “I can see that your website still doesn’t adhere to our recommendations for online trading. As a company we only want to work with customers who represent our brands correctly online, therefore **we have no other option than to give you 48hrs notice to change your website. If after this time you are non-compliant, your account will be put on STOP.** Please contact us on [...] when the necessary changes have been made and we will remove the STOP status off your account

Minor Offence – “Thanks for taking the time and effort to bring your website in line with our recommendations for online trading. However, I have noticed a few products which I believe do not fully comply with the new Guidelines [NOTE: Name them if questioned] **Please can you ensure that ALL products are brought in line with the guidelines within the next 48hrs, otherwise we will have no alternative option than reducing your discount terms to [X]% until such time as your website is fully compliant.**

- After 48hrs the account is compliant – No Action Needed at this time
- After 48hrs **minor offence still exists** – Ring customer back and advise “I can see that your website still doesn’t adhere to our recommendations for online trading. As a company, we only want to work with customers who represent our brands correctly online, therefore until you make the necessary changes, **your account terms have been immediately reduced to [X]%. Your terms will remain at [X]% until this matter is resolved [...].**”²⁵⁹ (Emphasis added by CMA)

5.99 Contemporaneous internal Ultra documents confirm that Ultra took initial enforcement action against resellers that were not complying with the Trading Guidelines. For example, the Contact Record²⁶⁰ included a column headed ‘Card’ with ‘yellow cards’ and ‘red cards’ listed against some customers’ accounts. Ultra confirmed that it used the yellow cards as ‘internal “flags” to indicate that customers had breached the guidelines and been asked not to commit any further breaches’.²⁶¹

5.100 This was supported by written evidence obtained during the CMA’s investigation. In interview, [Marketing Director] of Ultra explained that: ‘if they were making an effort to sort something out, then, potentially, the term “yellow card” was used. [...] if a customer was completely just carrying on trying to

²⁵⁹ Proposed guidelines scripts for outbound calls’ (URN UD0089).

²⁶⁰ See paragraph 5.90.2 above.

²⁶¹ Question 6(b) of Ultra’s response to section 26 notice dated 20 February 2015 (URN UC0080.1).

misrepresent the products completely [...] that'd probably be category red card. [...]'.²⁶²

Reducing resellers' wholesale terms of supply

5.101 The evidence demonstrates that Ultra threatened to, and did in practice, reduce the wholesale terms²⁶³ of resellers that did not sign the Reseller Image Licence. As explained above, Ultra considered that, by signing the Reseller Image Licence, resellers were providing confirmation that they supported the Trading Guidelines.²⁶⁴ Moreover, the Final Proposal²⁶⁵ and the script for calls with resellers on 1 February 2012 noted that Ultra planned to reduce the terms of resellers for a 'minor offence' until products were 'brought in line with the guidelines'.²⁶⁶ For example:

5.101.1 On 5 January 2012, [Marketing Director] of Ultra sent an email to [Employee] of [Reseller] forwarding Ultra's email of 9 December 2011:²⁶⁷

*'Please see e-mail below and contract attached covering all the information on our trading guidelines. [...] Please can you scan sign and email the contract back to me as a matter of urgency? **We are going to take steps over the next week or so to permanently reduce the terms of customers who have not signed and returned the contract (on HR and Ultra).** For customers who have signed the contract we will require proof prior to the 1st Feb the brands are represented appropriately. I am encouraged you support the guidelines [...]*'.²⁶⁸

5.101.2 An email, undated, sent from the Trading Guidelines Mailbox to four resellers,²⁶⁹ informed them that their terms had been reduced

²⁶² Transcript of interview with [Marketing Director] (Ultra) dated 19 August 2015, page 74, lines 10 to 14; 16 to 18 and 21 to 22 (URN UC0161.1).

²⁶³ The reference to 'terms' was the trading terms agreed between Ultra and each reseller, and included the wholesale/cost price at which Ultra would supply product to the reseller. Ultra has confirmed that a 'reduction in terms' means that, instead of being supplied at the more common wholesale/cost price of [~~3~~] off RRP, resellers would instead be given a less generous discount of (say) [~~3~~] % off RRP, thereby increasing the wholesale/cost price of the product(s). Question 9 (a) of Ultra's response to section 26 notice dated 20 February 2015 (URN UC0080.1). This was also confirmed by [Marketing Director] (Ultra) in interview. Transcript of interview with [Marketing Director] (Ultra) dated 19 August 2015, page 25, lines 5 to 8 (URN UC0161.1).

²⁶⁴ See paragraph 5.65 above.

²⁶⁵ See paragraph 5.36.6 and Annex D.

²⁶⁶ See paragraph 5.98 above.

²⁶⁷ See paragraph 5.53 above.

²⁶⁸ Email from [Marketing Director] (Ultra) to [Employee] ([Reseller]) dated 5 January 2012, titled 'Trading Guidelines' (URN UD0051).

²⁶⁹ Ultra confirmed that the recipients of the email were the: 'list of customers shown on the Tab 'terms reduced; within the Original Customer Contact – Master document'. The customers listed at the worksheet were:

to RRP less [X]% for failure to return a signed Reseller Image Licence to Ultra:

*'It is with regret, we provide you with confirmation that your terms on Hudson Reed and Ultra have been reduced to less [X]% off our retail prices with immediate effect. A signed copy of our image licence contract was not received back at Ultra within the timeframes set out on our previous correspondence.'*²⁷⁰
(Emphasis added by CMA)

5.101.3 On 16 January 2012, Ultra sent an email from the Trading Guidelines Mailbox to [Reseller], noting:

*'It is with regret, we provide you with notice your terms on Hudson Reed and Ultra will be reduced to less [X]% off our retail prices from Monday 23rd January, if a signed contract is not received back at Ultra Finishing next week.'*²⁷¹ (Emphasis added by CMA).

5.102 Further, within the Contact Record,²⁷² the 'Accounts Reduced To Less [X]%' sheet listed four resellers (including [Reseller]) who had their terms reduced on 23 January 2012 because Ultra had not received a signed version of the Reseller Image Licence from them.²⁷³

5.103 This is supported by evidence obtained by the CMA during its investigation. [Marketing Director] of Ultra confirmed in interview that Ultra did reduce customers' terms to 'less [X]%' in practice.²⁷⁴

Ceasing supply to resellers

5.104 In line with the proposed script for calls set out above,²⁷⁵ where a reseller did not sign the Reseller Image Licence and/or the reseller's website was not deemed to be complying with the Trading Guidelines, Ultra threatened to

[Reseller], [Reseller], [Reseller] and [Reseller]. Question 8.4 of Ultra's response to follow up section 26 notice dated 19 November 2014 (URN UC0055.1).

²⁷⁰ Email from Trading Guidelines Mailbox (Ultra) to unnamed recipients (undated) (URN UD0116).

²⁷¹ Email from Trading Guidelines Mailbox (Ultra) to [Employee] ([Reseller]), dated 16 January 2012 (URN UD0719).

²⁷² See paragraph 5.90.2 above. Ultra spreadsheet titled 'Contact Record – Master Sheet' undated (URN UD0135).

²⁷³ Namely: [Reseller], [Reseller], [Reseller] and [Reseller]. As explained at paragraph 5.90.2 above, the reference to 'contract' in the Contact Record refers to the Reseller Image Licence.

²⁷⁴ Transcript of interview with [Marketing Director] (Ultra) dated 19 August 2015 page 79, lines 15 to 17 (URN UC0161.1).

²⁷⁵ See paragraph 5.98 above.

cease supply of Hudson Reed and Ultra branded products until the ‘necessary changes’ had been made. For example:

- 5.104.1 On 3 February 2012, [Marketing Director] of Ultra sent an email titled ‘*Trading Guidelines update*’ to all resellers that had received the Trading Guidelines on 9 December 2011. In the email [Marketing Director] advised resellers that Ultra would cease to supply them if they failed to agree to the terms of the Reseller Image Licence or if they failed to market the Hudson Reed or Ultra brands ‘appropriately’ online:

*‘As you are aware, we are in the process of rationalising our channels to market online. This is to ensure we can successfully manage the Hudson Reed and Ultra brands appropriately online. [...] It was a condition of our continued trading on the Hudson Reed and Ultra brands that customers sign up to our Image Copyright Licence. [...] **A number of customers have failed to agree to our image terms and as a consequence we have put them on stop. [...] If you are aware of any customers who are using inappropriate images in relation to our products I should be grateful if you would bring this to my attention. [...] The first stage of the process with the implementation of the Image Licence has been concluded. While we will constantly be reviewing how we market our products, this present review, based upon the above factors, will continue in earnest over the weekend and in the coming weeks. It is possible this process may see us cease supply of Hudson Reed or Ultra products to other customers in addition to those who have not signed up the Image Licence. [...] Please can we also request you make sure the content of any pay per click Google advertising is accurate and does not display a promotion in breach of the copyright licence agreement?**’*²⁷⁶ (Emphasis added by CMA)

- 5.104.2 The Contact Record²⁷⁷ included a worksheet entitled ‘*Accounts Put On Stop*’. This sheet stated ‘*Accounts listed below are to be put on STOP indefinitely until customers [sic] website is compliant*’. This sheet set out a list of account names and the date Ultra ceased

²⁷⁶ Email from [Marketing Director] (Ultra) to Trading Guidelines addressees, dated 3 February 2012 titled ‘*Trading guidelines update*’ (URN UD0099). Also supplied by [Reseller] (URN U30007.4M).

²⁷⁷ See paragraph 5.90.2 above. Ultra spreadsheet titled ‘*Contact Record – Master Sheet*’ undated (URN UD0135).

and resumed supply on dates in February and July 2012. For example, the sheet recorded that Ultra:

- ceased to supply [Reseller] on 3 February 2012 and resumed supply on 9 February 2012²⁷⁸
- ceased to supply [Reseller], [Reseller] and [Reseller] on 3 February 2012 and resumed supply on 6 February 2012
- ceased to supply [Reseller], [Reseller] and [Reseller] on 3 February 2012 and resumed supply on 8 February 2012, and
- ceased to supply [Reseller] on 5 July 2012 and resumed supply on 9 July 2012.²⁷⁹

5.104.3 On 10 February 2012, [Marketing Director] of Ultra sent [Marketing Executive] of Ultra an email titled ‘*Online update*’.²⁸⁰ This attached a spreadsheet entitled ‘*Online overview list 10.2.12*’,²⁸¹ which referred to Ultra sending out legal letters to certain resellers. The ‘*Online overview list 10.2.12*’ noted that a number of resellers had been put ‘on stop’, with the following comments:

‘[Reseller] [...] Not interested in project, wouldn’t listen to reason “guarantees what we are doing is illegal and we will all go to jail” Any communication as to why he is “on stop” should be linked to outstanding overdue debt [...]

[Reseller] [...] Not inline, no contract signed, info provided – account on stop [...]

[Reseller] [...] Contract not received. Not in line, contenscious [sic] – on stop’.²⁸² (Emphasis as in original).

5.105 Ultra’s Master Spreadsheet also confirms that Ultra ceased to supply two resellers entirely as they had not signed the Reseller Image Licence.²⁸³

²⁷⁸ See further paragraphs 5.142 to 5.145 below.

²⁷⁹ Ultra spreadsheet titled ‘*Contact Record – Master Sheet*’ undated (URN UD0135).

²⁸⁰ Email from [Marketing Director] (Ultra) to [Marketing Executive] (Ultra), titled ‘*Online update*’ dated 10 February 2012 (URN UD0085).

²⁸¹ Attachment to email from [Marketing Director] (Ultra) to [Marketing Executive] (Ultra) titled ‘*Online update*’ dated 10 February 2012 (URN UD0085).

²⁸² Attachment to email from [Marketing Director] (Ultra) to [Marketing Executive] (Ultra) titled ‘*Online update*’ dated 10 February 2012 (URN UD0085).

²⁸³ Worksheet ‘*Removed Images From Site Due to Breaches*’ in the Master Spreadsheet (URN UD0018) where [Reseller] and [Reseller] are listed as having supply stopped by Ultra. [Reseller] and [Reseller] are listed as accounts who had not signed the Reseller Image Licence in the Contact Record.

5.106 In addition, the evidence demonstrates that Ultra threatened to cease supply to certain resellers specifically for failure to comply with the Online Discounting Restriction. For example, on 1 February 2012, [Sales and Marketing Director] of Ultra sent an email to [Employee] of [Reseller] stating:

*'[...] our online trading guidelines have come into effect today and it has been reported that your site is not compliant with them. We've been having discussions with all our online traders since Dec-11 about working together to meet the 1/2/12 deadline and didn't expect any difficulties from your site. [...] if we can't bring your site in line by close of business on 2/2/12 we will have to put your account on 'stop'. We certainly don't want to have to take this course of action and would appreciate it if someone contacts [Marketing Executive] [...] to give him some assurances that you will have correct pricing by tomorrow evening.'*²⁸⁴ (Emphasis added by CMA)

5.107 In addition, on 6 February 2012, [Marketing Director] of Ultra sent an email to a number of resellers giving notice of Ultra's intention to cease supply.²⁸⁵ On the same day, [Marketing Director] of Ultra forwarded this email to [Marketing Executive], [Marketing Executive] and [Employee], all of Ultra, noting that the reason for this action was because Ultra had not received the Reseller Image Licence back.²⁸⁶ However, such notice was also given to a reseller, [Reseller], because it had '*prices out online*', by which the CMA infers that the reseller's online prices were below the Recommended Online Price.²⁸⁷

5.108 Finally, the Contact Record also contained a column headed '*New RRP's [sic]*' which recorded entries against resellers recording whether or not they had updated RRP's in line with the February 2012 Price List. For example, against [Reseller], Ultra logged, '*Seem to have changed prices but not discounting at 25%. (28/05/2012)*'.²⁸⁸ Against another reseller, [Reseller], Ultra noted – '*Changed RRP's, not to 25% discount. (29/05/2012)*'

5.109 In its section 26 response, [Reseller] stated that: '*Our selling rights were also taken from us by Ultra for selling Ultra's brands namely Home of Ultra and Hudson Reed as our prices online were not in compliance with their*

²⁸⁴ Email from [Sales and Marketing Director] (Ultra) to [Employee] ([Reseller]) dated 1 February 2012, titled '*Online Trading Guidelines*' (URN UD0046).

²⁸⁵ Email from [Marketing Director] (Ultra) to undisclosed recipients dated 6 February 2012 (URN UD0045).

²⁸⁶ Email from [Marketing Director] (Ultra) to [Marketing Executive] (Ultra), [Marketing Executive] (Ultra) and [Employee] (Ultra) forwarding an email giving notice to resellers, dated 6 February 2012 (URN UD0045).

²⁸⁷ Email from [Marketing Director] (Ultra) to [Marketing Executive] (Ultra), [Marketing Executive] (Ultra) and [Employee] (Ultra) forwarding an email giving notice to resellers, dated 6 February 2012 (URN UD0045).

²⁸⁸ Ultra spreadsheet titled '*Contact Record – Master Sheet*' undated (URN UD0135).

advertising their products online at less 25% off RRP.²⁸⁹ (Emphasis added by CMA)

Withdrawal of image rights

5.110 The evidence demonstrates that, by mid-February 2012, Ultra was concerned that it was apparent that Ultra was using the Reseller Image Licence to specifically enforce the Online Discounting Restriction and also needed to be seen to be enforcing the copyright/image elements of the Reseller Image Licence. On 10 February 2012, [Marketing Director] of Ultra sent [Marketing Executive] of Ultra an email titled '*Online update*' attaching a spreadsheet entitled '*Online overview list 10.2.12*'. In the email, [Marketing Director] of Ultra stated:

'[...] 2. I am increasingly concerned the Copyright licence agreement is an obvious smoke screen for managing prices. The advice we have been given suggests we do need to be seen to enforce the clauses in the contract. Emphasis to date has purely been on prices. [Supplier] tightly manage the marketing of their products on their authorised reseller sites (ie a customer's [sic] gets a phone call for a breach such as using an incorrect image).²⁹⁰

3. According to [Lawyer] [Ultra's lawyer],²⁹¹ it only needs a handful of customers to club together and say they were told the same thing verbally and it is strong evidence of price fixing [...].

Marketing propose the next step is to push sales through a limited number of accounts (top 30 or 40?), who will share all the sales and inevitably support the guidelines, the likelihood of a legal challenge will be greatly reduced. We

²⁸⁹ [Reseller]'s response to question 10 of the section 26 notice dated 8 May 2015 (URN U100002.1) (See questions at URN U100001.1).

²⁹⁰ In interview the CMA asked about bullet 2 in this email and [Marketing Director] responded that her concerns with the Reseller Image Licence referred to in this email were: '*that it was being misunderstood and we were being [...] linked to [Supplier] too closely [...] the legal advice [...] we'd started to get was, obviously, that what [...] they were doing [...] was aggressive.* CMA: So when you say "For managing prices", what did you mean? [Marketing Director] responded: '*It was, genuinely, making sure our retail prices are accurate and not getting -- not customers being dragged into potentially us telling them what to sell at; which we didn't [...]. That had been my concern; that customers were misunderstanding it and we were all being tarred as doing something similar*'. Transcript of interview with [Marketing Director] (Ultra) dated 19 August 2015, page 58, lines 1 to 10 (URN UC0161.1).

²⁹¹ [Lawyer] of AB Corporate LLP is an external lawyer that acted for Ultra. See by way of example letter from [Lawyer] of AB Corporate LLP to [Reseller] dated 7 March 2012 (URN UD0125).

manage the other accounts out²⁹² by them not adhering to clauses in the Copyright licence agreement.²⁹³ (Emphasis added by CMA)

5.111 Later that day, on 10 February 2012 at 16:01, [Marketing Director] of Ultra sent an update email to all resellers making sales online²⁹⁴ titled '*Hudson Reed and Ultra trading guidelines update*' and drew specific attention to certain clauses of the Reseller Image Licence, including Clauses 4.6 and 4.18. [Marketing Director] of Ultra noted that Ultra was continuing to monitor resellers' websites to ensure compliance with the Reseller Image Licence:

'Thank you for your support in making the introductory stage of our trading guidelines a success. We are continuing to monitor the suitability of sites in line with the Copyright licence agreement and give focus to all points in the contract, some of which are outlined below. [...]

*Please note clause 4.6 "The reseller shall not use the images or the Trademarks in connection with any Promotional Offer without the prior written consent of Ultra Finishing." This covers additional discounts visibly displayed on your website. [...].'*²⁹⁵ (Emphasis as per original)

5.112 This demonstrates that Ultra used the Reseller Image Licence not only as a vehicle through which it asked its resellers to confirm their support for the Trading Guidelines, but also as a mechanism through which it forced resellers to bring their websites 'into line' if they set online prices below the Recommended Online Price.²⁹⁶

5.113 In light of the importance of images to a reseller's ability to sell online,²⁹⁷ the CMA considers that threats of, and actual, withdrawal of image rights was an effective enforcement mechanism, among others, by which to obtain resellers' compliance with the Online Discounting Restriction.

²⁹² In interview, [Marketing Director] (Ultra) stated that '*manage the other accounts out*', referred to '*my opinion at the time, that we could, potentially, use the copyright licence agreement on points like promotions [...] or them not paying their bill, the state of the site; just to explore options. Because how you would actually rationalise your customers again...we'd have to take legal advice on that, because its restrictive trade*'. Transcript of interview with [Marketing Director] (Ultra) dated 19 August 2015, page 60, lines 12 to 20 (URN UC0161.1).

²⁹³ Email from [Marketing Director] (Ultra) to [Marketing Executive] (Ultra), titled '*Online update*' dated 10 February 2012 (URN UD0085).

²⁹⁴ [Marketing Director] (Ultra) forwarded the email to [Employee] ([Reseller]), [Director] (Ultra) and [Employee] [company unknown] on 13 February 2012 stating: '*below went out to all other onliners on Friday*' (URN UD0015). Ultra confirmed in its response to Question 1.15 of follow up section 26 notice dated 19 November 2014 that the email was sent to '*All online customers*' (URN UC0055.1).

²⁹⁵ Email from [Marketing Director] (Ultra) to all online customers, titled '*Hudson Reed and Ultra trading guidelines*' (URN UD0097). [Reseller] received this email (URN U20085.7).

²⁹⁶ See paragraph 5.42 above.

²⁹⁷ See paragraphs 5.67 to 5.68 above.

- 5.114 In line with this position, the Contact Record included a table titled '*Accounts Who have not signed*', which demonstrates that Ultra sent legal letters before action²⁹⁸ to a number of resellers that had not signed up to the Reseller Image Licence, advising them that they had no permission to use Ultra's brand images.²⁹⁹ The letters required the recipients to provide signed undertakings not to use Ultra's images in the future without Ultra's express written permission. A separate letter sent on the same date enclosed the Reseller Image Licence and stated '*If you wish to continue using images supplied by and authorised by our client, our client is prepared to consider disposing of this matter and not taking any further action in relation to the breach of copyright [...] if you enter into our client's standard Image Licence Agreement*'.³⁰⁰
- 5.115 The Contract Record also included a table titled '*Accounts Who Have Signed Contract Who Are Not Adhering to the Guidelines*'.³⁰¹ The table referred to a letter having been sent to four resellers.³⁰² According to the letter, Ultra required the reseller to remedy all breaches of the Reseller Image Licence, noting Ultra's rights to terminate the reseller's rights to use Ultra's images and trademarks and thereby its reseller status.³⁰³
- 5.116 The evidence shows that, in at least one instance, on 13 April 2012, Ultra subsequently sent a further letter to a reseller advising that the Reseller Image Licence was terminated with immediate effect and required the reseller to immediately cease using all images supplied by Ultra.³⁰⁴
- 5.117 The attachment to [Marketing Director] of Ultra's email of 10 February 2012 to [Marketing Executive] of Ultra³⁰⁵ (the '*Online overview list 10.2.12*') indicates that Ultra considered that there had been such a breach of the Reseller Image Licence where online prices were '*out of line*'. The spreadsheet indicates that at least eleven resellers were identified to receive legal letters threatening to

²⁹⁸ The CMA has copies of such '*Letters Before Action*' as sent to resellers including [Reseller], [Reseller] and [Reseller], Letter from [Lawyer] (AB Corporate LLP) to [Reseller] dated 6 March 2012 (URN UD0123), Letter from [Lawyer] (AB Corporate LLP) to [Reseller] dated 7 March 2012 (URN UD0125). See also letter from [Lawyer] (AB Corporate LLP) to [Reseller] dated 7 March 2012 (URN UD0122).

²⁹⁹ Ultra spreadsheet titled '*Contact Record – Master Sheet*' undated (URN UD0135), '*Letters to be sent*' sheet. The resellers included in the table were: [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller] and [Reseller].

³⁰⁰ Letter from [Lawyer] (AB Corporate LLP) to [Reseller] dated 7 March 2012 (URN UD0126).

³⁰¹ Ultra spreadsheet titled '*Contact Record – Master Sheet*' undated (URN UD0135), '*Letters to be Sent*' sheet.

³⁰² [Reseller], [Reseller], [Reseller] and [Reseller].

³⁰³ Page 3 of template letters (URN UD0025), as confirmed by Ultra in its response to Question 6(c) of the CMA's enquiries of 28 April 2015 relating to a section 26 notice dated 20 February 2015 (URN UC0099.1).

³⁰⁴ Letter from [Lawyer] (AB Corporate LLP) to [Reseller] dated 13 April 2012 (URN U110007.1).

³⁰⁵ See paragraph 5.110 above. Attachment to email from [Marketing Director] (Ultra) to [Marketing Executive] (Ultra) titled '*Online update*' dated 10 February 2012 (URN UD0085).

withdraw image rights on the grounds that they were 'out of line'. For example, comments in the spreadsheet note:

5.117.1 *'Signed contract received but [...] he has moved his prices out of line'*³⁰⁶

5.117.2 *'Signed a contract – not inline',*³⁰⁷ and

5.117.3 *'Google advertising campaign advertising 45% off all HR products'.*³⁰⁸

Ongoing monitoring and enforcement

5.118 This section sets out the evidence demonstrating that, after February 2012, Ultra continued to monitor resellers' compliance with the Trading Guidelines, and in particular their compliance with the Online Discounting Restriction, and both threatened and took enforcement action if it found instances of non-compliance.³⁰⁹

5.119 The evidence demonstrates that, from time to time during the Relevant Period, Ultra issued revised product lists containing updated RRPs, and accordingly updated Recommended Online Prices, which continued to be set at 25% below the RRP for in-store sales, in line with the terms of the Online Discounting Restriction. For example:

5.119.1 On 12 December 2012 and 15 January 2013, Ultra sent emails attaching a new Hudson Reed and Ultra price list, including updated Recommended Online Prices, from the Trading Guidelines Mailbox to resellers. The email sent on 12 December 2012 stated as follows:

'As a valued online retailer of Hudson Reed & Ultra products, we are pleased to attach a copy of new retail prices effective from 1st March 2013, accompanied by a column showing the recommended retail price for online sales. Please be aware that all online prices

³⁰⁶ Comment regarding [Reseller]. Attachment to email from [Marketing Director] (Ultra) to [Marketing Executive] (Ultra) titled 'Online update' dated 10 February 2012 (URN UD0085).

³⁰⁷ Comment regarding [Reseller]. Attachment to email from [Marketing Director] (Ultra) to [Marketing Executive] (Ultra) titled 'Online update' dated 10 February 2012 (URN UD0085).

³⁰⁸ Comment regarding [Reseller]. Attachment to email from [Marketing Director] (Ultra) to [Marketing Executive] (Ultra) titled 'Online update' dated 10 February 2012 (URN UD0085).

³⁰⁹ See paragraphs 5.119 to 5.1.

detailed in the file are a recommendation only and are not legally binding'.³¹⁰

5.119.2 Similarly, on 30 May 2014, Ultra sent an email from the Trading Guidelines Mailbox attaching '*a handful of price re-aligns for our Hudson Reed & Ultra brands – valid from 1st June 2014*'.³¹¹ The updated RRP's again included updated Recommended Online Prices.³¹²

5.120 The evidence demonstrates that, from time to time during the Relevant Period, Ultra monitored resellers' compliance with the Trading Guidelines, which specifically included monitoring resellers' compliance with the Online Discounting Restriction.

5.121 For example, Ultra's '*Brand Management Summary*'³¹³ worksheet in the Contact Record dated 22 May 2012 listed [100-150] websites selling Hudson Reed and Ultra branded products online and stated that [more than 90%] of those websites were '*Adhering To The Guidelines*'. A further [less than 10% of] websites were listed as '*Working Outside The Guidelines*' and the comments in this document demonstrate that Ultra had taken enforcement action against these resellers. For example:

5.121.1 The *Brand Management Summary* worksheet suggests that '*working outside*' Ultra's Trading Guidelines was related to the reseller's online prices. In particular, Ultra noted that '*[[j]ust a couple still out. 99% now inline*' and '*7 Rad valves still outside Guidelines. old RRP's have been used*'.³¹⁴

5.121.2 In addition, the worksheet further demonstrates that Ultra withdrew permission for a reseller, [Reseller], to use its images on its website. This was as a result of [Reseller] not complying with the Online Discounting Restriction because it was selling at discounts

³¹⁰ Email from Trading Guidelines Mailbox (Ultra) to resellers making sales online dated 12 December 2012 (URN UD0729). Email from Trading Guidelines Mailbox (Ultra) to resellers making sales online dated 15 January 2013 (URN UD0727).

³¹¹ Email from Trading Guidelines Mailbox to Trading Guidelines addressees dated 30 May 2014 (URN UD0699).

³¹² Spreadsheet attached to email from Trading Guidelines Mailbox to Trading Guidelines addressees dated 30 May 2014 (URN UD0697.1). Also spreadsheet attached to email from Ultra to [Reseller] dated 30 May 2014 (URN U30007.4Y).

³¹³ Ultra spreadsheet titled '*Contact Record – Master Sheet*' (URN UD0135).

³¹⁴ Ultra spreadsheet titled '*Contact Record – Master Sheet*' (URN UD0135).

of more than 25%, thereby at prices lower than the Recommended Online Price:

*'Rang him regarding breach. Has said that he's not able to compete at the discounts stated so is selling over 25%. Heated discussion, culminating in him hanging up and me advising that he should remove all products from his site.'*³¹⁵

5.122 This was confirmed by [Marketing Executive] of Ultra in interview with the CMA.³¹⁶

5.123 A summary worksheet dated March 2013 also demonstrates that Ultra monitored [100-150] customers selling Hudson Reed and Ultra branded products online at that time and recorded [less than 10% of accounts as] *'problem sites after March Price Increase'*.³¹⁷

5.124 In addition, a spreadsheet entitled, *'Brand Management Daily Check Sheet'*,³¹⁸ demonstrates that Ultra was monitoring online prices of its customers in 2014, including whether or not those prices were 'in line' with a 'Recommended Selling Price'. The spreadsheet also indicates that Ultra intended to make contact with resellers to resolve any 'issue'.

5.125 An extract from the *'Brand Management Daily Check Sheet'* for 2014 is set out at Table 2 below. It demonstrates that Ultra considered a *'non-compliant'* website to be one whose 'Customer Price' was below the 'Recommended Selling Price'. The CMA infers that the 'Recommended Selling Price' was the Recommended Online Price, as the Recommended Selling Price is consistently 25% below the stated RRP, and therefore in line with the expected Recommended Online Price. The *'Brand Management Daily Check Sheet'* also demonstrates that Ultra contacted the *'non-compliant'* reseller to *'resolve'* the breach where a 'Customer Price' was below the Recommended Online Price, even if by a marginal amount.³¹⁹

³¹⁵ Ultra spreadsheet titled *'Contact Record – Master Sheet'* (URN UD0135).

³¹⁶ When asked about the entry against the reseller, [Reseller], in the *'Brand Management Summary'* table in the Ultra spreadsheet titled *'Contact Record – Master Sheet'*, [Marketing Executive] (Ultra) stated: *'we identified that he was selling outside the recommended online discount, so we rang to have a conversation about it and that was [...] the result'*. Transcript of interview with [Marketing Executive] (Ultra) dated 19 August 2015, page 45, lines 15 to 17 (URN UC0160.1).

³¹⁷ Brand Management Summary, dated 20 March 2013 (URN UD0102). See also (URN UD0229).

³¹⁸ Ultra spreadsheet titled *'Brand Management Daily Check Sheet'* (URN UD0105).

³¹⁹ For example, on 19 June 2014, Ultra recorded [Reseller] as being 'non-compliant' for a price that was three pence below the 'Recommended Selling Price'. Ultra spreadsheet titled *'Brand Management Daily Check Sheet'* (URN UD0105).

Table 2: Extract from Brand Management Daily Check Sheet³²⁰

Date 2014	Product Code	Recommended Retail Price	Recommended Selling Price	Any results out of line?	Details of Non Compliant Websites?	Customer Price	Contact Needed?	Contact Made?	Issue Resolved?
18 June	[✂]	£397.00	£297.75		[Reseller]	£219.95	Y	Y	Y
19 June	[✂]	£261.00	£195.75		[Reseller]	£195.72	Y	Y	Y
20 June	[✂]	£99.00	£74.25	Y	[Reseller]	£60.76			
24 June	[✂]	£755.00	£566.25	Y	[Reseller]	£552.99	Y	Y	Y
24 June	[✂]	£156.00	£117.00	Y	[Reseller]	£99.00	Y	Y	
24 June	[✂]	£156.00	£117.00	Y	[Reseller]	£114.99	Y	Y	Y
24 July	[✂]	£32.80	£24.60	Y	[Reseller]	£24.00			
25 July	[✂]	£229.00	£171.75	Y	[Reseller]	£167.26			
11 August	[✂]	£41.00	£30.75	Y	[Reseller]	£24.74			

³²⁰ Ultra spreadsheet titled 'Brand Management Daily Check Sheet' (URN UD0105).

5.126 In addition, a further extract from an entry on a tab of the '*Brand Management Daily Check Sheet*' headed with one reseller's name ([Reseller])³²¹ indicates that Ultra monitored at least this reseller's online price and compared it to the Recommended Online Price (see Table 3 below). Where the reseller's price was 'non-compliant', Ultra made contact with the reseller to '*resolve*' the issue. The spreadsheet shows that Ultra considered a 'website discount' that offered a product at 1% below the Recommended Online Price to require contact from Ultra:

³²¹ Ultra spreadsheet titled 'Brand Management Daily Check Sheet' (URN UD0105).

Table 3: Extract from '[Reseller]' tab on *Brand Management Daily Check Sheet*³²²

Product Code	Ultra or Hudson Reed RRP	Recommended On Line Price	Discount	You pay price	Website Discount	Contact Needed?	Contact Made?	Issue Resolved?
[✂]	735.00	551.25	25%	£546.00	26%	Y	Y	Y
[✂]	599.00	449.25	25%		100%			
[✂]	526.00	394.50	25%		100%			
[✂]	247.00	185.25	25%	£184.00	26%	Y	Y	Y
[✂]	360.00	270.00	25%	£259.00	28%	Y	Y	Y

³²² Ultra spreadsheet titled 'Brand Management Daily Check Sheet' (URN UD0105).

5.127 In interview, [Marketing Executive] of Ultra confirmed that the purpose of this spreadsheet was to monitor the reseller's online price and to compare it to the Recommended Online Price: *'So, obviously, this one, it was a recommended retail price and making sure that someone's got the correct RRP. We obviously had the, the recommended online price which was 25 per cent. So, that was that. If there was any issues at, at that level, in Google, so if you could, could see any differences between those two, we'd have to let the customer know.'*³²³

Conclusion on monitoring and enforcement by Ultra to sign the Reseller Image Licence and comply with the Online Discounting Restriction

5.128 In the light of the evidence set out above, the CMA considers that Ultra actively monitored which resellers had signed and returned the Reseller Image Licence. Ultra also monitored resellers' websites to check that resellers making sales online were in compliance with the Trading Guidelines, including in particular the Online Discounting Restriction.

5.129 Ultra made it clear to resellers in January 2012 (at the latest) that there would be consequences for failure to comply with the Trading Guidelines, which included the Online Discounting Restriction.³²⁴ The three principal enforcement mechanisms used by Ultra for non-compliance with the Online Discounting Restriction (either alone or in combination) were:

- 5.129.1 temporarily or permanently reducing the reseller's wholesale terms of supply
- 5.129.2 temporarily or permanently ceasing supply of Hudson Reed or Ultra branded products, and
- 5.129.3 withdrawing the reseller's right to use images of Hudson Reed or Ultra branded products.

G. Reseller understanding and conduct: adherence to the Online Discounting Restriction

5.130 The evidence set out above, including in particular Ultra's internal strategy documents and correspondence, demonstrates that the Reseller Image Licence and price list containing the Recommended Online Price were sent to all resellers selling Hudson Reed and Ultra branded products online

³²³ Transcript of interview with [Marketing Executive] (Ultra) dated 19 August 2015, page 37, lines 18 to 22 (URN UC0160.1).

³²⁴ See for example paragraph 5.97 above.

(approximately [100-150] resellers³²⁵).³²⁶ The evidence also demonstrates that Ultra monitored all its resellers' websites for compliance with the Online Discounting Restriction.³²⁷

5.131 For administrative efficiency, the CMA has identified three resellers as examples from the numerous resellers selling Hudson Reed and Ultra branded products online in order to demonstrate the existence of an agreement and/or concerted practice with Ultra. Therefore, this Section sets out specific evidence in relation to three of Ultra's resellers, [Reseller 1], [Reseller 2] and [Reseller 3] (each a Reseller and together the Resellers), in response to the introduction of the Trading Guidelines and the Online Discounting Restriction.

5.132 The evidence set out in this Section demonstrates that each of the Resellers understood and adhered to the Online Discounting Restriction, including by setting their online prices no lower than the Recommended Online Price and/or amending their online prices in response to instructions from Ultra, so that they were no lower than the Recommended Online Price.

(i) [Reseller 1]

5.133 Although the CMA makes no findings in relation to the period prior to 1 February 2012, it is relevant context that [Reseller 1] was aware of Ultra's 2009 Online Discounting Policy and reported other resellers to Ultra for offering discounts outside the terms of that policy. In particular, on 1 June 2009, [Employee] of [Reseller 1] sent an email to [National Sales Manager] of Ultra entitled '*Hudson Reed – Over 20%*'.³²⁸ The email included links to a number of resellers' websites that were offering discounts of more than 20% off RRP on Hudson Reed branded products.

5.134 [Reseller 1] has confirmed to the CMA during the course of the CMA's investigation that [Reseller 1] was instructed by Ultra not to sell or advertise online Ultra's products below the level specified by Ultra.³²⁹

5.135 As regards the Trading Guidelines, the evidence demonstrates that there were communications between [Reseller 1] and Ultra about a '*price restriction policy*' as early as September 2011. On 3 September 2011, [Employee] of

³²⁵ See paragraph 4.10 above.

³²⁶ See paragraph 5.55 above.

³²⁷ See paragraphs 5.89 to 5.93 above.

³²⁸ Email from [National Sales Manager] (Ultra) to [Marketing Executive] (Ultra) dated 1 June 2009, forwarding an email from [Employee] ([Reseller 1]) to [National Sales Manager] (Ultra) dated 1 June 2009 (URN UD0143).

³²⁹ Questions 2(b) and (e) of [Reseller 1]'s response to section 26 notice dated 24 October 2014 (URN U20013.1).

[Reseller 1] emailed [National Sales Manager] of Ultra in relation to online sales of Hudson Reed products. She noted:

'Thank you for your time on our recent visit. [...] However, as I know you are aware, Hudson Reed is not a brand that we would promote, or sway a customer to buy, as we are not competitive at all on prices. There are internet retail outlets that are simply butchering your prices to the point where it is impossible to compete. [...] I know this is something that you are currently addressing, and you mentioned that one idea was to restrict the use of your images should an internet retailer not adhere to the suggested selling terms. [...] As you can see images are of no importance here as they are all the same, what is important is price:- Obviously you cannot by law, dictate to retailers what discounts they should sell your products at [...] You can of course, restrict buying terms and Credit [sic] facilities, but your most powerful restriction is that of supply. A structured approach with clear criteria and a consequence of no supply for me is the way forward [...]. Many companies who are enforcing price restrictions [...] have at least one person within the company who monitors the activity of internet retailers everyday [sic] and act immediately upon any that are not abiding by their rules. [...] [Supplier] employ people to monitor the website [...]. I know you supply both direct and through distribution, so you may need two separate approaches here. [...] we are willing to support you in anyway [sic] we can when you introduce a price restriction policy'.³³⁰ (Emphasis added by CMA)

- 5.136 [Reseller 1]'s position as regards a 'price restriction policy' is corroborated by Ultra's internal record of discussions with customers about online discounting from 15 September 2011. Ultra recorded in relation to [Reseller 1]:

'They feel as [✂] it is a shame they can't do more business with us currently. They would however be very keen to support selling HR as one of our preferred onliners if we did introduce a successful policing method.'³³¹ (Emphasis added by CMA)

- 5.137 On 9 December 2011, Ultra sent the Reseller Image Licence and Recommended Online Price to all of its resellers selling Hudson Reed and Ultra branded products online.³³² This included [Reseller 1]. The email

³³⁰ Email from [Employee] ([Reseller 1]) to [National Sales Manager] (Ultra) dated 3 September 2011 (URN UD0161).

³³¹ Ultra minutes from meetings with customers dated 15 September 2011, titled 'Hudson Reed (online discounting meetings)' (URN UD0160).

³³² Email from Trading Guidelines Mailbox to Trading Guidelines addresses dated 9 December 2011 copying in [Employee] ([Reseller 1]) (URN UD0742). See paragraphs 5.53 to 5.55 above.

referred to an earlier discussion about the Trading Guidelines. The CMA infers that this earlier discussion took place in November 2011 in accordance with the script referred to above.³³³

- 5.138 In response to Ultra's email, on 12 December 2011 [Employee] of [Reseller 1] sent an email to Ultra's Trading Guidelines Mailbox. [Employee] of [Reseller 1] confirmed that [Reseller 1] supported Ultra in its objective to control prices and referred back to her previous correspondence from September 2011:

'Thank you for the contract with regard to images.'

Please find below the email that I sent to [National Sales Manager] in September where I outlined my concern with regard to price fixing via the use of images.

[Reseller 1] is seriously on board when it comes to price restrictions, we strongly support [Supplier], [Supplier], to name but a few, as per below we seriously miss out on sales of Hudson Reed as we are unable to compete on price. I really don't feel restrictions on images is the way forward, what is to stop any company taking off your images and use only product codes and prices. I think only in terms of our competition, and I want reiterate that [Reseller 1] will fully support Ultra Finishing as long as all issues are addressed.³³⁴ (Emphasis added by CMA)

- 5.139 During the CMA's investigation, the CMA asked [Employee] of [Reseller 1] to explain her *'concern with regard to price fixing by the use of images'*. [Employee] of [Reseller 1] responded that: *'I must have thought that if we didn't comply with the prices that they wanted us to sell at, that they would take away the images'*.³³⁵

- 5.140 [Employee] of [Reseller 1]³³⁶ signed the Reseller Image Licence on 20 December 2011.³³⁷

- 5.141 In January 2012, Ultra recorded in the Contact Record: *'[Employee of Reseller 1] will have everything in line by 1st [February]. Will leave it a week, then move. Call 30/01 - Still on track.'*³³⁸

³³³ See paragraph 5.47 above.

³³⁴ Email from [Employee] ([Reseller 1]) to Trading Guidelines Mailbox (Ultra) dated 12 December 2011 (URN UD0762).

³³⁵ Transcript of interview with [Employee] ([Reseller 1]) dated 10 September 2015, page 74, lines 7 and 8 and lines 15 to 23 (URN U20124.1).

³³⁶ [X] (URN U20072.2).

³³⁷ Reseller Image Licence between Ultra Finishing Limited and [Reseller] dated 20 December 2011 (URN UD0273).

³³⁸ Column titled *'Januaruy 2012'* (sic), Ultra spreadsheet titled *'Contact Record – Master Sheet'* (URN UD0135).

5.142 In February 2012, [Reseller 1]'s account was put 'on stop' by Ultra. On 6 February 2012, [Employee] of [Reseller 1] sent [Sales and Marketing Director] of Ultra the following email:

*'Can you help out, our account has been stopped but no one has been in contact with me, it appears we updated your 2012 price list and **some prices are incorrect. We have offered to remove all discounts** but still been told we can no longer have an account. [...] I understand someone called [Marketing Executive] has taken the decision.'*³³⁹ (Emphasis added by CMA)

5.143 [Sales and Marketing Director] of Ultra responded to [Employee] of [Reseller 1] later that day, noting that:

*'I believe your account has been put on stop because you have failed to comply with our online trading guidelines. This has come as a bit of a shock because we were strongly of the belief that you were in agreement with our principles.'*³⁴⁰ (Emphasis added by CMA)

5.144 After its account was suspended by Ultra, [Reseller 1] took steps to change its online pricing to be in line with the Online Discounting Restriction in order to have its account with Ultra re-opened. In particular, the evidence shows that on 6 February 2012 [Reseller 1] set its online discounts at 25% off RRP (ie at the Recommended Online Price), in direct response to Ultra's instructions:³⁴¹

5.144.1 At 16:38 on 6 February 2012 [Marketing Director] of Ultra sent [Employee] of [Reseller 1] an email titled '*Hudson Reed & Ultra Trading Guidelines*':

*'Please find information as requested [...] I have also included a copy of the contract that has been signed by [Reseller 1] for your reference too.'*³⁴²

³³⁹ Email from [Employee] ([Reseller 1]) to [Sales and Marketing Director] (Ultra) dated 6 February 2012 (URN UD0109).

³⁴⁰ Email from [Sales and Marketing Director] (Ultra) to [Employee] ([Reseller 1]) dated 6 February 2012 (URN UD0109).

³⁴¹ Question 3.14 of [Reseller 1]'s response to section 26 notice dated 23 October 2014 (URN U20013.1).

³⁴² Email from [Marketing Director] (Ultra) to [Employee] ([Reseller 1]) dated 6 February 2012, titled '*Hudson Reed & Ultra Trading Guidelines*', attaching Ultra and Hudson Reed Price List and signed Reseller Image Licence (URN U20013.3B), (URN U20013.3H), (URN U20013.3G).

5.144.2 At 16:45 on 6 February 2012 [Employee] of [Reseller 1] forwarded this email from Ultra internally to his colleagues, instructing them as follows:

'Selling Discount to be set at 25%. Pls [sic] let me know when it is complete so we can make live. Time is critical as we will lose the google [sic] ranking within a few days'.³⁴³ (Emphasis added by CMA)

5.144.3 When asked about the above instruction from [Employee] of [Reseller 1], [Employee] of [Reseller 1] confirmed in interview that, *'[Employee] would have obviously sent it to the inputting team to make sure that the prices they were inputting as the selling prices were set at 25 per cent off the RRP'.³⁴⁴* [Employee] of [Reseller 1] explained why [Employee] of [Reseller 1] also forwarded the attachments (Reseller Image Licence and price lists) to his colleagues: *'just to make sure obviously that [...] if he's agreed this selling discount with Ultra that these price lists were on the website at the RRP less 25 per cent, because that must have been what he'd agreed with them'.³⁴⁵*

5.144.4 Later on 6 February 2012, at 16:54, [Employee] of [Reseller 1] sent an email to [Employee] of [Reseller 1],³⁴⁶ noting:

'everything is currently off line until we rectify the prices, the account on hold at the moment. [Employee] and [Employee] are working on this now and should be done by Wed am, then I can discuss opening the re-opening the account'.³⁴⁷

5.144.5 When asked about the email above and what [Employee] of [Reseller] meant about everything being off line until *'we rectify the prices'*, [Employee] of [Reseller 1] stated in interview: *'That must have been because obviously we weren't adhering to...their recommended prices...the recommended online prices including VAT from their price list'.³⁴⁸*

³⁴³ Email from [Employee] ([Reseller 1]) to [Employee] ([Reseller 1]), [Employee] ([Reseller 1]) and [Employee] ([Reseller 1]) dated 6 February 2012, titled *'Hudson Reed & Ultra Trading Guidelines'* (URN U20013.3B).

³⁴⁴ Transcript of interview with [Employee] ([Reseller 1]) dated 10 September 2015, page 92, lines 20 to 22 (URN U20124.1).

³⁴⁵ Transcript of interview with [Employee] ([Reseller 1]) dated 10 September 2015, page 93, lines 7 to 10 (URN U20124.1).

³⁴⁶ See document [X] (URN U20072.2).

³⁴⁷ Email from [Employee] ([Reseller 1]) to [Employee] ([Reseller 1]), copying in [Employee] ([Reseller 1]) dated 6 February 2012, titled *'ultra and Hudson reed'* (URN U20013.3C).

³⁴⁸ Transcript of interview with [Employee] ([Reseller 1]) dated 10 September 2015, page 92, lines 2 to 8 (URN U20124.1).

5.144.6 On 7 February 2012, [Employee] of [Reseller 1] sent an email to [Marketing Director] of Ultra with the subject heading 'web sites prices' which stated:

*'We have checked the prices but before we can say 100% they are correct we need to make live on the website. This will take about 2 hrs work and we will show "call for price" and this stops customers placing an order online. At the moment we are not taking any telesales orders over the phone. Please let me know if this is acceptable before we go ahead.'*³⁴⁹

5.144.7 [Marketing Director] of Ultra replied to [Employee] of [Reseller 1] later that day:

*'Sorry but "call for price" is not acceptable.'*³⁵⁰ *Your web site is [✂] and I had numerous calls when this appeared last time. Other customers just assume the worst'.*³⁵¹

5.145 The CMA infers from the email from [Employee] of [Reseller 1] to [Marketing Director] of Ultra on 7 February 2012 that [Reseller 1] changed its online prices in order to comply with the Online Discounting Restriction.³⁵² This is supported by the 'Accounts Put On Stop' sheet in the Contact Record, which records that [Reseller 1] was put 'on stop' on 3 February 2012 and taken 'off stop' on 9 February 2012.³⁵³

5.146 The evidence suggests that [Reseller 1] complied with the Online Discounting Restriction from 7 February 2012 until 31 December 2012. In particular, in addition to the evidence set out above:

5.146.1 The Contact Record 'Master' worksheet recorded [Reseller 1]'s website as being 'Inline' [sic]³⁵⁴

5.146.2 [Reseller 1] does not feature in a list of [less than 10% of] accounts identified as working outside of the Trading Guidelines in the

³⁴⁹ Email from [Employee] ([Reseller 1]) to [Marketing Director] (Ultra) dated 7 February 2012, titled 'web sites prices' (URN U20013.3D).

³⁵⁰ In interview, when asked about her comment in this email on 'call for price' slogans, [Marketing Director] (Ultra) informed the CMA that, 'we made some initially mistakes (sic). We took legal advice and we went back. [...] I remember verbal conversations where we said it's absolutely fine... And obviously [Reseller 1] will have been informed of that at a later date, obviously'. Transcript of interview with [Marketing Director] (Ultra) dated 19 August 2015, page 56, lines 11 to 23 (URN UC0161.1).

³⁵¹ Email from [Marketing Director] (Ultra) to [Employee] ([Reseller 1]) dated 7 February 2012 titled 'web sites prices' (URN U20013.3D).

³⁵² Email from [Employee] ([Reseller 1]) to [Marketing Director] (Ultra), dated 7 February 2012, titled 'web sites prices' (URN U20013.3D).

³⁵³ See paragraph 5.104.2 and Ultra spreadsheet titled 'Contact Record – Master Sheet' (URN UD0135).

³⁵⁴ Column entitled 'Website Inline?' of Ultra spreadsheet titled 'Contact Record – Master Sheet' (URN UD0135).

'Brand Management Summary' worksheet dated 22 May 2012.³⁵⁵
By implication, [Reseller 1] was one of the remaining [more than 90% of] accounts identified as *'adhering'* to the Trading Guidelines

5.146.3 A few days later, on 28 May 2012, Ultra recorded that [Reseller 1]'s *'RRPs'* had not been updated.³⁵⁶ Ultra recorded a yellow card³⁵⁷ against [Reseller 1]'s account name and made a *'reminder call'* to [Reseller 1]. [Reseller 1]'s response to the reminder call was recorded as: *'Passed on to his colleagues to get done'*. The CMA infers from this entry that [Reseller 1]'s online pricing was out of line with the Recommended Online Price for a short period, but Ultra's close monitoring enabled it to discover this quickly and contact [Reseller 1] to remind it to change its online prices. Ultra's comment *'[p]assed on to his colleagues to get done'* demonstrates that [Reseller 1] responded positively to the reminder call. Ultra's monitoring activities also suggest that any other instances of non-compliance would have been identified by Ultra and rectified by [Reseller 1].

5.147 [REDACTED].³⁵⁸ [REDACTED].³⁵⁹ [REDACTED].³⁶⁰

5.148 This is corroborated by contemporaneous documentary evidence that shows Ultra contacted [Reseller 1] again in January 2013 because some of its products were *'outside'* the Trading Guidelines.³⁶¹

5.149 In addition, in the *'Brand Management Summary'* dated 20 March 2013, Ultra recorded [less than 10% of accounts as] *'problem sites after March Price Increase'*, including [Reseller 1], noted as being [REDACTED].³⁶²

5.150 Notwithstanding the fact that [Reseller 1] refused to comply with the Online Discounting Restriction after 1 January 2013, the correspondence between [Reseller 1] and Ultra after 31 December 2012 supports the CMA's findings that Ultra's comments about products being *'outside the trading recommendations'* meant, or were interpreted by [Reseller 1] to mean, that [Reseller 1] was not complying with the Online Discounting Restriction. On 17

³⁵⁵ *'Brand Management Summary'* worksheet of Ultra spreadsheet titled *'Contact Record – Master Sheet'* (URN UD0135).

³⁵⁶ Column entitled *'New RRP's'* of Ultra spreadsheet titled *'Contact Record – Master Sheet'* (URN UD0135).

³⁵⁷ See paragraph 5.99 and footnote 261 above.

³⁵⁸ [REDACTED].

³⁵⁹ [REDACTED].

³⁶⁰ [REDACTED].

³⁶¹ See paragraphs 5.149 to 5.151 below.

³⁶² *Brand Management Summary*, dated 20 March 2013 (URN UD0102). See also (URN UD0229).

January 2013, [Marketing Executive] of Ultra emailed [Employee] of [Reseller 1] to request that [Reseller 1] amended its website:

*'We've noticed a few products which are outside the trading recommendations on your [Reseller 1] site [lists links to [Reseller 1] website]. Please can you get someone at your end to investigate and amend as necessary'.*³⁶³

5.151 On 21 January 2013, [Employee] of [Reseller 1] replied to [Marketing Executive] of Ultra, noting:

*'We seem to be the same price as all the competition? However, [✂], I understand you have a close working relationship. [lists other retailers website prices]'.*³⁶⁴ (Emphasis added by CMA)

5.152 The evidence set out above demonstrates that [Reseller 1] complied with and implemented the Online Discounting Restriction and complied with Ultra's instructions to set its online prices no lower than the Recommended Online Price from 7 February 2012 (at the latest) to at least 31 December 2012.

(ii) [Reseller 2]

5.153 On 9 December 2011, Ultra sent the Reseller Image Licence and Recommended Online Price to all of its resellers selling Hudson Reed and Ultra branded products online.³⁶⁵ This included [Reseller 2]. The email referred to an earlier discussion about the Trading Guidelines. The CMA infers that this earlier discussion took place in November 2011 in accordance with the script referred to above.³⁶⁶

5.154 [Reseller 2] signed the Reseller Image Licence on 15 December 2011.³⁶⁷

5.155 In January 2012, Ultra recorded in the Contact Record against [Reseller 2]:
*'[✂]. Making the changes as we speak. [...] 26/01/2011 [sic]'.*³⁶⁸

5.156 On 16 March 2012, [Marketing Director] of Ultra sent [Reseller 2] an email emphasising that the Trading Guidelines applied to online selling prices: *'It*

³⁶³ Email from [Marketing Executive] (Ultra) to [Employee] ([Reseller 1]), dated 17 January 2013, titled *'Trading Guidelines'* (URN U20013.3F).

³⁶⁴ Email from [Employee] ([Reseller 1]) to [Marketing Executive] (Ultra), dated 21 January 2013, titled *'Trading Guidelines'* (URN U20013.3F).

³⁶⁵ Email from Trading Guidelines mailbox to Trading Guidelines addresses dated 9 December 2011 (URN UD0742) Also see version of email as received by [Reseller 2] (URN U30007.4H). See further paragraphs 5.53 to 5.55 above.

³⁶⁶ See paragraph 5.47 above.

³⁶⁷ Reseller Image Licence signed by [Employee] of [Reseller 2] on 15 December 2011 (URN U30007.4L). Email from [Employee] ([Reseller 2]) to Trading Guidelines mailbox (Ultra) dated 15 December 2011, titled *'Images Agreement'* (URN U30007.4K).

³⁶⁸ Column titled *'Januaruy 2012'* [sic], Ultra spreadsheet titled *'Contact Record – Master Sheet'* (URN UD0135).

*needs to be clear any promotions exclude HR and Ultra product on your site and this needs to be a reality at the checkout’.*³⁶⁹

- 5.157 Ultra monitored [Reseller 2]’s website to check its compliance with the Trading Guidelines, including the Online Discounting Restriction. For example, on 5 April 2012 [Marketing Executive] of Ultra contacted [Employee] of [Reseller 2]:

*‘As part of our weekly checks, we have come across a product on your website which is **currently being marketed outside of our guidelines**: LQ348 Please could you give this your urgent attention?’³⁷⁰ (Emphasis added by CMA)*

- 5.158 [Employee] of [Reseller 2] confirmed to the CMA that his understanding of this request was that Ultra had identified a product which was being advertised at a price lower than the Recommended Online Price.³⁷¹

- 5.159 Later on 5 April 2012, [Marketing Executive] of Ultra sent another email to [Employee] of [Reseller 2] in relation to another product being marketed outside the Trading Guidelines:

‘I have also checked and the LQ345 we discussed last week is still outside the guidelines, your code is: [✂]. Please could you look at this ASAP?’³⁷²

- 5.160 In response to Ultra’s requests, [Reseller 2] confirmed to the CMA that it ‘rectified’ the price of the products that Ultra had identified as being outside the Trading Guidelines.³⁷³ The CMA infers from this that [Reseller 2] changed its price to comply with the Online Discounting Restriction. This is corroborated by an email from [Employee] of [Reseller 2] to [Marketing Executive] of Ultra which noted that [Reseller 2] had already changed the product to be in line with the Trading Guidelines:

‘Thats [sic] been changed - I changed that on Monday

[✂]

³⁶⁹ Email from [Marketing Director] (Ultra) to Trading Guidelines addressees (including [Reseller 2]), dated 16 March 2012 (URN U30007.4O).

³⁷⁰ Email from [Marketing Executive] (Ultra) to [Employee] ([Reseller 2]), dated 5 April 2012 (URN U30007.4Q).

³⁷¹ Question 2(a) of [Employee]’s ([Reseller 2]) response to section 26 notice dated 9 October 2015 (URN U30049.1).

³⁷² Email from [Marketing Executive] (Ultra) to [Employee] ([Reseller 2]), dated 5 April 2012 (URN U30007.4Q).

³⁷³ See Question 2(b) of [Employee]’s ([Reseller]) response to section 26 notice dated 9 October 2015 (URN U30049.1).

From Hudson Reed to Ultra and rrp and selling please explain whats [sic] outside the guide line'.³⁷⁴

5.161 On 21 August 2012, [Marketing Executive] of Ultra sent an email to [Employee] of [Reseller 2]:

'Can we ask you to investigate and make the necessary amendments to the below Ultra product. It's currently outside our recommendations.

[redacted].³⁷⁵

5.162 [Employee] of [Reseller 2] has confirmed that his understanding of Ultra's request was that [Reseller 2]'s advertised price was outside Ultra's recommendations, ie lower than the Recommended Online Price.³⁷⁶ Although [Employee] of [Reseller 2] has stated that [Reseller 2] did not keep a log of what actions were taken following this email, he has confirmed to the CMA that any online price displayed lower than Ultra's Recommended Online Price would have been increased to be no lower than the Recommended Online Price.³⁷⁷

5.163 A further email from [Marketing Executive] of Ultra to [Employee] of [Reseller 2] on 13 December 2012 provides further evidence of Ultra monitoring [Reseller]'s website and instructing it to make changes regarding a number of products listed in the email:

'As discussed, could you look at the below and amend on [redacted]

[lists five product numbers].'³⁷⁸

5.164 [Employee] of [Reseller 2] replied to [Marketing Executive] of Ultra later that day, confirming that the requested changes had been made:

'Amended as requested'.³⁷⁹

5.165 [Employee] of [Reseller 2] has confirmed that his understanding of [Marketing Executive] of Ultra's email dated 13 December 2012 was that [Reseller 2] was

³⁷⁴ Email from [Employee] ([Reseller]) to [Marketing Executive] (Ultra) dated 5 April 2012 (URN U30007.4Q).

³⁷⁵ Email from [Marketing Executive] (Ultra) to [Employee] ([Reseller]), dated 21 August 2012 (URN U30007.4R).

³⁷⁶ Question 3(a) of [Employee]'s ([Reseller]) response to section 26 notice dated 9 October 2015 (URN U30049.1).

³⁷⁷ Question 3(b) of [Employee]'s ([Reseller]) response to section 26 notice dated 9 October 2015 (URN U30049.1).

³⁷⁸ Email from [Employee] ([Reseller 2]) to [Marketing Executive] (Ultra) dated 13 December 2012, titled 'Guidelines' (URN U30007.4G).

³⁷⁹ Email from [Employee] ([Reseller 2]) to [Marketing Executive] (Ultra) dated 13 December 2012, titled 'Guidelines' (URN U30007.4G).

not adhering to Ultra's Online Discounting Restriction and was being asked to change the advertised price of products that Ultra had identified were not in line with their recommendations.³⁸⁰ [Employee] of [Reseller 2] has also confirmed that [Reseller 2] amended the advertised price of these products in response to this email to comply with the Online Discounting Restriction, in accordance with the Recommended Online Price in the applicable price list.³⁸¹

- 5.166 On 6 March 2013, following a price increase circulated by Ultra on 12 December 2012³⁸² and 15 January 2013,³⁸³ [Employee] of [Reseller 2] received an email from [Marketing Executive] of Ultra titled '*Trading Guidelines update*' which stated:

'Dear All

*A big thank you for your support and taking the time to make the 1st March changes. The management of the project has been continuing at Ultra Finishing and all online customers have been contacted to ensure websites have been updated in line with our copyright licence agreement. **I would like to offer reassurances appropriate action has now been taken against all accounts found to be operating outside our trading guidelines.** [...]*

*Promotions including our HR and Ultra products are a breach of the copyright licence agreement as highlighted previously. **It needs to be clear that any promotions exclude HR and Ultra product on your site and this also needs to be a reality at the checkout.** As a HR and Ultra online partner, we would request you continue to highlight any concerns you have regarding the online marketing of the two brands and we will resolve the situation. We also have a team of people in the office dedicated to researching online marketing of our brands.'*³⁸⁴ (Emphasis added by CMA)

³⁸⁰ Question 4(a) of [Employee]'s ([Reseller 2]) response to section 26 notice dated 9 October 2015 (URN U30049.1).

³⁸¹ Question 4(b) of [Employee]'s ([Reseller 2]) response to section 26 notice dated 9 October 2015 (URN U30049.1).

³⁸² Email from Trading Guidelines mailbox (Ultra) to resellers making sales online dated 12 December 2012 (URN UD0729).

³⁸³ Email from Trading Guidelines mailbox (Ultra) to resellers making sales online dated 15 January 2013 (URN UD0727).

³⁸⁴ Email from [Marketing Executive] (Ultra) to [Marketing Executive] (group addresses behind this email undisclosed but included [Reseller 2]), dated 6 March 2013, titled '*Trading Guidelines – Update*' (URN U30007.4S).


5.167 [Reseller 2] confirmed that Ultra never made it clear precisely what it meant by 'promotions'. However, [Reseller 2]'s impression was that Ultra was seeking to link its Recommended Online Price with the use of its images online.³⁸⁵

5.168 On 15 May 2013, [Marketing Assistant] of Ultra sent an email to [Employee] of [Reseller 2] asking [Reseller 2] to amend products listed on its website outside of the Trading Guidelines.³⁸⁶



5.169 [Employee] of [Reseller] understood that Ultra's email meant [Reseller 2] had been advertising the listed products below the Recommended Online Price.³⁸⁷ In response to Ultra's email,³⁸⁸ [Reseller 2] made changes to its prices to comply with the Online Discounting Restriction.³⁸⁹

5.170 The evidence also demonstrates that [Reseller 2] monitored the online prices of other resellers of Hudson Reed and Ultra branded products and reported any resellers which offered Hudson Reed and Ultra branded products below the Recommended Online Price. For example, on 5 June 2013, [Employee] of [Reseller 2] sent an email to [Employee] of [Reseller 2] noting:

'We have had to cancel an order today because our customer could find the unit £60.00 and £176.00 cheaper. Please see below the links:

*[]*³⁹⁰

5.171 [Employee] of [Reseller 2] forwarded this email to [Marketing Assistant] of Ultra on the same day.³⁹¹ On 6 June 2013, [Marketing Assistant] of Ultra replied to [Employee] of [Reseller 2] indicating that Ultra had reviewed the two retailers' websites and taken steps to ask one of the retailers to rectify their online pricing:

*'Just for your information **we have addressed the issues below; the listing on [Reseller] will be amended promptly and the [Reseller] listing is of the Black Wood Quartet unit ()** rather than the High Gloss Grey Unit ()*

³⁸⁵ Question 5(b) of [Employee]'s ([Reseller 2]) response to section 26 notice dated 9 October 2015 (URN U30049.1).

³⁸⁶ Email from [Marketing Assistant] (Ultra) to [Employee] ([Reseller 2]) dated 15 May 2013, titled 'Online Trading Guidelines' (URN U30007.4U).

³⁸⁷ Question 7(a) of [Reseller 2]'s response to section 26 notice dated 9 October 2015 (URN U30049.1).

³⁸⁸ See point 6 of email dated 13 June 2015 from [Employee] ([Reseller 2]) to the CMA in response to the CMA's letter of 1 June 2015 requesting provision of outstanding information from [Reseller 2]'s response to section 26 notice dated 23 October 2014 (URN U30027).

³⁸⁹ Question 7(b) of [Reseller 2]'s response to section 26 notice dated 9 October 2015 (URN U30049.1).

³⁹⁰ Email from [Employee] ([Reseller 2]) to [Employee] ([Reseller 2]) dated 5 June 2013, titled 'Hudson Reed Online Guideline' (URN U30007.4V).

³⁹¹ Email from [Employee] ([Reseller 2]) to [Marketing Assistant] (Ultra), dated 5 June 2013, titled 'Hudson Reed Online Guideline' (URN U30007.4V).

but if there are any other examples you may come across please forward them on and they will be dealt with immediately.³⁹²

- 5.172 On 2 November 2013, [Employee] of [Reseller 2] sent [Marketing Executive] of Ultra an email attaching a screenshot of another retailer's ([Reseller]) online promotion under the subject heading *'10% discount on checkout'*:

*'I have attached a screenshot of promotional activity over the weekend and on evenings on the net. I would like to know if this type of promotion over the weekend and evenings is allowed?'*³⁹³

- 5.173 [Employee] of [Reseller 2] explained to the CMA that [Reseller 2] wanted to offer the same promotions that other competitors were offering and therefore was asking for clarification from Ultra as to whether it was allowed to carry out such price promotions under the Trading Guidelines.³⁹⁴ [Employee] of [Reseller 2] explained that he did this because [Reseller 2] did not want to lose the right to use Ultra's images under the Reseller Image Licence.³⁹⁵

- 5.174 On 4 November 2013, [Marketing Executive] of Ultra replied to [Employee] of [Reseller 2] indicating there were no exceptions to the restriction set out in Clause 4.6 of the Reseller Image Licence:

'Many thanks for bringing this to our attention.

One of the conditions of our image licence agreement states- '4.6 The Reseller shall not use the Images or the Trademarks in connection with any Promotional Offer without the prior express written consent of Ultra Finishing.' *There are no exceptions to this whether it's a weekday, weeknight, morning or evening. I'll investigate this today and take the appropriate action'*.³⁹⁶ (Emphasis added by CMA).

- 5.175 On 30 May 2014 Ultra sent an email from the Trading Guidelines Mailbox to [Reseller 2] attaching a spreadsheet setting out new prices for Hudson Reed and Ultra branded products,³⁹⁷ including an updated *'Recommended Online*

³⁹² Email from [Marketing Assistant] (Ultra) to [Employee] ([Reseller 2]) dated 6 June 2013 (URN U30007.4V).

³⁹³ Email from [Employee] ([Reseller 2]) to [Marketing Executive] (Ultra), titled *'10% discount on CHECKOUT'*, dated 2 November 2013 (U30007.4W).

³⁹⁴ Question 9(a) of [Reseller 2]'s response to section 26 notice dated 9 October 2015 (URN U30049.1).

³⁹⁵ Question 9(b) of [Reseller 2]'s response to section 26 notice dated 9 October 2015 (URN U30049.1).

³⁹⁶ Email from [Marketing Executive] (Ultra) to [Employee] ([Reseller 2]) dated 4 November 2013, titled *'Promotion [Reseller]'* (U30007.4X).

³⁹⁷ Email from Trading Guidelines mailbox (Ultra) to Trading Guidelines addressees, dated 30 May 2014, titled *'Hudson reed and Ultra Price re-aligns – 30.05.2014'* (URN U30007.4Y).

Price'.³⁹⁸ This email from Ultra was forwarded from [Employee] of [Reseller 2] to [Employee] of [Reseller 2]:

'can you realign the prices'.³⁹⁹

5.176 [Employee] of [Reseller 2] confirmed that following this email, [Employee] of [Reseller 2] would have amended [Reseller 2]'s cost and selling prices.⁴⁰⁰

5.177 The evidence demonstrates that [Reseller 2] complied with the Online Discounting Restriction from 1 February 2012 (at the latest) until 28 August 2014.⁴⁰¹ In particular, in addition to the evidence set out above:

5.177.1 The Contact Record '*Master*' worksheet recorded [Reseller 2]'s website as being '*Inline*' [sic]⁴⁰²

5.177.2 [Reseller 2] does not feature in a list of [less than 10% of] accounts identified as working outside of the Trading Guidelines in the '*Brand Management Summary*' worksheet dated 22 May 2012.⁴⁰³ By implication, [Reseller 2] was one of the remaining [more than 90% of] accounts identified as '*adhering*' to the Trading Guidelines.

5.177.3 A few days later, on 28 May 2012, Ultra recorded that certain resellers' RRP's had not been updated.⁴⁰⁴ No such comments were made against [Reseller 2]'s account name. Rather, Ultra recorded '*seem to be updated but not to full 25%*'.

5.177.4 On 20 March 2013, Ultra recorded [less than 10% of accounts as] '*problem sites after March Price Increase*' with a note that they were '*all being dealt with/relevant action taken*'.⁴⁰⁵ [Reseller 2] was not referred to.

³⁹⁸ Spreadsheet provided by [Reseller 2] in response to CMA letter dated 1 June 2015 (further to section 26 notice dated 23 October 2014) (URN U30027.1). See point 7 of [Reseller 2]'s email to CMA dated 13 June 2013 (URN U30027).

³⁹⁹ Email from [Employee] ([Reseller 2]) to [Employee] ([Reseller 2]) dated 31 May 2014 (URN U30007.4Y).

⁴⁰⁰ Question 11(c) of [Reseller 2]'s response to section 26 notice dated 9 October 2015 (URN U30049.1).

⁴⁰¹ [Reseller 2] submitted to the CMA that it '*never accepted Ultra's position*'. [Reseller 2]'s response to CMA's letter dated 1 June 2015 (URN U30027). However, the evidence shows that, when Ultra contacted [Reseller 2] to complain that products were being sold outside of the Trading Guidelines, [Reseller 2] changed its online prices in response. The evidence set out above demonstrates that [Reseller 2] complied with and implemented the Online Discounting Restriction and complied with Ultra's instructions to set its online prices no lower than the Recommended Online Price from 1 February 2012 (at the latest) to at least 28 August 2014.

⁴⁰² Column entitled '*Website Inline?*' of Ultra spreadsheet titled '*Contact Record – Master Sheet*' (URN UD0135).

⁴⁰³ '*Brand Management Summary*' worksheet of Ultra spreadsheet titled '*Contact Record – Master Sheet*' (URN UD0135).

⁴⁰⁴ Column entitled '*New RRP's*' of Ultra spreadsheet titled '*Contact Record – Master Sheet*' (URN UD0135).

⁴⁰⁵ Brand Management Summary, dated 20 March 2013 (URN UD0102). See also (URN UD0229).

5.177.5 The extract from the Brand Management Daily Check Sheet at paragraph 5.125 above shows that Ultra monitored online pricing on a regular (sometimes daily) basis between June and September 2014 and recorded only one entry for a product where [Reseller 2]'s price was lower than the Recommended Online Price.⁴⁰⁶ The CMA infers from this entry that Ultra's close monitoring enabled it to discover this quickly and contact [Reseller 2] to 'resolve' the issue.⁴⁰⁷ Ultra's monitoring activities also suggest that any other instances of non-compliance would have been identified by Ultra and rectified by [Reseller 2].

5.178 Moreover, [Reseller 2] has confirmed to the CMA during the course of the CMA's investigation that:

5.178.1 [Reseller 2] was instructed by Ultra not to advertise Ultra's products online below the price specified by Ultra.⁴⁰⁸ The CMA notes that the price advertised on a reseller's website is typically the final price the purchaser will expect to pay for that product.⁴⁰⁹

5.178.2 [Employee] of [Reseller 2]'s understanding of the price list containing the Recommended Online Price was that Ultra, *'would prefer us to price the product at the Recommended Retail Price and the suggested Selling [sic] price. Ultra cannot take legal (Court) action for its enforcement if not complied but can suspend the use of the images of its products.'*⁴¹⁰

5.179 The evidence set out above demonstrates that [Reseller 2] complied with and implemented the Online Discounting Restriction and complied with Ultra's instructions to set its online prices no lower than the Recommended Online Price from 1 February 2012 (at the latest) to at least 28 August 2014.

(iii) [Reseller 3]

5.180 On 9 December 2011, Ultra sent the Reseller Image Licence and Recommended Online Price to all of its resellers selling Hudson Reed and

⁴⁰⁶ See the worksheet dated 24 July 2014, Ultra spreadsheet titled 'Brand Management Daily Check Sheet' (URN UD0105).

⁴⁰⁷ See the 'Issue resolved' column, Ultra spreadsheet titled 'Brand Management Daily Check Sheet' (URN UD0105).

⁴⁰⁸ [Reseller 2] stated: 'During 2012 only the condition 1(e) applied'. (URN U30027). 'Condition 1(e)' refers to the CMA's question in the section 26 notice dated 23 October 2014 (URN U30001.1): 'Since 1 January 2009, has Ultra requested or instructed the retailers in relation to any of the following: e) Not to advertise online certain bathroom brands and/or products supplied by it below the Recommended Retail Price ('RRP'), a specified online price, or a maximum discount off the RRP?'.

⁴⁰⁹ See paragraph 4.12 above.

⁴¹⁰ Question 1(d) of [Reseller 2]'s response to section 26 notice dated 9 October 2015 (URN U30049.1).

Ultra branded products online.⁴¹¹ This included [Reseller 3]. The email referred to an earlier discussion about the Trading Guidelines. The CMA infers that this earlier discussion took place in November 2011 in accordance with the script referred to above.⁴¹²

- 5.181 On 5 January 2012, [Marketing Director] of Ultra forwarded Ultra's email of 9 December 2011, which attached the Reseller Image Licence and price list containing the Recommended Online Price for February 2012, to [Employee] of [Reseller 3]:

*'Thank you for your taking the time to speak with me. Please see e-mail below and contract attached covering all the information on our new trading guidelines. I understand [Area Sales Manager] [Ultra] has previously confirmed with [Employee] [Reseller 3] he received the e-mail and the posted copy. Please can you scan sign and email the contract back to me as a matter of urgency? We are going to take steps over the next week or so to permanently reduce the terms of customers who have not signed and returned the contract (on HR and Ultra). For customers who have signed the contract we will require proof prior to the 1st Feb the brands are represented appropriately. I am encouraged you support the guidelines [...].'*⁴¹³

- 5.182 [Employee] of [Reseller 3] has confirmed that he understood 'new trading guidelines' to mean the '25% off RRP agreement and rights relating to use of images'.⁴¹⁴ He also explained that he understood 'permanently reduce the terms of customers' to mean that Ultra would give less favourable accounting terms for customers that were not selling within the Trading Guidelines, or possibly reduce rights for image use.⁴¹⁵ In addition, [Reseller 3] understood that, by 1 February 2012, all companies that had signed the Reseller Image Licence would be monitored to ensure that they were selling within the Trading Guidelines.⁴¹⁶

- 5.183 [Employee] of [Reseller 3] signed the Reseller Image Licence on the same day, ie 5 January 2012.⁴¹⁷

⁴¹¹ Email from Trading Guidelines Mailbox (Ultra) to Trading Guidelines addresses dated 9 December 2011 (URN UD0742). See paragraphs 5.53 to 5.55 above.

⁴¹² See paragraph 5.47 above.

⁴¹³ Email from [Marketing Director] (Ultra) to [Employee] ([Reseller 3]) dated 5 January 2012, titled 'Trading Guidelines' (URN UD0051).

⁴¹⁴ Question 4(b) of [Employee]'s ([Reseller 3]) response to section 26 notice dated 7 October 2015 (URN U40034.1) (See questions at URN U40031.1).

⁴¹⁵ Question 4(c) of [Employee]'s ([Reseller 3]) response to section 26 notice dated 7 October 2015 (URN U40034.1) (See questions at URN U40031.1).

⁴¹⁶ Question 4(d) of [Employee]'s ([Reseller 3]) response to section 26 notice dated 7 October 2015 (URN U40034.1) (See questions at URN U40031.1).

⁴¹⁷ Reseller Image Licence between Ultra Finishing Limited and [Reseller 3] dated 5 January 2012 (URN UD0315).

5.184 On 18 January 2012, [Marketing Director] of Ultra sent [Employee] of [Reseller 3] the following email:

*'Nice to meet with you last week [...] Your support and input on the imminent trading guidelines is much appreciated. [...] Jus [sic] to update you further we are currently in the process of contacting all selling brands online, who have signed a contract to make sure they have begun the necessary changes. We will be contacting them all again next week to again stress the importance of having made alterations by 1st Feb and reiterating the consequences (I have requested you are not contacted as I have been through it with you all personally. I know your concern is with distributors [sic] customers [...] I do agree these will potentially prove the most tricky, but reassure you we are doing everything we can to capture everybody selling our products online and we will opt for the swiftest route to address those not representing the brands appropriately.'*⁴¹⁸ (Emphasis added by CMA)

5.185 [Employee] of [Reseller 3] has explained to the CMA that he was unsure as to what [Marketing Director] of Ultra meant by '*necessary changes*'; however, he considered that this related to image rights and selling at prices no lower than the Recommended Online Price.⁴¹⁹ [Employee] of [Reseller 3] has confirmed to the CMA that [Reseller 3] was chased by Ultra '*nonstop RE pricing errors. For example, if any seller priced an item under the 25% price guideline, [Ultra Marketing Director] would monitor constantly and would call them straight away to request changes to be made.*'⁴²⁰

5.186 In response to [Marketing Director]'s email of 18 January 2012, on 19 January 2012, [Employee] of [Reseller 3] emailed [Marketing Director] of Ultra reporting websites selling at low prices:

*'[...] yes it was very good to meet you and I look forward to working together on this. On that note we have identified another idiot seller: [two links to websites] We have lost a sale to this person today over the price, we refused to price match despite the customer wanting to purchase from us only.'*⁴²¹ (Emphasis added by CMA)

⁴¹⁸ Email from [Marketing Director] (Ultra) to [Employee] ([Reseller 3]) dated 18 January 2012, titled '*meeting*' (URN UD0150).

⁴¹⁹ Question 1(b) of [Employee]'s ([Reseller 3]) response to section 26 notice dated 7 October 2015 (URN U40034.1) (See questions at URN U40031.1).

⁴²⁰ Question 1(c) of [Employee]'s ([Reseller 3]) response to section 26 notice dated 7 October 2015 (URN U40034.1) (See questions at URN U40031.1).

⁴²¹ Email from [Employee] ([Reseller 3]) to [Marketing Director] (Ultra) dated 19 January 2012, titled '*meeting*' (URN UD0150).

5.187 [Employee] of [Reseller 3] has explained that by ‘*idiot seller*’, he meant ‘*somebody selling the products with incorrect use of images/pricing, undercutting other sellers of the products, which would result in us losing out on a sale. I assume I didn’t feel it was fair if we had agreed to follow their requirements if others didn’t also fall into line with the rules.*’⁴²² [Employee] of [Reseller 3] confirmed that ‘*to price match*’ would have taken [Reseller 3] below the Recommended Online Price, which he considered [Reseller 3] was not permitted to do. However, he has explained that [Reseller 3] may have gone below the Recommended Online Price with telephone orders as Ultra had no way of finding out about this.⁴²³

5.188 On 20 January 2012, [Marketing Director] of Ultra responded to [Employee] of [Reseller 3]:

*‘Thank you for the information, all websites on both the Google search and [Reseller] are on our list and we reiterate we will only be working with customers who represent our brands appropriately online from 1st Feb.’*⁴²⁴

5.189 [Employee] of [Reseller 3] has confirmed that he understood this to mean that Ultra would only work with resellers who had agreed to sell under its ‘*guidelines*’⁴²⁵ and as such would have use of Ultra’s images.⁴²⁶

5.190 The evidence suggests that [Reseller 3] complied with the Online Discounting Restriction from 1 February 2012 (at the latest) until at least 28 August 2014. In particular, in addition to the evidence set out above:

5.190.1 The Contact Record ‘*Master*’ worksheet recorded [Reseller 3]’s website as being ‘*Inline*’ [sic]⁴²⁷

5.190.2 [Reseller 3] does not feature in a list of [less than 10% of] accounts identified as working outside of the Trading Guidelines in the ‘*Brand Management Summary*’ worksheet dated 22 May 2012.⁴²⁸

⁴²² Question 2(a) of [Employee]’s ([Reseller 3]) response to section 26 notice dated 7 October 2015 (URN U40034.1) (See questions at URN U40031.1).

⁴²³ Question 2(b) of [Employee]’s ([Reseller 3]) response to section 26 notice dated 7 October 2015 (URN U40034.1) (See questions at URN U40031.1).

⁴²⁴ Email from [Marketing Director] (Ultra) to [Employee] ([Reseller 3]) dated 20 January 2012, titled ‘*meeting*’ (URN UD0150).

⁴²⁵ See paragraph 5.182 above for [Employee]’s ([Reseller 3]) explanation of what he understood ‘*new trading guidelines*’ to mean.

⁴²⁶ Question 3(b) of [Employee]’s ([Reseller 3]) response to section 26 notice dated 7 October 2015 (URN U40034.1) (See questions at URN U40031.1).

⁴²⁷ Column entitled ‘*Website Inline?*’ of Ultra spreadsheet titled ‘*Contact Record – Master Sheet*’ (URN UD0135).

⁴²⁸ ‘*Brand Management Summary*’ worksheet of Ultra spreadsheet titled ‘*Contact Record – Master Sheet*’ (URN UD0135).

By implication, [Reseller 3] was one of the remaining [more than 90% of] accounts identified as '*adhering*' to the Trading Guidelines.

- 5.190.3 A few days later, on 28 May 2012, Ultra recorded that certain resellers' '*RRPs*' had not been updated.⁴²⁹ No such comments were made against [Reseller 3]'s account name. Rather, Ultra recorded that [Reseller 3]'s account had been updated.
- 5.190.4 On 20 March 2013, Ultra recorded [less than 10% of accounts as] '*problem sites after March Price Increase*' with a note that they were '*all being dealt with/relevant action taken*'.⁴³⁰ [Reseller 3] was not referred to.
- 5.190.5 The extract from the Brand Management Daily Check Sheet at paragraph 5.125 above shows that Ultra monitored online pricing on a regular (sometimes daily) basis between June and September 2014 and recorded only four entries for products where prices were lower than the Recommended Online Price.⁴³¹ The CMA infers from these entries that Ultra's close monitoring enabled it to discover this quickly and contact [Reseller 3] to '*resolve*' the issue. The evidence expressly confirms that [Reseller 3] responded positively to these contacts on at least one occasion.⁴³² Ultra's monitoring activities also suggest that any other instances of non-compliance would have been identified by Ultra and rectified by [Reseller 3].

5.191 Moreover, [Reseller 3] has confirmed to the CMA during the course of the CMA's investigation that:

- 5.191.1 [Reseller 3] was instructed by Ultra not to sell⁴³³ or advertise Ultra's products online below the price specified by Ultra.⁴³⁴

⁴²⁹ Column entitled '*New RRP's*' of Ultra spreadsheet titled '*Contact Record – Master Sheet*' (URN UD0135).

⁴³⁰ Brand Management Summary, dated 20 March 2013 (URN UD0102). See also (URN UD0229).

⁴³¹ See the worksheets dated 18 June 2014, 20 June 2014 25 July 2014 and 11 August 2014, Ultra spreadsheet titled '*Brand Management Daily Check Sheet*' (URN UD0105).

⁴³² See the worksheet dated 18 June 2014 in which Ultra recorded '*Issue resolved*'. Ultra spreadsheet titled '*Brand Management Daily Check Sheet*' (URN UD0105).

⁴³³ [Reseller 3]'s response to section 26 notice dated 23 October 2014, Question 1: *Since 1 January 2009, has Ultra requested or instructed the retailers in relation to any of the following: b) Not to sell online certain bathroom brands and/or products supplied by it below the Recommended Retail Price ('RRP'), a specified online price, or a maximum discount off the RRP?* [Reseller 3] responded: '*Yes – 25%*' (URN U40005.1).

⁴³⁴ The CMA asked: '*Since 1 January 2009, has Ultra requested or instructed the retailers in relation to any of the following: e) Not to advertise online certain bathroom brands and/or products supplied by it below the Recommended Retail Price ('RRP'), a specified online price, or a maximum discount off the RRP?*'. [Reseller 3] responded: '*Yes -25% Hudson Reed*'. Question 1 of [Reseller]'s response to section 26 notice dated 23 October 2014 (URN U40005.1).

5.191.2 Ultra's instruction was for [Reseller 3], and all of Ultra's other customers, to comply with a maximum discount of 25% off RRP, or face certain consequences:

*'Ultra group certainly insisted that, we along with all their other customers, sign or agree to a contract that **would grant us image rights on the back of sticking to their price guide of RRP with a maximum discount of 25% to be offered to customers.** [...] image usage was hugely important to us and without we would have been unable to sell the products effectively. This image requirement has become less important over the last 1-2 years as our own in-house technology has improved'.⁴³⁵ (Emphasis added by CMA).*

5.191.3 [Reseller 3] complied with the Online Discounting Restriction.⁴³⁶ [Reseller 3] further stated that *'we agreed to fall in line with their request for use of images'* and *'we didn't discount products any further than 25% off RRP'*.⁴³⁷ [Employee] of [Reseller 3] stated to the CMA that [Reseller 3] *'just wanted to sell the goods and anything we could do to support their requirement will have been done.'*⁴³⁸

5.192 The evidence set out above demonstrates that [Reseller 3] complied with and implemented the Online Discounting Restriction, and complied with Ultra's instructions to set its online prices no lower than the Recommended Online Price from 1 February 2012 (at the latest) to at least 28 August 2014.

Termination of the Online Discounting Restriction

5.193 On 28 August 2014, the CMA launched a formal investigation into Ultra's conduct under section 25 of the Act, having established reasonable grounds for suspecting a breach of the Chapter I prohibition and/or Article 101 TFEU in relation to the Infringements.⁴³⁹ In December 2014, Ultra offered to the CMA to communicate to customers that it had not been enforcing the terms of the Reseller Image Licence since September 2014, and had decided more

⁴³⁵ Email from [Employee] ([Reseller 3]) to CMA dated 13 May 2015 (URN U40013).

⁴³⁶ [Reseller 3]'s response to section 26 notice dated 23 October 2014, Question 2.16: 'If at any stage the retailer did not comply with the applicable request(s) or instruction(s), has Ultra contacted them again, what they said and/or whether Ultra took any further action in this respect?' [Reseller 3] responded: *'we complied'*. (URN U40005.1).

⁴³⁷ [Reseller 3]'s response to CMA queries on [Reseller 3]'s response to section 26 notice dated 23 October 2014, Questions 2.13 and 2.14 (URN U40015.1).

⁴³⁸ Email from [Employee] ([Reseller 3]) to CMA dated 20 August 2015 (URN U40023).

⁴³⁹ See further Annex E, Section A.

generally to review the Trading Guidelines.⁴⁴⁰ Ultra also offered to the CMA to confirm to customers '*for the avoidance of doubt that Ultra Finishing Group and its subsidiaries will not seek to influence the price*' at which its goods are advertised or sold online.⁴⁴¹

- 5.194 The CMA has not been provided with contemporaneous evidence of this position being communicated to Ultra's resellers, but has been provided with evidence of an internal email of 25 September 2014 from [Marketing Director] of Ultra to 'Marketing' stating that '*the prices at which our customers sell is entirely a matter for them*'.⁴⁴² Further evidence shows that, in response to queries from resellers in April and July 2015, Ultra confirmed that the prices they sell at were a matter for the resellers.⁴⁴³ For the purposes of this Decision, the CMA has taken a conservative view and finds the end date for the Relevant Period to be 28 August 2014.

⁴⁴⁰ Draft commitments letter received from Ultra on 15 December 2014 (URN UC0055.2).

⁴⁴¹ Draft commitments letter received from Ultra on 15 December 2014 (URN UC0055.2).

⁴⁴² Email from [Marketing Director] (Ultra) to Marketing (Ultra) dated 25 September 2014 (URN UD0858).

⁴⁴³ Email from [Marketing Executive] (Ultra) to [Employee] ([Reseller]) dated 28 April 2015 (URN UD0862) and email from [Marketing Assistant] (Ultra) to [Employee] ([Reseller]) dated 30 July 2015 (URN UD0863).

6. LEGAL ASSESSMENT

A. Introduction

6.1 This Chapter sets out the CMA's conclusions of its legal assessment of Ultra's arrangements with the Resellers in the light of the evidence set out at Chapter 5 above.⁴⁴⁴ A detailed explanation of the legal principles on which the CMA's assessment is based and on which the CMA relies, including references to the relevant case law and primary and secondary legislation, is set out at Annex A (Legal Framework). However, the key legal principles are included in this Chapter for ease of reference.

6.2 This Chapter sets out the CMA's findings, as follows:

- Ultra and each of the Resellers constitute undertakings (**Section C**).
- Ultra entered into an agreement and/or concerted practice with each of the Resellers (**Section D**).
- The agreements and/or concerted practices had the object of preventing, restricting or distorting competition in relation to the supply of Hudson Reed and Ultra branded bathroom fittings (**Section E**).
- The agreements and/or concerted practices appreciably prevented, restricted or distorted competition in relation to the supply of bathroom fittings, both in the EU and in the UK (**Section F**).
- The agreements and/or concerted practices had an effect on trade between EU Member States (**Section G**).
- The agreements and/or concerted practices had an effect on trade within the UK (**Section H**).
- No relevant exclusions or exemptions apply (**Section I**).
- Conclusion (**Section J**).

6.3 The CMA has assessed the evidence in this case by reference to the requisite standard of proof as described in paragraphs A.92 to A.93 of Annex A. The CMA is of the view that the evidence set out in this Decision is sufficient to discharge the burden of proof in respect of the CMA's findings.

⁴⁴⁴ Note that references to specific paragraph numbers are included in this section for ease of reference to the primary sources of evidence, but the conclusions are reached in light of the totality of the evidence.

B. Summary of findings

- 6.4 On the basis of the facts and evidence referred to in Chapter 5 above, the CMA finds that Ultra has infringed the Chapter I prohibition and/or Article 101 TFEU by entering into agreements and/or participating in concerted practices (in each case between Ultra and each Reseller) that the Reseller would not sell or advertise Hudson Reed or Ultra branded products online below the Recommended Online Price (referred to in the remainder of this Chapter as the Agreements).
- 6.5 In the legal and economic context in which they operated, the CMA finds that the Agreements genuinely restricted the ability of Resellers to determine their online sales price for Hudson Reed and Ultra branded products. In particular, the CMA finds that the instruction not to sell or advertise Hudson Reed or Ultra products online below the Recommended Online Price was the key objective of Ultra's Trading Guidelines, which was enforced, in part, via the Reseller Image Licence. In the context of online 'click-to-buy' sales, the price advertised online is normally the price paid by the customer, ie the sales price. The CMA therefore concludes that the Agreements restricted each Reseller's ability to sell online below the Recommended Online Price.
- 6.6 The Trading Guidelines were supported by measures to identify resellers who sold or advertised Hudson Reed or Ultra products online below the Recommended Online Price, combined with actual or threatened sanctions for pricing below this level.
- 6.7 In the light of these findings, the CMA concludes that the Recommended Online Price was not simply a recommendation but fixed a minimum resale price in respect of online sales of Hudson Reed and Ultra branded products. As such, the CMA concludes that the Agreements amounted to resale price maintenance (RPM).
- 6.8 Further, and in the light of that conclusion, the CMA finds that the Agreements had as their object the prevention, restriction or distortion of competition in relation to the supply of bathroom fittings in the UK.
- 6.9 In each Agreement, the Reseller agreed to comply with, or implemented, Ultra's instruction not to sell or advertise Hudson Reed or Ultra products online below the Recommended Online Price. The duration of the Agreements differ in each case, but each Agreement covers some or all of the Relevant Period.
- 6.10 The evidence provided to the CMA demonstrates that the Reseller Image Licence and price list containing the Recommended Online Price were sent to all resellers selling Ultra or Hudson Reed branded products online

(approximately [100-150] resellers⁴⁴⁵).⁴⁴⁶ The evidence also demonstrates that Ultra monitored all such resellers' websites for compliance with the Online Discounting Restriction.⁴⁴⁷ For administrative efficiency, the CMA has identified the three Resellers as examples from the numerous resellers selling Hudson Reed and Ultra branded products online in order to demonstrate the existence of an agreement and/or concerted practice with Ultra.⁴⁴⁸ The CMA makes no findings in respect of other resellers of Ultra's products.

C. Undertakings

Key legal principles

6.11 The Chapter I prohibition and Article 101 TFEU apply to agreements and concerted practices between 'undertakings'. For the purposes of the Act and Article 101 TFEU, an undertaking is every entity engaged in economic activity, regardless of its legal status and the way in which it is financed.⁴⁴⁹

Findings

6.12 The CMA finds that:

- 6.12.1 Throughout the Relevant Period, Ultra was engaged in the manufacture and supply of bathroom fittings. See Chapter 3 for an assessment of the liability of the Ultra Group and the period for which it is found liable for the Infringements.⁴⁵⁰
- 6.12.2 Throughout the duration of the Agreement with Ultra, [Reseller 1] was engaged in the retail sale of bathroom fittings.⁴⁵¹
- 6.12.3 Throughout the duration of the Agreement with Ultra, [Reseller 2] was engaged in the retail sale of bathroom fittings.⁴⁵²
- 6.12.4 Throughout the duration of the Agreement with Ultra, [Reseller 3] was engaged in the retail sale of bathroom fittings.⁴⁵³

⁴⁴⁵ See paragraph 4.10 above

⁴⁴⁶ See paragraph 5.55 above.

⁴⁴⁷ See paragraphs 5.89 to 5.93 and 5.121 to 5.1 above.

⁴⁴⁸ See Annex E, paragraphs E.16 and E.17

⁴⁴⁹ See Annex A, paragraph A.8.

⁴⁵⁰ As Rule 10(2) of the CMA Rules has been applied, the CMA is addressing this Decision to the Ultra Group only in this case and not to any resellers of Ultra products. However, in order to demonstrate an infringement by Ultra, the CMA must still show that Ultra entered into an infringing agreement with one or more resellers. See paragraph 1.2 above and Annex E, paragraphs E.18 and E.19. Due to the application of Rule 10(2), there is no assessment of liability in relation to the Resellers.

⁴⁵¹ [REDACTED]

⁴⁵² [REDACTED]

⁴⁵³ [REDACTED]

- 6.13 In the light of the above, the CMA concludes that Ultra and each of the Resellers constitutes an undertaking for the purposes of the Chapter I prohibition and Article 101 TFEU.

D. Agreements and/or concerted practices

Key legal principles

- 6.14 The Chapter I prohibition and Article 101 TFEU apply both to 'agreements' and 'concerted practices'. It is not necessary, for the purposes of finding an infringement, to characterise conduct as exclusively an agreement or a concerted practice.⁴⁵⁴ The aim of the Chapter I prohibition and Article 101 TFEU is to catch different forms of coordination between undertakings and thereby to prevent undertakings from being able to evade the competition rules simply on account of the form in which they coordinate their conduct.⁴⁵⁵

Agreements

- 6.15 For the purposes of the Chapter I prohibition and Article 101 TFEU, 'agreements' include oral agreements and 'gentlemen's agreements'. There is no requirement for an agreement to be formal or legally binding, or for it to contain any enforcement mechanisms.⁴⁵⁶
- 6.16 The key question in establishing an agreement is whether there has been a 'concurrence of wills' between at least two parties, the form of which is unimportant, so long as it constitutes a faithful expression of the parties' intention.⁴⁵⁷ In the absence of an explicit agreement (ie laid down or based on a contract) expressing the concurrence of wills or joint intention by the parties to conduct themselves on the market in a specific way, acquiescence may be sufficient to give rise to an agreement for the purpose of the Chapter I prohibition/Article 101 TFEU.⁴⁵⁸
- 6.17 There are two ways in which acquiescence to a unilateral policy can be established:⁴⁵⁹
- 6.17.1 Express acquiescence: if the clauses of an agreement drawn up in advance provide for or authorise a party to adopt subsequently a specific unilateral policy which will be binding on the other party

⁴⁵⁴ See Annex A, paragraph A.22.

⁴⁵⁵ See Annex A, paragraph A.23.

⁴⁵⁶ See Annex A, paragraph A.25.

⁴⁵⁷ See Annex A, paragraph A.27.

⁴⁵⁸ See Annex A, paragraph A.29.

⁴⁵⁹ See Annex A, paragraph A.30.

- 6.17.2 Tacit acquiescence: if one party requires explicitly or implicitly the cooperation of the other party for the implementation of its unilateral policy and the other party complies with that requirement by implementing that unilateral policy in practice.
- 6.18 Tacit acquiescence may also be deduced from a system of monitoring and penalties, if this system allows the supplier to implement its policy in practice.⁴⁶⁰

Concerted practices

- 6.19 The prohibition on concerted practices prohibits, amongst other things, coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.⁴⁶¹

Findings

- 6.20 In the light of the evidence set out at Chapter 5 above, the CMA finds that Ultra entered into an agreement and/or concerted practice with each of the Resellers that prevented or restricted the Reseller from selling or advertising Hudson Reed or Ultra products online below the Recommended Online Price. The CMA sets out its findings in relation to Ultra and each Reseller below.

(a) Ultra

- 6.21 The CMA finds that Ultra introduced the Trading Guidelines (which were enforced, in part, via the Reseller Image Licence) as an online brand management policy, which applied to most or all of its resellers making sales of Hudson Reed and/or Ultra branded products online, including each of the Resellers. As part of that policy, the CMA finds that Ultra:
- 6.21.1 instructed its resellers, including each Reseller, not to sell or advertise Hudson Reed or Ultra branded products online below the Recommended Online Price
- 6.21.2 monitored its resellers' online prices, including those of each Reseller, to identify instances where Hudson Reed or Ultra branded products were offered at a price lower than the Recommended Online Price, and

⁴⁶⁰ See Annex A, paragraph A.31.

⁴⁶¹ See Annex A, paragraph A.36.2.

- 6.21.3 threatened and/or took enforcement action against any reseller, including (where relevant) each Reseller, that offered Hudson Reed or Ultra branded products for sale online at a price lower than the Recommended Online Price.
- 6.22 The CMA's findings are supported by the totality of the evidence set out at Chapter 5 above and, in particular, the following findings of fact:
- 6.22.1 In October 2011, Ultra drafted an online brand management policy, the principal purpose of which was to manage online discounting of Hudson Reed and Ultra branded products by implementing a maximum discount level for online sales of 25% below the RRP's for in-store sales.⁴⁶²
- 6.22.2 Ultra's online brand management policy envisaged policing resellers' compliance with the maximum online discount and taking enforcement action against online resellers that did not comply with the online trading guidelines, including by setting online prices lower than the Recommended Online Price. The envisaged enforcement included:⁴⁶³
- Customers that failed to bring their websites 'in line' in February 2012 would have supply of Hudson Reed or Ultra branded products withheld (referred to as being put 'on stop'), until their websites were rectified.
 - Customers that had a few products discounted 'incorrectly' (ie set below the Recommended Online Price) in February 2012 would have their wholesale terms reduced, with a credit given if they correct their website within 48 hours.
 - After February 2012, customers that had a few products discounted 'incorrectly' (ie set below the Recommended Online Price) would be informed, and after two days their wholesale terms would be reduced if they failed to resolve the issue. A credit would, however, be given if 'every effort' was made by the customer to correct their website.
 - After February 2012, customers that paid no attention to Ultra's 'recommendations' would have their wholesale terms reduced

⁴⁶² See paragraphs 5.26, 5.28 to 5.34, 5.36 and Annex D. See also Chapter 5, Section C for historical background relevant to the motivations for Ultra's actions during the Relevant Period.

⁴⁶³ See paragraph 5.36.6 above and Annex D.

either on a temporary or permanent basis, depending on whether this was a first, second or third ‘offence’.

- 6.22.3 In or around November 2011, members of Ultra’s marketing team personally contacted each of Ultra’s resellers selling Hudson Reed or Ultra branded products online, including the Resellers.⁴⁶⁴ The evidence demonstrates that, during these calls or meetings, Ultra:
- informed each reseller (or Reseller) that it would be introducing the Trading Guidelines for sales of its Hudson Reed and Ultra branded products online
 - explained that the Trading Guidelines would take effect from 1 February 2012
 - explained that the Trading Guidelines included a number of requirements for online sales of the Hudson Reed and Ultra brands, and
 - included an instruction that, as part of the Trading Guidelines, Hudson Reed and Ultra branded products should not be sold or advertised online below the Recommended Online Price.⁴⁶⁵
- 6.22.4 The Recommended Online Price was not, in practice, a ‘recommendation’, but effectively set a minimum price for Hudson Reed and Ultra branded products, on the basis that resellers who set online prices below the Recommended Online Price faced a range of potential consequences.⁴⁶⁶
- 6.22.5 Ultra planned to use the Reseller Image Licence as a mechanism for ensuring its resellers signed up to and complied with its instructions not to sell or advertise Hudson Reed or Ultra products online below the Recommended Online Price.⁴⁶⁷ Clause 4.6 of the Reseller Image Licence reinforced Ultra’s instructions not to sell or advertise Hudson Reed or Ultra products online below the Recommended Online Price, as it prevented resellers from using images of Ultra’s products in connection with any promotional offer without Ultra’s consent.⁴⁶⁸ This restricted the ability of resellers to offer prices below the Recommended Online Price by offering a

⁴⁶⁴ See paragraphs 5.45 to 5.50, 5.137, 5.153 and 5.180 above.

⁴⁶⁵ See paragraphs 5.45 to 5.50, 5.137, 5.153 and 5.180 above.

⁴⁶⁶ See Chapter 5, Sections D, E and F above, in particular paragraphs 5.59 to 5.61.

⁴⁶⁷ See paragraphs 5.62 to 5.70 and 5.110 above.

⁴⁶⁸ See paragraphs 5.71 to 5.76 and 5.111 to 5.113 above.

promotion, such as an additional percentage discount from the advertised price.⁴⁶⁹

6.22.6 Ultra made it clear to resellers, including the Resellers, that there would be consequences for failure to comply with the Trading Guidelines.⁴⁷⁰ In particular, resellers, including the Resellers, understood that selling or advertising Hudson Reed or Ultra products online below the Recommended Online Price could result in Ultra withdrawing permission to use copyrighted images of its products.⁴⁷¹ Some of the Resellers were aware that failure to comply could also result in:

- Ultra ceasing supply (temporarily or permanently), and/or
- a worsening of their wholesale terms.⁴⁷²

6.22.7 The Recommended Online Price was sent to resellers, including the Resellers, in December 2011, at the same time as the Reseller Image Licence.⁴⁷³

6.22.8 Ultra's Trading Guidelines, which included the instruction not to sell or advertise Hudson Reed or Ultra products online below the Recommended Online Price, were fully operational by 1 February 2012.⁴⁷⁴

6.22.9 Throughout the Relevant Period, Ultra took measures to identify resellers, including the Resellers, which were selling or advertising Hudson Reed or Ultra products online below the Recommended Online Price, by monitoring resellers' websites and encouraging resellers to monitor each other and report non-compliance to Ultra.⁴⁷⁵

6.22.10 Throughout the Relevant Period, Ultra contacted resellers, including the Resellers, that it identified as selling or advertising Hudson Reed or Ultra products online below the Recommended

⁴⁶⁹ See paragraphs 5.73 to 5.76 above.

⁴⁷⁰ See paragraphs 5.65, 5.97, 5.98 and 5.111 to 5.112 above.

⁴⁷¹ See paragraphs 5.139, 5.166 to 5.167, 5.173, 5.178.2, 5.181, 5.182 and 5.191.2 above.

⁴⁷² [Reseller] knew its account was put on stop because it failed to comply with the Trading Guidelines, see paragraphs 5.142 to 5.144.3 above. [Reseller] was aware that its terms could be reduced if it failed to comply with the Trading Guidelines, see paragraphs 5.181 and 5.182.

⁴⁷³ See paragraphs 5.51 to 5.57, 5.137, 5.153 and 5.180 above.

⁴⁷⁴ See paragraphs 5.36.5, 5.39, 5.97 and 5.98 above.

⁴⁷⁵ See paragraphs 5.89 to 5.93, 5.120 to 5.1 above and 6.23.8, 6.28.5, 6.34.6 below including the references therein.

Online Price, and instructed them to amend their online prices so they were no lower than the Recommended Online Price.⁴⁷⁶

6.22.11 From time to time throughout the Relevant Period, Ultra threatened and/or took enforcement action against resellers, including the Resellers, which it identified as selling or advertising Hudson Reed or Ultra branded products online below the Recommended Online Price. The three principal enforcement mechanisms included:

- temporarily or permanently reducing the resellers' wholesale terms of supply⁴⁷⁷
- temporarily or permanently ceasing supply of Hudson Reed or Ultra branded products⁴⁷⁸
- withdrawing a reseller's right to use images of Hudson Reed or Ultra branded products,⁴⁷⁹ or
- a combination of the above.⁴⁸⁰

6.22.12 From 28 August 2014, Ultra ceased enforcing the Trading Guidelines, including the instruction not to sell or advertise Hudson Reed or Ultra products online below the Recommended Online Price.⁴⁸¹

(b) *[Reseller 1]*

6.23 The CMA relies on the following findings of fact in relation to *[Reseller 1]*:

6.23.1 *[Reseller 1]* was aware of Ultra's 2009 Online Discounting Policy and reported other resellers to Ultra for offering discounts outside the terms of that policy. This shows that *[Reseller 1]* must have known and understood what Ultra was seeking to achieve in 2012.⁴⁸²

⁴⁷⁶ See paragraphs 5.94 to 5.129 above and 6.23.9, 6.28.6, 6.34.7 below including the references therein.

⁴⁷⁷ See paragraphs 5.98 and 5.101 above.

⁴⁷⁸ See paragraphs 5.96.2, 5.97, 5.98, 5.104.1 to 5.104.3, 5.106 to 5.109 and 5.142 to 5.145 above.

⁴⁷⁹ See paragraphs 5.110 to 5.112 and 5.115 to 5.117 above.

⁴⁸⁰ For example, Ultra ceased supplying *[Reseller]* (see paragraph 5.104.3 above) and also withdrew *[Reseller]*'s rights to use Ultra's images (see paragraph 5.116 above).

⁴⁸¹ See paragraphs 5.193 and 5.194 above.

⁴⁸² See paragraph 5.133 above.

- 6.23.2 [Reseller 1] was instructed by Ultra not to sell or advertise Ultra's products online below the price specified by Ultra.⁴⁸³
- 6.23.3 At a meeting prior to 3 September 2011, Ultra communicated to [Reseller 1] its intention to prevent or restrict resellers making sales online from discounting Hudson Reed and Ultra branded products online below a fixed level.⁴⁸⁴ Ultra also communicated to [Reseller 1] its intention to restrict the use of its images by resellers making sales online as a mechanism for enforcing the proposed restrictions on online discounting.⁴⁸⁵
- 6.23.4 [Reseller 1] complained to Ultra about online discounting, suggested ideas for how to enforce a '*price restriction policy*' and confirmed its agreement in principle to Ultra's proposals to restrict online discounts in September 2011.⁴⁸⁶ Moreover, [Reseller 1] stated that '*[Reseller 1] is seriously on board when it comes to price restrictions*'.⁴⁸⁷
- 6.23.5 Ultra sent [Reseller 1] a draft of the Reseller Image Licence and a price list containing the Recommended Online Price by email on 9 December 2011.⁴⁸⁸ A hard copy of the Reseller Image Licence was also sent by post for execution by [Reseller 1].⁴⁸⁹
- 6.23.6 [Reseller 1] reiterated its agreement in principle to online price restrictions by email to Ultra on 12 December 2011.⁴⁹⁰
- 6.23.7 On 20 December 2011, [Reseller 1] signed and returned the Reseller Image Licence to Ultra.⁴⁹¹
- 6.23.8 From time to time during the Relevant Period, Ultra monitored [Reseller 1]'s online prices, to identify whether it was selling or advertising Hudson Reed or Ultra products online below the Recommended Online Price.⁴⁹²

⁴⁸³ See paragraph 5.134 above.

⁴⁸⁴ See paragraph 5.135 above.

⁴⁸⁵ See paragraph 5.135 above.

⁴⁸⁶ See paragraphs 5.135 and 5.136 above.

⁴⁸⁷ See paragraph 5.138.

⁴⁸⁸ See paragraph 5.137 above.

⁴⁸⁹ See paragraph 5.137 above.

⁴⁹⁰ See paragraph 5.138 above.

⁴⁹¹ See paragraph 5.140 above.

⁴⁹² See paragraphs 5.141 to 5.143, 5.146, 5.149 to 5.151 above.

- 6.23.9 On at least two occasions, in February 2012⁴⁹³ and again in January 2013,⁴⁹⁴ Ultra instructed [Reseller 1] to comply with the Trading Guidelines, which [Reseller 1] understood as an instruction to set its online prices so that they were no lower than the Recommended Online Price.⁴⁹⁵
- 6.23.10 [Reseller 1] understood that selling or advertising Hudson Reed or Ultra products online below the Recommended Online Price would result in Ultra withdrawing [Reseller 1]’s right to use Ultra’s images.⁴⁹⁶
- 6.23.11 In February 2012, Ultra ceased to supply [Reseller 1] because [Reseller 1] was selling or advertising Hudson Reed or Ultra products online below the Recommended Online Price.⁴⁹⁷ The account was re-activated when [Reseller 1] increased its online prices so that they were no lower than the Recommended Online Price applicable at the time.⁴⁹⁸
- 6.23.12 On at least one occasion, in February 2012, [Reseller 1] increased its online prices so that they were no lower than the Recommended Online Price applicable at the time, in response to direct instructions from Ultra.⁴⁹⁹
- 6.23.13 On 31 December 2012, [Reseller 1] ceased to comply with Ultra’s instructions not to sell or advertise Hudson Reed or Ultra products online below the Recommended Online Price.⁵⁰⁰
- 6.24 In the light of the above findings of fact, the CMA finds a concurrence of wills, between [Reseller 1] and Ultra, that [Reseller 1] would not sell or advertise Hudson Reed or Ultra branded products online below the Recommended Online Price. In particular:
- 6.24.1 Ultra instructed [Reseller 1] not to sell or advertise Ultra’s Hudson Reed or Ultra branded products online below the Recommended Online Price, with the threat of negative consequences if [Reseller 1] failed to comply, and

⁴⁹³ See paragraph 5.144.1 above.

⁴⁹⁴ See paragraph 5.149 above.

⁴⁹⁵ See paragraphs 5.142 to 5.144.3 and 5.151 above.

⁴⁹⁶ See paragraph 5.139 above.

⁴⁹⁷ See paragraphs 5.104.2, 5.142 to 5.145 above.

⁴⁹⁸ See paragraphs 5.104.2 and 5.145 above.

⁴⁹⁹ See paragraphs 5.144.2 to 5.144.6 above.

⁵⁰⁰ See paragraphs 5.147 to 5.148 above.

6.24.2 [Reseller 1]:

- understood the instruction from Ultra and the potential consequences if it did not comply, and
- in practice, agreed to abide by and/or implemented Ultra's instructions not to sell or advertise Hudson Reed or Ultra products online below the Recommended Online Price, including making price adjustments where instructed to do so by Ultra.

This constitutes an agreement for the purposes of the Chapter I prohibition and Article 101 TFEU.

- 6.25 In the alternative, in the light of the findings of fact above, the CMA finds that the arrangements identified above constituted at the very least a concerted practice between Ultra and [Reseller 1], on the basis that Ultra and [Reseller 1] knowingly substituted practical cooperation between them for the risks of competition.
- 6.26 The CMA finds that the evidence set out in Chapter 5⁵⁰¹ and the findings of fact above demonstrate that [Reseller 1] adhered to the agreement and/or concerted practice not to sell or advertise Hudson Reed or Ultra branded products online below the Recommended Online Price from 7 February 2012 (at the latest) to 31 December 2012.
- 6.27 Moreover, in the light of Ultra's monitoring and enforcement activity throughout this period, the CMA finds that if [Reseller 1] had sold or advertised Hudson Reed or Ultra products online below the Recommended Online Price from time to time between 7 February 2012 and 31 December 2012, this would have been identified by Ultra. Ultra would then have taken action to ensure that [Reseller 1]'s prices were at, or above, the Recommended Online Price. The evidence demonstrates that when asked by Ultra to amend its prices, [Reseller 1] did so. The CMA therefore concludes that [Reseller 1] was a party to an agreement and/or concerted practice with Ultra from 7 February 2012 (at the latest) to 31 December 2012.

(c) *[Reseller 2]*

- 6.28 The CMA relies on the following findings of fact in relation to [Reseller 2]:

⁵⁰¹ See, in particular, paragraph 5.146 above.

- 6.28.1 In or around November 2011, Ultra verbally communicated to [Reseller 2] its intention to prevent or restrict resellers making sales online from discounting Hudson Reed and Ultra branded bathroom fittings products online below a fixed level.⁵⁰²
- 6.28.2 [Reseller 2] was instructed by Ultra not to advertise Ultra's products online below the price specified by Ultra.⁵⁰³
- 6.28.3 Ultra sent [Reseller 2] a draft of the Reseller Image Licence and a price list containing the Recommended Online Price by email on 9 December 2011.⁵⁰⁴ A hard copy of the Reseller Image Licence was also sent by post for execution by [Reseller 2].⁵⁰⁵
- 6.28.4 On 15 December 2011, [Reseller 2] signed and returned the Reseller Image Licence to Ultra.⁵⁰⁶
- 6.28.5 From time to time during the Relevant Period, Ultra monitored [Reseller 2]'s online prices, to identify whether it was selling or advertising Hudson Reed or Ultra products online below the Recommended Online Price.⁵⁰⁷
- 6.28.6 On at least six occasions, in April 2012, August 2012, December 2012, March 2013, May 2013 and again in May 2014, Ultra instructed [Reseller 2] to comply with the Trading Guidelines, which [Reseller 2] understood as an instruction to set its online prices so that they were no lower than the Recommended Online Price.⁵⁰⁸
- 6.28.7 [Reseller 2] understood that selling or advertising Hudson Reed or Ultra products online below the Recommended Online Price would result in Ultra withdrawing [Reseller 2]'s right to use Ultra's images.⁵⁰⁹
- 6.28.8 On at least four occasions, in April 2012, August 2012, December 2012 and May 2013, [Reseller 2] increased its online prices so that

⁵⁰² See paragraph 5.153 above.

⁵⁰³ See paragraph 5.178.1 above.

⁵⁰⁴ See paragraph 5.153 above.

⁵⁰⁵ See paragraph 5.153 above.

⁵⁰⁶ See paragraph 5.154 above.

⁵⁰⁷ See paragraphs 5.155, 5.157, 5.159, 5.161, 5.163, 5.168 and 5.177 above.

⁵⁰⁸ See paragraphs 5.157 to 5.160 (April 2012), 5.161 to 5.162 (August 2012), 5.163 to 5.165 (December 2012), 5.166 to 5.167 (March 2013), 5.168 to 5.169 (May 2013), 5.175 to 5.176 (May 2014).

⁵⁰⁹ See paragraphs 5.166 to 5.167, 5.173 and 5.178.2 above.

they were no lower than the Recommended Online Price, in response to direct instructions from Ultra.⁵¹⁰

6.28.9 On at least two occasions, in June 2013 and November 2013, [Reseller 2] reported resellers to Ultra for selling or advertising Hudson Reed or Ultra products online at a lower price than [Reseller 2], ie below the Recommended Online Price.⁵¹¹

6.29 In the light of the above findings of fact, the CMA finds a concurrence of wills, between [Reseller 2] and Ultra, that [Reseller 2] would not sell or advertise Ultra's Hudson Reed or Ultra branded products online below the Recommended Online Price. In particular:

6.29.1 Ultra instructed [Reseller 2] not to sell or advertise Ultra's Hudson Reed or Ultra branded products online below the Recommended Online Price, with the threat of negative consequences if [Reseller 2] failed to comply, and

6.29.2 [Reseller 2]:

- understood the instruction from Ultra and the potential consequences if it did not comply, and
- in practice, agreed to abide by and/or implemented Ultra's instructions not to sell or advertise Hudson Reed or Ultra products online below the Recommended Online Price including making price adjustments where instructed to do so by Ultra.

This constitutes an agreement for the purposes of the Chapter I prohibition and Article 101 TFEU.

6.30 In the alternative, in the light of the findings of fact above, the CMA finds that the arrangements identified above constituted at the very least a concerted practice between Ultra and [Reseller 2], on the basis that Ultra and [Reseller 2] knowingly substituted practical cooperation between them for the risks of competition.

6.31 The CMA finds that the evidence set out in Chapter 5⁵¹² and the findings of fact above demonstrate that [Reseller 2] adhered to the agreement and/or concerted practice not to sell or advertise Hudson Reed or Ultra branded

⁵¹⁰ See paragraphs 5.160 (April 2012), 5.162 (August 2012), 5.164 and 5.165 (December 2012) and 5.169 (May 2013).

⁵¹¹ See paragraphs 5.170 to 5.174 above.

⁵¹² See, in particular, paragraph 5.177 above.

products online below the Recommended Online Price from 1 February 2012 (at the latest) to 28 August 2014.

- 6.32 Whilst the CMA understands that [Reseller 2] occasionally sold or advertised Hudson Reed or Ultra branded products online below the Recommended Online Price, such instances of non-compliance were identified by Ultra and [Reseller 2] subsequently adjusted its prices.
- 6.33 Moreover, in the light of Ultra's monitoring and enforcement activity throughout the Relevant Period, the CMA finds that if there had been any other instances when [Reseller 2] had sold or advertised Hudson Reed or Ultra branded products online below the Recommended Online Price from time to time between 1 February 2012 and 28 August 2014, this would have been identified by Ultra. Ultra would then have taken action to ensure that [Reseller 2]'s prices were at or above the Recommended Online Price. The evidence demonstrates that when asked to amend its prices by Ultra, [Reseller 2] did so. The CMA therefore concludes that [Reseller 2] was a party to an agreement and/or concerted practice with Ultra from 1 February 2012 (at the latest) to 28 August 2014.

(d) *[Reseller 3]*

- 6.34 The CMA relies on the following findings of fact in relation to [Reseller 3]:

6.34.1 In or around November 2011, Ultra verbally communicated to [Reseller 3] its intention to prevent or restrict resellers making sales online from discounting Hudson Reed and Ultra branded bathroom fittings products online below a fixed level.⁵¹³

6.34.2 [Reseller 3] was instructed by Ultra not to sell or advertise Ultra's products online below the price specified by Ultra.⁵¹⁴

6.34.3 Ultra sent [Reseller 3] a draft of the Reseller Image Licence and a price list containing the Recommended Online price by email on 9 December 2011⁵¹⁵ and again on 5 January 2012.⁵¹⁶ A hard copy of the Reseller Image Licence was also sent by post for execution by [Reseller 3].⁵¹⁷

⁵¹³ See paragraph 5.180 above.

⁵¹⁴ See paragraph 5.191.1 above.

⁵¹⁵ See paragraph 5.180 above.

⁵¹⁶ See paragraph 5.181 above.

⁵¹⁷ See paragraph 5.180 above.

- 6.34.4 On 5 January 2012, [Reseller 3] signed and returned the Reseller Image Licence to Ultra.⁵¹⁸
- 6.34.5 [Reseller 3] confirmed its agreement in principle not to sell or advertise Hudson Reed or Ultra products online below the Recommended Online Price in January 2012.⁵¹⁹
- 6.34.6 From time to time during the Relevant Period, Ultra monitored [Reseller 3]'s online prices, to identify whether it was selling or advertising Hudson Reed or Ultra products online below the Recommended Online Price.⁵²⁰
- 6.34.7 On a number of occasions, Ultra instructed [Reseller 3] to comply with the Trading Guidelines, which [Reseller 3] understood as an instruction to set its online prices so that they were no lower than the Recommended Online Price.⁵²¹
- 6.34.8 [Reseller 3] understood that selling or advertising Hudson Reed or Ultra products online below the Recommended Online Price would result in Ultra offering less favourable wholesale terms to [Reseller 3], or withdrawing [Reseller 3]'s right to use Ultra's images.⁵²²
- 6.34.9 [Reseller 3] agreed to follow Ultra's instructions and did not discount Ultra products below the Recommended Online Price.⁵²³
- 6.34.10 On at least one occasion, in January 2012,⁵²⁴ [Reseller 3] refused to match a competitor's price in order to avoid selling Ultra products below the Recommended Online Price.⁵²⁵
- 6.34.11 On at least one occasion, in January 2012, [Reseller 3] reported resellers to Ultra for selling or advertising Hudson Reed or Ultra products online below the Recommended Online Price.⁵²⁶
- 6.35 In the light of the above findings of fact, the CMA finds a concurrence of wills, between [Reseller 3] and Ultra, that [Reseller 3] would not sell or advertise

⁵¹⁸ See paragraph 5.183 above.

⁵¹⁹ See paragraphs 5.186 to 5.189 above.

⁵²⁰ See paragraphs 5.185 and 5.190 above.

⁵²¹ See paragraphs 5.181, 5.182, 5.184, 5.185, 5.188, 5.189 and 5.191 above.

⁵²² See paragraphs 5.181, 5.182 and 5.191.2 above.

⁵²³ See paragraph 5.191.3 above.

⁵²⁴ The CMA notes that this implementation took place before the start of the Relevant Period.

⁵²⁵ See paragraphs 5.186 and 5.187 above.

⁵²⁶ See paragraphs 5.186 and 5.187 above.

Ultra's Hudson Reed or Ultra branded products online below the Recommended Online Price. In particular:

6.35.1 Ultra instructed [Reseller 3] not to sell or advertise Ultra's Hudson Reed or Ultra branded products online below the Recommended Online Price, with the threat of negative consequences if [Reseller 3] failed to comply, and

6.35.2 [Reseller 3]:

- understood the instruction from Ultra and the potential consequences if it did not comply, and
- in practice, [Reseller 3] agreed to abide by and/or implemented Ultra's instructions not to sell or advertise Hudson Reed or Ultra products online below the Recommended Online Price.

This constitutes an agreement for the purposes of the Chapter I prohibition and Article 101 TFEU.

6.36 In the alternative, in the light of the findings of fact above, the CMA finds that the arrangements identified above constituted at the very least a concerted practice between Ultra and [Reseller 3] on the basis that Ultra and [Reseller 3] knowingly substituted practical cooperation between them for the risks of competition.

6.37 The CMA finds that the evidence set out in Chapter 5⁵²⁷ and the findings of fact above demonstrate that [Reseller 3] adhered to the agreement and/or concerted practice not to sell or advertise Hudson Reed or Ultra branded products online below the Recommended Online Price from 1 February 2012 (at the latest) to 28 August 2014.

6.38 Moreover, in the light of Ultra's monitoring and enforcement activity throughout the Relevant Period, the CMA finds that if [Reseller] had sold or advertised Hudson Reed or Ultra products online below the Recommended Online Price from time to time between 1 February 2012 and 28 August 2014, this would have been identified by Ultra. Ultra would then have taken action to ensure that [Reseller 3]'s prices were at or above the minimum Recommended Online Price. [Reseller 3] has told the CMA that it would have done anything it could do to support Ultra's requirements.⁵²⁸ The CMA therefore concludes that [Reseller 3] was a party to an agreement and/or

⁵²⁷ See, in particular, paragraphs 5.190 to 5.191 above.

⁵²⁸ See paragraph 5.191.3 above.

concerted practice with Ultra from 1 February 2012 (at the latest) to 28 August 2014.

E. Object or effect of preventing, restricting or distorting competition

- 6.39 The Chapter I prohibition and Article 101 TFEU prohibit agreements between undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition.⁵²⁹
- 6.40 If an agreement has as its object the prevention, restriction or distortion of competition, it is not necessary to prove that the agreement has had, or would have, any anti-competitive effects in order to establish an infringement of the Chapter I prohibition or Article 101 TFEU.⁵³⁰
- 6.41 The CMA finds that the Agreements each had the object of preventing, restricting or distorting competition in the supply of bathroom fittings in the UK. In reaching this conclusion, the CMA has considered the Agreements':
- 6.41.1 content
 - 6.41.2 objectives, and
 - 6.41.3 legal and economic context.

Key legal principles

- 6.42 In conducting this assessment, the CMA has had particular regard to the following legal principles:
- 6.42.1 Object infringements are those forms of coordination between undertakings that can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.⁵³¹
 - 6.42.2 The 'object' of an agreement (or concerted practice) is to be identified primarily from an examination of objective factors, such as the content of its provisions, its objectives and the legal and economic context.⁵³² The legal and economic context includes consideration of:
 - the nature of the goods or services affected, and

⁵²⁹ See Annex A, paragraph A.38.

⁵³⁰ See Annex A, paragraph A.39.

⁵³¹ See Annex A, paragraph A.40.

⁵³² See Annex A, paragraph A.41.

- the conditions of the functioning and structure of the market in question.⁵³³
- 6.42.3 Anti-competitive subjective intentions on the part of the parties may also be taken into account when considering whether an agreement has an anti-competitive object.⁵³⁴
- 6.42.4 The fact that the agreement pursues other legitimate objectives does not preclude it from being regarded as having a restrictive object.⁵³⁵ Moreover, the CJ has held that the aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU.⁵³⁶
- 6.42.5 Resale price maintenance (RPM) has been found to constitute a restriction of competition by object.⁵³⁷ It covers both fixed and minimum resale prices and can be achieved:
- directly, for example a contractual provision that directly sets a fixed or minimum resale price,⁵³⁸ or
 - indirectly, for example through threats, intimidation, warnings or penalties which pressurise resellers to observe a given price level (eg delay or suspension of deliveries, termination of supply, the withdrawal of credit facilities and threatened legal action), where the ability of resellers to determine their resale prices has genuinely been restricted.⁵³⁹
- 6.42.6 RPM can be made more effective when combined with measures to identify price-cutting distributors (eg the implementation of a price-monitoring system) or an obligation on resellers to report other members of the distribution network who deviate from the agreed price level.⁵⁴⁰

⁵³³ See Annex A, paragraph A.41.

⁵³⁴ See Annex A, paragraph A.42.

⁵³⁵ See Annex A, paragraph A.43.

⁵³⁶ See Annex A, paragraph A.43.

⁵³⁷ See Annex A, paragraph A.47.

⁵³⁸ See Annex A, paragraph A.52.

⁵³⁹ See Annex A paragraphs A.46 to A.53.

⁵⁴⁰ See Annex A, paragraph A.56.

Findings

Summary

6.43 The CMA finds that:

- 6.43.1 Ultra entered into an agreement and/or concerted practice with each of the Resellers that the Resellers would not sell or advertise Hudson Reed or Ultra branded products online below the Recommended Online Price.⁵⁴¹
- 6.43.2 In the legal and economic context in which they operated, the Agreements genuinely restricted the ability of the Resellers to determine their online sales price for Hudson Reed and Ultra branded products. In particular, the Online Discounting Restriction was the key objective of Ultra's Trading Guidelines, which was enforced, in part, via the Reseller Image Licence. In the context of online 'click-to-buy' sales, the price advertised online is normally the price paid by the customer, ie the sales price. The CMA therefore concludes that the Agreements restricted each Reseller's ability to sell online below the Recommended Online Price.⁵⁴²
- 6.43.3 The Online Discounting Restriction was reinforced by measures to identify resellers who priced below the Recommended Online Price, combined with actual or threatened sanctions for pricing below this level.⁵⁴³
- 6.43.4 In the light of these findings, the Recommended Online Price was not simply a recommendation but fixed a minimum resale price in respect of online sales of Hudson Reed and Ultra branded products.⁵⁴⁴
- 6.43.5 As such, the CMA finds that the Agreements amounted to RPM.⁵⁴⁵
- 6.43.6 The RPM was reinforced by Clause 4.6 of the Reseller Image Licence, which itself was used to restrict resellers from offering prices below the Recommended Online Price without Ultra's prior consent.⁵⁴⁶

⁵⁴¹ See paragraph 6.20 above.

⁵⁴² See paragraph 6.47 below.

⁵⁴³ See paragraph 6.49 below.

⁵⁴⁴ See paragraphs 6.48 to 6.51 below.

⁵⁴⁵ See paragraph 6.51 below.

⁵⁴⁶ See paragraph 6.50 below.

- 6.44 In the light of their content and objectives, and when viewed in the legal and economic context in which they operated, the CMA finds that the object of the Agreements was to prevent, restrict or distort competition through resale price maintenance. In other words, the Agreements were, by their very nature, harmful to the proper functioning of normal competition.
- 6.45 This is further supported by evidence as to the subjective intentions of Ultra when entering into the Agreements.⁵⁴⁷

Content of the Agreements

- 6.46 The CMA finds that the content of the Agreements was to prevent or restrict the Resellers from selling Hudson Reed or Ultra branded products online below the Recommended Online Price.
- 6.47 In the legal and economic context in which they operated,⁵⁴⁸ the CMA finds that the Agreements genuinely restricted the ability of the Resellers to determine their online sales prices for Hudson Reed and Ultra branded products. In particular, the Online Discounting Restriction was the key objective of Ultra's Trading Guidelines, which was enforced, in part, via the Reseller Image Licence.⁵⁴⁹ In the context of online 'click-to-buy' sales, the price advertised online is normally the price paid by the customer, ie the sales price.⁵⁵⁰ The CMA therefore concludes that the Agreements restricted each Reseller's ability to sell online below the Recommended Online Price, amounting to RPM in respect of online sales.
- 6.48 The fact that the Recommended Online Price was described as a '*recommendation*' or '*not legally binding*' in written communications from Ultra to the Resellers does not affect the CMA's conclusion that the Agreements amounted to RPM in respect of online sales.
- 6.49 When viewed in the light of the actions taken by Ultra to identify resellers who sold or advertised Hudson Reed or Ultra products online below the Recommended Online Price and the actual or threatened sanctions for pricing below this level, the CMA considers that the Resellers were not genuinely free to determine their online sales price. If the Resellers attempted to sell or advertise Hudson Reed or Ultra branded products online below the Recommended Online Price, they risked Ultra ceasing to supply them, a

⁵⁴⁷ See paragraphs 6.58 to 6.63 below.

⁵⁴⁸ See Chapter 4 above, and paragraph 6.56 below.

⁵⁴⁹ See paragraphs 5.59 to 5.70 and 5.77 to 5.83 above.

⁵⁵⁰ See paragraphs 4.12 to 4.14 above.

worsening of their wholesale terms, or withdrawal of Ultra's permission to use copyrighted images of its products.⁵⁵¹

- 6.50 The CMA considers that the Reseller Image Licence formed part of and reinforced the Online Discounting Restriction as one of several enforcement mechanisms available to Ultra for ensuring reseller compliance.⁵⁵² In addition, the CMA considers that Clause 4.6 of the Reseller Image Licence itself was used to restrict resellers from offering prices below the Recommended Online Price without Ultra's prior consent,⁵⁵³ which in itself amounts to RPM. For the purposes of this investigation, the CMA has considered this restriction as part of the Online Discounting Restriction.⁵⁵⁴
- 6.51 In the light of these findings, the CMA considers that the Agreements fixed a minimum resale price for the online sale of Hudson Reed or Ultra branded goods. As such, the CMA concludes that the Agreements amounted to RPM in respect of online sales.
- 6.52 RPM has been found consistently at both EU and national level (including the UK) to have the object of preventing, restricting or distorting competition.⁵⁵⁵

Objectives of the Agreements

- 6.53 The Agreements prevented the Resellers from selling or advertising Hudson Reed or Ultra branded products online below the Recommended Online Price.⁵⁵⁶ In the context of online sales, it is clear from this alone that the main objective of the Agreements was to prevent the Resellers from offering prices online below a pre-determined level. Further, it is clear from the fact that Ultra monitored the retail prices offered on Resellers' websites and imposed sanctions for non-compliance that the objective of the Agreements was to fix minimum resale prices in practice.⁵⁵⁷
- 6.54 The CMA considers that, in the absence of the Agreements, each Reseller would have been able to determine independently its own price for online sales of Hudson Reed and Ultra branded products. In this way, each Reseller would have had the freedom, should it have so wished and given the incentives it faced, to attract and win customers by using the internet to signal to customers the existence of a price advantage over its competitors. As such,

⁵⁵¹ See paragraph 6.22.11 above including the references therein.

⁵⁵² See paragraphs 5.62 to 5.76, 5.166 and 5.167 above including references therein.

⁵⁵³ See, in particular, paragraphs 5.166 and 5.167 above.

⁵⁵⁴ See paragraphs 5.62 to 5.76 above including references therein.

⁵⁵⁵ See Annex A, paragraph A.47.

⁵⁵⁶ See paragraph 6.46 above.

⁵⁵⁷ See paragraphs 6.22.9 to 6.22.11 above including the references therein.

this would have increased the scope for price competition between the Resellers (and, more generally, other Ultra resellers).

6.55 In the light of the above, the CMA considers that the objective of the Agreements was to:

6.55.1 reduce price competition between resellers from online sales, and

6.55.2 reduce downward pressure on the prevailing price of a particular product in the market (the Market Price).

Context of the Infringements

6.56 In reaching its findings that the Agreements each had the object of restricting competition, the CMA has had regard to the actual context⁵⁵⁸ in which the Agreements operated, including the goods affected by them,⁵⁵⁹ the conditions of the functioning and structure of the market,⁵⁶⁰ and the relevant legal and economic context.⁵⁶¹

Subjective intent

6.57 Whilst the CMA is not required to demonstrate that Ultra intended to prevent, restrict or distort competition when entering into the Agreements, it may nonetheless take its intentions into account when considering the object of the Agreements.⁵⁶² These intentions demonstrate both the nature of the Agreements and what Ultra was seeking to achieve.

The reduction of price competition online and between online and offline sales channels

6.58 The CMA finds that Ultra's principal aim in adopting the Online Discounting Restriction was to reduce or eliminate aggressive discounting on sales made online, and therefore:

6.58.1 to reduce price competition between resellers from online sales

6.58.2 to reduce downward pressure on the Market Price, and thereby

6.58.3 to protect or increase the retail margins of resellers, and

6.58.4 to encourage resellers to stock Ultra's products.

⁵⁵⁸ See Chapter 4 above.

⁵⁵⁹ See paragraphs 4.1 and 4.2, and Annex B.

⁵⁶⁰ See paragraphs 4.4 and 4.5 above and Annex B, paragraphs B.22 to B.24.

⁵⁶¹ See paragraphs 4.3 and 4.6 to 4.25 above.

⁵⁶² See Annex A, paragraph A.42.

- 6.59 This is based on the totality of evidence set out in Chapter 5 above, and in particular the following specific evidence:
- 6.59.1 From 2006, online discounting of Ultra branded goods had reduced resellers' margins to the extent that it was no longer attractive for certain resellers to promote Hudson Reed products.⁵⁶³
 - 6.59.2 Ultra introduced the 2009 Online Discounting Policy in response to complaints from resellers about discounting by online dealers.⁵⁶⁴
 - 6.59.3 The 2009 Online Discounting Policy had the explicit aim of restricting online discounting of Hudson Reed and Ultra branded products.⁵⁶⁵
 - 6.59.4 Between at least November 2010 and September 2011, Ultra received further complaints from customers that online discounting of Ultra's products was making it difficult for them to compete.⁵⁶⁶
- 6.60 Ultra's contemporaneous documents also demonstrate that its main objective for implementing the Trading Guidelines, including the Online Discounting Restriction, was to reduce price competition between resellers from online sales and to reduce downward pressure on the Market Price.⁵⁶⁷ For example:
- 6.60.1 Ultra's Outline Proposal to the Board stated that the Recommended Online Price would be set at a maximum of 25% off RRP's *'to ensure showrooms can be compete [sic] and are encouraged to promote the brand'*.⁵⁶⁸
 - 6.60.2 The Outline Proposal specified that customers who *'intentionally change all their prices, or all those in a product group, to gain a competitive advantage'* would have committed a 'major offence' (ie a breach of the Online Discounting Restriction).⁵⁶⁹
 - 6.60.3 Although the wording of the Final Proposal differed in certain respects from the Outline Proposal, the substance of Ultra's proposals remained largely unchanged.⁵⁷⁰

⁵⁶³ See paragraphs 5.21 and Annex C, paragraph C.1.

⁵⁶⁴ See paragraph 5.14 and Annex C, paragraphs C.1 to C.5.

⁵⁶⁵ See paragraphs 5.14, 5.15 and 5.18 above and Annex C, paragraphs C.5, C.6 and C.19.

⁵⁶⁶ See, for example, the evidence set out at paragraphs 4.20.1 to 4.20.2 and 5.21 above.

⁵⁶⁷ See paragraphs 5.21 to 5.35 above.

⁵⁶⁸ See paragraph 5.30 above and Annex D (Objective).

⁵⁶⁹ See definition of 'major offence' under 'ongoing procedure' in the Outline Proposal at Annex D (Enforcement sanctions).

⁵⁷⁰ See paragraph 5.34 above and Annex D.

6.60.4 [Marketing Director] of Ultra expressed a concern that the Reseller Image Licence was ‘*an obvious smoke screen for managing prices*’.⁵⁷¹

Protecting the value of the Hudson Reed and Ultra brands

6.61 During the course of CMA’s investigation, Ultra has submitted that the rationale for introducing the Trading Guidelines and the Online Discounting Restriction was to protect the value of the Hudson Reed and Ultra brands. In particular, Ultra has submitted that it introduced the Trading Guidelines and Reseller Image Licence in order to address the following issues:

6.61.1 Poor service provided by resellers making sales online⁵⁷²

6.61.2 Poor quality websites (including the use of poor quality or incorrect images of Ultra’s products and poor information)⁵⁷³

6.61.3 High credit risk of certain resellers making sales online⁵⁷⁴

6.61.4 Certain resellers offering counterfeit goods and/or incorrectly listing goods as ‘in stock’⁵⁷⁵

6.61.5 Passing off by certain resellers.⁵⁷⁶

6.62 The CMA recognises that the above issues may have been genuinely held commercial concerns, and may have led, in part, to the introduction of the

⁵⁷¹ See paragraph 5.110 above.

⁵⁷² For example, during her interview with the CMA, [Marketing Director] (Ultra) referred to ‘*an increasing number with very poor-quality websites, offering no service that we perceived*’. Transcript of interview with [Marketing Director] (Ultra), dated 19 August 2015, page 12, lines 6 and 7 (URN UC0161.1).

⁵⁷³ For example, during her interview with the CMA, [Marketing Director] (Ultra) referred to ‘*an increasing number with very poor-quality websites, offering no service that we perceived. So that, that’s why we brought in a -- a protection of the brands and the -- the images and only wanting to work with those online customers who could sell products in a reputable way and would be there tomorrow for the consumer*’. Transcript of interview with [Marketing Director] (Ultra), dated 19 August 2015, page 12, lines 5 to 10. See also page 29, lines 7 to 9; page 36, lines 17 to 18; lines 22 to 23 and page 31, lines 20 to 23 (URN UC0161.1).

⁵⁷⁴ For example, during her interview with the CMA, [Marketing Director] (Ultra) referred to the fact that Ultra had ‘*a couple of customers who were very high-risk credit, who owed us a lot of money as well; really, really not sustainable*’. Transcript of interview with [Marketing Director] (Ultra), dated 19 August 2015, page 11, line 25; page 12, line 1; 13-19; page 16, line 16; and page 23, line 22 to page 24, line 7 (URN UC0161.1).

⁵⁷⁵ For example, during her interview with the CMA, [Marketing Director] (Ultra) referred to Ultra having concerns about where a reseller was sourcing its products ‘*because customers had said you can’t actually buy anything off them and when we visited those premises, they were just a PO office [...]*’ and Ultra ‘*didn’t know if it was stolen product. We did have an issue when we moved warehouses with -- with product going missing.*’ Transcript of interview with [Marketing Director] (Ultra), dated 19 August 2015, page 36, lines 12 to 15 and page 37, lines 13 and 14 (URN UC0161.1).

⁵⁷⁶ For example, during her interview with the CMA, [Marketing Director] of Ultra referred to the fact that some resellers were passing off Ultra-branded product as Hudson Reed and vice versa. Transcript of interview with [Marketing Director] (Ultra), dated 19 August 2015, page 22, lines 6 and 7; page 16, lines 15 to 16; page 25, lines 20 and 21; page 27, lines 5 to 8; page 63, lines 13 to 19 and page 78, lines 1 to 2 (URN UC0161.1).

Trading Guidelines and Reseller Image Licence. In particular, the CMA notes that:

6.62.1 The stated objective of the Outline Proposal was the implementation of an '*online pricing policy to ensure the long term success of the Hudson Reed and Ultra brands*'.⁵⁷⁷

6.62.2 As well as setting out Ultra's 'recommended' online retail price, the Trading Guidelines required resellers to '*[represent] Ultra's brands online in a consistent way*', including, for example, clearly representing the Hudson Reed and Ultra brand on resellers' websites, and not altering the colour, design, shape or size of any Hudson Reed or Ultra logos.⁵⁷⁸

6.63 However, the CMA considers that these objectives were, at most, subsidiary to the objective of protecting resellers' margins by reducing price competition from resellers making sales online. Moreover, whilst these may have been genuinely held commercial concerns, they do not justify the introduction of the Online Discounting Restriction. In particular, maintaining a prestigious image is not a legitimate aim for restricting competition.⁵⁷⁹ Finally, the CMA notes that the fact that an agreement may pursue other legitimate objectives does not preclude it from being regarded as having a restrictive object.⁵⁸⁰

6.64 In the light of the above, the CMA finds that the Agreements had the object of preventing, restricting or distorting competition (through resale price maintenance) in the supply of the Hudson Reed and Ultra brands in the UK.

F. Appreciable restriction of competition

6.65 The CMA finds that the Agreements appreciably prevented, restricted or distorted competition in relation to the supply of bathroom fittings, both in the EU and in the UK.

Appreciable effect on competition within the EU

6.66 An agreement or concerted practice falls outside the scope of Article 101 TFEU if its impact on competition is insignificant.⁵⁸¹

⁵⁷⁷ See paragraph 5.30 above and Annex D (Objective).

⁵⁷⁸ See paragraph 5.47 above.

⁵⁷⁹ See Annex A, paragraph A.43.

⁵⁸⁰ See Annex A, paragraph A.43.

⁵⁸¹ See Annex A, paragraphs A.57 to A.58.

- 6.67 According to case law, an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its very nature and independently of any concrete effect that it may have, an appreciable restriction on competition.⁵⁸²
- 6.68 The CMA finds that each of the Agreements had the object of preventing, restricting or distorting competition.⁵⁸³ The CMA therefore also finds that, by their very nature, each of the Agreements constitutes an appreciable restriction of competition in the supply of bathroom fittings for the purposes of Article 101 TFEU.

Appreciable effect on competition in the UK

- 6.69 In order to infringe the Chapter I prohibition, an agreement and/or concerted practice must have an ‘appreciable’ effect on competition within the UK.⁵⁸⁴
- 6.70 When considering whether each of the Agreements has an ‘appreciable’ effect on competition within the UK, the CMA has considered section 60(2) of the Act. This provides that a court must act with a view to securing that there is no inconsistency with any relevant decision of the European Courts when determining a question in relation to the Chapter I prohibition.
- 6.71 An agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its very nature and independently of any concrete effect that it may have, an appreciable restriction on competition.⁵⁸⁵ The CMA therefore also finds that the Agreements constitute, by their very nature, an appreciable restriction of competition in the supply of bathroom fittings for the purposes of the Chapter I prohibition.
- 6.72 In any event, and in the alternative, the CMA finds that the Agreements had an appreciable potential effect on competition for the supply of bathroom fittings in the UK. This conclusion is based on the following findings of fact:
- 6.72.1 the Agreements covered the whole of the UK, rather than being confined to a particular region or locality

⁵⁸² See Annex A, paragraph A.59.

⁵⁸³ See paragraph 6.64 above.

⁵⁸⁴ See Annex A, paragraphs A.57 to A.60.

⁵⁸⁵ See Annex A, paragraphs A.59.

6.72.2 Ultra's share of supply in relation to particular products within the bathroom fittings sector varied between [X]% and [X]% in 2013,⁵⁸⁶ and

6.72.3 UFGL had turnover of £62 million in 2012, £87.8 million in 2013 and £134.5 million in 2014.⁵⁸⁷

G. Effect on trade between EU Member States

6.73 Article 101 TFEU applies where an agreement or concerted practice may affect trade between EU Member States to an appreciable extent.⁵⁸⁸

Potential to affect trade between EU Member States

6.74 An effect on trade means that the agreement and/or concerted practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.⁵⁸⁹

6.75 The CMA finds that the Agreements have the potential to affect trade between EU Member States to an appreciable extent. The CMA has based its finding on the following:⁵⁹⁰

6.75.1 the Agreements involve RPM and cover products that are supplied throughout the whole of the UK⁵⁹¹

6.75.2 the products that are the subject of the Agreements are easily traded across borders as there are no significant cross-border barriers, in particular when sold through resellers online⁵⁹²

⁵⁸⁶ Except for bath/shower screens and whirlpool and spas where it was lower. These shares may have fluctuated over time. See Annex B, paragraph B.24.

⁵⁸⁷ UFGL audited accounts year end 31 December 2012 (URN U0004), UFGL audited accounts year end 31 December 2013 (URN U0005) and UFGL audited accounts year end 31 December 2014 (URN U0006). The 2014 figure includes the discontinued operations relating to the Mark Two business, which was placed in administration on 26 November 2014. In *North Midland Construction plc v Office of Fair Trading* [2011] CAT 14 at [60], the CAT took into account that the parties to the infringement were 'substantial undertakings' (one of which had turnover of £10 million) in concluding that the alleged infringement was appreciable.

⁵⁸⁸ See Annex A, paragraph A.61.

⁵⁸⁹ See Annex A, paragraph A.63.

⁵⁹⁰ See Annex A, paragraphs A.69 to A.73.

⁵⁹¹ See paragraph 6.51 and Annex B, paragraph B.13.3.

⁵⁹² See Annex B, paragraphs B.15 to B.17. In addition, a report by AMA (Bathroom Market Report UK 2013-2017 Analysis, Fourteenth Edition, August 2013, page 30) (URN UD0257) estimates that, in 2012, imports of baths and sanitary ware into the UK from other EU Member States totalled £123 million and exports from the UK to the EU totalled £31.2 million. AMA also noted at page 33 that 'British manufacturers mainly export three types of products: china fittings [...], plastic baths [...] and ceramic fittings [...]. The main destination of china fittings is the EU [...].'

6.75.3 the Agreements relate to online commerce, which, by its nature, is likely to reach consumers in other EU Member States, and

6.75.4 the turnover and market position⁵⁹³ of the undertaking concerned.

H. Effect on trade within the UK

6.76 The Chapter I prohibition applies to agreements and/or concerted practices, which may affect trade within the UK or a part of the UK (where they operate or are intended to operate in that part).⁵⁹⁴ Unlike the position under Article 101 TFEU, there is no requirement that the effect on trade within the UK should be appreciable.⁵⁹⁵

6.77 The CMA finds that the Agreements may affect trade within the UK or a part of the UK. This is because the products which are the subject of the Agreements are supplied throughout the UK.

I. Exclusion or exemption

Exclusion

6.78 The Chapter I prohibition does not apply in cases where it is excluded by or as a result of Schedules 1-3 of the Act.⁵⁹⁶

6.79 The CMA finds that none of the relevant exclusions applies to the Agreements.

Exemption

Block Exemption

6.80 Vertical agreements that restrict competition may be exempt from the Chapter I prohibition and/or Article 101 TFEU if they fall within the Vertical Agreements Block Exemption Regulation (VABER).⁵⁹⁷ VABER applies to vertical agreements where the relevant market shares of the supplier and the buyer are each below 30% and the agreements do not contain any 'hardcore'

⁵⁹³ See Annex B, paragraphs B.23 to B.24.

⁵⁹⁴ See Annex A, paragraph A.78.

⁵⁹⁵ See Annex A, paragraph A.79.

⁵⁹⁶ See Annex A, paragraph A.80.

⁵⁹⁷ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 102, 23.4.2010). See Annex A, paragraph A.84.

restrictions.⁵⁹⁸ A hardcore restriction includes a restriction of the buyer's ability to determine its sale price (ie it amounts to RPM).⁵⁹⁹

6.81 The CMA finds that the VABER does not apply to the Agreements, and therefore that the Agreements are not exempt from the application of the Chapter I prohibition or Article 101 TFEU. This is for the following reasons:

6.81.1 the Agreements prevented the Resellers from selling or advertising Hudson Reed or Ultra branded products online below the Recommended Online Price⁶⁰⁰

6.81.2 the Agreements therefore restricted the buyer's ability to determine its sale price (ie it amounted to RPM)⁶⁰¹

6.81.3 therefore, Article 4(a) of the VABER applies and the Agreements fall outside the scope of the VABER.

Individual exemption

6.82 Agreements and/or concerted practices that restrict competition are exempt from the Chapter I prohibition and/or Article 101 TFEU if certain criteria are satisfied.⁶⁰² In particular, it must be shown that the agreement in question:

6.82.1 contributes to improving production or distribution or promoting technical or economic progress while allowing consumers a fair share of the resulting benefits, but

6.82.2 does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives, or

6.82.3 afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

6.83 The CMA notes that agreements and/or concerted practices, which have as their object the prevention, restriction or distortion of competition, are very unlikely to benefit from individual exemptions.⁶⁰³ It is for the party claiming the benefit of exemption to adduce evidence that substantiates its claim.⁶⁰⁴ No such evidence has been provided by Ultra.

⁵⁹⁸ See Annex A, paragraph A.84.

⁵⁹⁹ See Annex A, paragraphs A.84 and A.85 .

⁶⁰⁰ See paragraph 6.46 above.

⁶⁰¹ See paragraph 6.47 and 6.51 above.

⁶⁰² See Annex A, paragraph A.86 and A.87.

⁶⁰³ See Annex A, paragraph A.89.

⁶⁰⁴ See Annex A, paragraph A.89

J. Conclusion on the application of the Chapter I prohibition and Article 101 TFEU

- 6.84 In the light of the above, the CMA has found that Ultra has infringed the Chapter I prohibition and/or Article 101 TFEU by entering into an agreement and/or concerted practice with each of the Resellers, which had as its object the appreciable prevention, restriction, or distortion of competition in the supply of bathroom fittings in the UK.

7. THE CMA'S ACTION

A. Decision

7.1 On the basis of the evidence set out above, the CMA has concluded that Ultra infringed the Chapter I prohibition and/or Article 101 TFEU by participating in an agreement and/or concerted practice with each of the Resellers that had as its object the prevention, restriction or distortion of competition. Further, the CMA finds both Ultra and its ultimate parent company, UFGL, jointly and severally liable for the Infringements.

7.2 Specifically, the CMA has concluded that:

7.2.1 From 7 February 2012 (at the latest) to 31 December 2012, Ultra and [Reseller 1] were party to an agreement and/or concerted practice that [Reseller 1] would not sell or advertise Hudson Reed or Ultra branded products online below the Recommended Online Price, which had as its object the appreciable prevention, restriction, or distortion of competition (through resale price maintenance) in relation to the supply of bathroom fittings in the UK.

7.2.2 From 1 February 2012 (at the latest) to 28 August 2014, Ultra and [Reseller 2] were party to an agreement and/or concerted practice that [Reseller 2] would not sell or advertise Hudson Reed or Ultra branded products online below the Recommended Online Price, which had as its object the appreciable prevention, restriction, or distortion of competition (through resale price maintenance) in relation to the supply of bathroom fittings in the UK.

7.2.3 From 1 February 2012 (at the latest) to 28 August 2014, Ultra and [Reseller 3] were party to an agreement and/or concerted practice that [Reseller 3] would not sell or advertise Hudson Reed or Ultra branded products online below the Recommended Online Price, which had as its object the appreciable prevention, restriction, or distortion of competition (through resale price maintenance) in relation to the supply of bathroom fittings in the UK.

7.3 Further to the CMA's findings of infringements of the Chapter I prohibition and/or Article 101 TFEU, the remainder of this Chapter sets out the enforcement action which the CMA is taking and its reasons for taking that action.

B. Directions

- 7.4 Section 32(1) of the Act provides that if the CMA has made a decision that an agreement⁶⁰⁵ infringes the Chapter I prohibition and Article 101(1) TFEU, it may give to such person(s) as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.
- 7.5 In this Decision, the CMA has found three separate infringements of the Chapter I prohibition and/or Article 101(1) TFEU ending on 28 August 2014. Evidence obtained during the course of the CMA's investigation confirms that the Infringements have ceased. In particular:
- 7.5.1 In December 2014, Ultra offered to the CMA to communicate to customers that it had not been enforcing the terms of the Reseller Image Licence since September 2014, and had decided more generally to review the Trading Guidelines.⁶⁰⁶ Ultra also offered to the CMA to confirm to customers '*for the avoidance of doubt that Ultra Finishing Group and its subsidiaries will not seek to influence the price*' at which its goods are advertised or sold online.⁶⁰⁷ Whilst the CMA has not been provided with contemporaneous evidence of such communication to Ultra's resellers, it has been provided with evidence of an internal email of 25 September 2014 from [Marketing Director] of Ultra to 'Marketing' stating that '*the prices at which our customers sell is entirely a matter for them*'.⁶⁰⁸
- 7.5.2 Further evidence shows that, in response to queries from resellers in April and July 2015, Ultra confirmed that the prices they sell at were a matter for the resellers.⁶⁰⁹
- 7.5.3 In addition, the CMA notes that the Board of Ultra adopted a competition law compliance programme on 28 April 2016.
- 7.6 In the light of the above, the CMA considers that the Infringements have ceased. The CMA considers that it is not necessary to give directions to Ultra or UFGL in this case.

⁶⁰⁵ Or, as appropriate, concerted practice or decision by an association of undertakings – see section 2(5) of the Act.

⁶⁰⁶ Draft commitments letter received from Ultra on 15 December 2014 (URN UC0055.2).

⁶⁰⁷ Draft commitments letter received from Ultra on 15 December 2014 (URN UC0055.2).

⁶⁰⁸ Email from [Marketing Director] (Ultra) to Marketing (Ultra) dated 25 September 2014 (URN UD0858).

⁶⁰⁹ Email from [Marketing Executive] (Ultra) to [Employee] ([Reseller]) dated 28 April 2015 (URN UD0862) and email from [Marketing Assistant] (Ultra) to [Employee] ([Reseller]) dated 30 July 2015 (URN UD0863).

C. Financial penalties

- 7.7 Section 36(1) of the Act provides that on making a decision that an agreement⁶¹⁰ has infringed the Chapter I prohibition and/or Article 101(1) TFEU, the CMA may require an undertaking that is a party to the agreement to pay a penalty in respect of the infringement. In accordance with section 38(8) of the Act, the CMA must have regard to the guidance on penalties in force at the time when setting the amount of the penalty (the Penalties Guidance).⁶¹¹
- 7.8 Penalties in respect of the Infringements are imposed on Ultra as the legal entity that participated in the conduct that is the subject of the Infringements, and UFGl as the parent company that is held jointly and severally liable for the Infringements.

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

- 7.9 Provided the penalties it imposes in a particular case are:
- 7.9.1 within the range of penalties permitted by section 36(8) of the Act⁶¹² and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (the 2000 Order),⁶¹³ and
 - 7.9.2 the CMA has had regard to the Penalties Guidance in accordance with section 38(8) of the Act, the CMA has a margin of appreciation when determining the appropriate amount of a penalty under the Act.⁶¹⁴
- 7.10 The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.⁶¹⁵ Rather, the CMA makes its assessment on a case-by-case basis,⁶¹⁶ having regard to all relevant circumstances and the twin objectives of the CMA's policy on financial penalties, namely:

⁶¹⁰ Or, as appropriate, concerted practice or decision by an association of undertakings – see section 2(5) of the Act.

⁶¹¹ The guidance currently in force is the OFT's *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board.

⁶¹² Section 36(8) is addressed at paragraphs 7.50 and following below.

⁶¹³ SI 2000/309, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

⁶¹⁴ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at [168] and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, at [102].

⁶¹⁵ See, for example, *Eden Brown and Others v OFT* [2011] CAT 8, at [78].

⁶¹⁶ See, for example, *Kier Group and Others v OFT* [2011] CAT 3, at [116] where the CAT noted that 'other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent'. See also *Eden Brown and Others v OFT* [2011] CAT 8, at [97] where the CAT observed that '[d]ecisions by this Tribunal on penalty appeals are very closely related to the particular facts of the case'.

- 7.10.1 to impose penalties on infringing undertakings which reflect the seriousness of the infringement, and
- 7.10.2 to ensure that the threat of penalties will deter both the infringing undertaking and other undertakings from engaging in anti-competitive activities.⁶¹⁷

Small agreements

- 7.11 Section 39(3) of the Act provides that a party to a 'small agreement' is immune from financial penalties for infringements of the Chapter I prohibition. This immunity does not apply to infringements of Article 101 TFEU. A 'small agreement' is an agreement between undertakings whose combined applicable turnover does not exceed £20 million for the business year ending in the calendar year preceding one during which the infringement occurred.⁶¹⁸
- 7.12 The turnover of Ultra alone exceeded £20 million in calendar year 2013.⁶¹⁹ Accordingly, Ultra does not benefit from immunity from penalty under section 39(3) of the Act.

Intention/negligence

- 7.13 The CMA may impose a penalty on an undertaking that has infringed the Chapter I prohibition and/or Article 101 TFEU only if it is satisfied that the infringement has been committed intentionally or negligently.⁶²⁰ However, the CMA is not obliged to specify whether it considers the infringement to be intentional or merely negligent.⁶²¹
- 7.14 The Competition Appeal Tribunal (CAT) has defined the terms 'intentionally' and 'negligently' as follows:

'...an infringement is committed intentionally for the purposes of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of

⁶¹⁷ Section 36(7A) of the Act and *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 1.4.

⁶¹⁸ Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262), Regulation 3. The term 'applicable turnover' means the turnover determined in accordance with the Schedule to the Regulations.

⁶¹⁹ Ultra audited accounts year end 31 December 2013 (URN U0002).

⁶²⁰ Section 36(3) of the Act.

⁶²¹ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1 paragraphs [453] to [457]; see also Cases 1014 and 1015/1/1/03 *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at paragraph [221].

*section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition’.*⁶²²

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

*‘the question whether the infringements were committed intentionally or negligently...is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty’.*⁶²³

7.16 The circumstances in which the CMA might find that an infringement has been committed intentionally include the situation in which the agreement or conduct in question has as its object the restriction of competition.⁶²⁴ The CMA considers that the Infringements had as their object the prevention, restriction or distortion of competition.⁶²⁵

7.17 Ignorance or a mistake of law does not prevent a finding of intentional infringement, even where such ignorance or mistake is based on independent legal advice.⁶²⁶

7.18 In the light of the evidence set out at Chapter 5 above, the CMA considers that Ultra was aware, or should reasonably have been aware, that its conduct was capable of restricting or distorting competition. For example, Ultra prepared a script for dealing with calls from Trading Standards or questions from resellers alleging that the Trading Guidelines constituted price-fixing.⁶²⁷ In addition, in an internal email, [Marketing Director] of Ultra expressed a concern that the Reseller Image Licence was *‘an obvious smoke screen for managing prices’*.⁶²⁸

⁶²² *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at [221].

⁶²³ Case 280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555, paragraph 124, referring to Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82/AZ *International Belgium and Others v Commission* [1983]

⁶²⁴ See *Enforcement* (OFT407, December 2004), adopted by the CMA Board, paragraph 5.9.

⁶²⁵ See paragraph 6.8 above.

⁶²⁶ See the CJ’s comments in Case C-681/11 *Bundeswettbewerbshörde v Schenker & Co. AG*, judgment of 18 June 2013, paragraph 38: *‘the fact that the undertaking concerned has characterised wrongly in law its conduct upon which the finding of the infringement is based cannot have the effect of exempting it from imposition of a fine in so far as it could not be unaware of the anti-competitive nature of that conduct’* and paragraph 41 *‘It follows that legal advice given by a lawyer cannot, in any event, form the basis of a legitimate expectation on the part of an undertaking that its conduct does not infringe Article 101 TFEU or will not give rise to the imposition of a fine.’* See also *Enforcement* (OFT407, December 2004), adopted by the CMA Board, paragraph 5.10.

⁶²⁷ *Proposed guidelines scripts for outbound calls* (URN UD0089). The script stated *‘We don’t expect any calls from trading standards. However, should we receive any correspondence from them, it’s important we explain that all discussions with our customers are recommendations and that legal advice has been sought.’* In addition, Ultra prepared a response to a ‘predicted question’ of *‘You can’t do this it’s price fixing!’*

⁶²⁸ See paragraph 5.110 above.

7.19 Accordingly, in the present case, the CMA considers that the very nature of the Infringements means that Ultra (i) was aware, or (ii) could not have been unaware, that the Agreements were restrictive of competition. At the very least, the CMA considers that Ultra ought to have known that its actions would result in a restriction of competition.⁶²⁹

7.20 In conclusion, the CMA has found that Ultra committed the Infringements intentionally or negligently.

Single penalty

7.21 The CMA has discretion whether to impose a single penalty or multiple penalties for infringing behaviour that could in principle be characterised as more than one infringement.⁶³⁰

7.22 In the present case, the CMA considers it appropriate to impose a single penalty on the Ultra Group for the Infringements in view of the fact that:

7.22.1 the Infringements were related and involved almost identical subject matter

7.22.2 the Infringements were part of a larger collection of similar arrangements between Ultra and its resellers selling Hudson Reed and Ultra branded products online, and

7.22.3 the CMA's decision to pursue three such arrangements as infringements was a matter of discretion.

Calculation of penalties

7.23 As noted at paragraph 7.7 above, when setting the amount of the penalty, the CMA must have regard to the guidance on penalties in force at that time. The Penalties Guidance establishes a six-step approach for calculating the penalty. The six steps are set out below.

Step 1 – the starting point

7.24 The starting point for determining the level of financial penalty that will be imposed on an undertaking is calculated having regard to the seriousness of the infringement and the relevant turnover of the undertaking.⁶³¹ The 'relevant

⁶²⁹ See *Enforcement* (OFT407, December 2004), adopted by the CMA Board, paragraph 5.12.

⁶³⁰ See, for example, *Kier Group and Others v OFT* [2011] CAT 3, at [179].

⁶³¹ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraphs 2.3 to 2.6.

turnover' is defined in the Penalties Guidance as the turnover of the undertaking in the relevant market affected by the infringement in the undertaking's last business year.⁶³² The 'last business year' is the undertaking's financial year preceding the date when the infringement ended.⁶³³

- 7.25 In the present case, the relevant turnover for the Ultra Group comprises the turnover generated by Ultra in the supply of bathroom fittings in the UK for the financial year ending 31 December 2013.
- 7.26 To reflect adequately the seriousness of an infringement, the CMA will apply a starting point of up to 30% of an undertaking's relevant turnover.⁶³⁴ The actual percentage that is applied to the relevant turnover depends, in particular, on the nature of the infringement. The more serious and widespread the infringement, the higher the likely percentage rate.⁶³⁵ When making its assessment of the seriousness of an infringement, the CMA will consider a number of factors, including the nature of the products or services, the structure of the market, the market shares of the undertakings involved in the infringement, entry conditions and the infringement's effect on competitors and third parties. The CMA will also take into account the need to deter other undertakings from engaging in such infringements in the future. The assessment is made on a case-by-case basis, taking account of all the circumstances of the case.⁶³⁶
- 7.27 The starting point for the penalty in this case takes into account the fact that the Infringements amounted to RPM, which constitutes vertical 'price fixing' and a 'hard-core' restriction.⁶³⁷ The CMA considers RPM to be a serious infringement of the Chapter I prohibition and Article 101 TFEU. The CMA has taken into account the need to deter both the Ultra Group and other undertakings from engaging in such infringements in the future.

⁶³² *Ibid*, paragraph 2.7. The CMA notes the observation of the Court of Appeal in *Argos Ltd and Littlewoods Ltd v Office of Fair Trading and JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318, at paragraph 169 that: '[...] neither at the stage of the OFT investigation, nor on appeal to the Tribunal, is a formal analysis of the relevant product market necessary in order that regard can properly be had to step 1 of the Guidance in determining the appropriate penalty.' The Court of Appeal considered that it was sufficient for the OFT to 'be satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement' (at paragraphs 170 to 173).

⁶³³ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.7.

⁶³⁴ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.5.

⁶³⁵ *Ibid*, paragraph 2.4.

⁶³⁶ *Ibid*, paragraph 2.6.

⁶³⁷ See Article 4(a) of the VABER.

7.28 However, the CMA notes that the Infringements do not fall within the category of the most serious infringements of the Chapter I prohibition and Article 101 TFEU (such as horizontal price fixing, market sharing and other cartel activities), which would ordinarily attract a starting point towards the upper end of the 30% range.

7.29 The CMA has also taken into account the following factors in assessing the seriousness of the Infringements:

7.29.1 *The nature of the products:* The relevant product market for the purposes of the Infringements is the supply of bathroom fittings.⁶³⁸ Price, including prices offered online, is an important parameter of competition.⁶³⁹

7.29.2 *The structure of the market and Ultra's market share:* The upstream supply of bathroom fittings comprises a relatively large number of manufacturers offering a range of different bathroom fittings.⁶⁴⁰ Ultra has an overall aggregated share of around [X]% of the supply of all bathroom fittings in the UK, but this may have fluctuated over time.⁶⁴¹ Therefore, Ultra has a relatively low market share in a fragmented market.

7.29.3 *Entry conditions:* The CMA has taken into account entry conditions in paragraph 6.75 above where it discussed why the Infringements are capable of having an effect on trade between Member States. The Infringements may have an impact on entry from other Member States as set out in the paragraph mentioned.

7.29.4 *Impact on competitors and third parties:* The Infringements had a clear impact on the Resellers, in relation to whom Ultra sought to prevent or restrict their ability to determine their own resale prices. In turn, the Infringements would have reduced price competition from online sales of bathroom fittings products and reduced downward pressure on the retail price of bathroom fittings, which potentially resulted in higher prices to consumers.

7.30 In view of the foregoing, the CMA has applied a starting point of 18% of relevant turnover.

⁶³⁸ See paragraph B.20 below.

⁶³⁹ See paragraph 4.11 above.

⁶⁴⁰ See paragraph 4.4 above.

⁶⁴¹ See paragraph B.24 below.

Step 2 – adjustment for duration

- 7.31 The starting point under step 1 may be increased, or in particular circumstances decreased, to take into account the duration of an infringement.⁶⁴² Where the total duration of an infringement is more than one year, the CMA will round up part years to the nearest quarter year, although the CMA may in exceptional circumstances decide to round up the part year to a full year.⁶⁴³
- 7.32 The CMA has found that one of the Infringements lasted from 7 February 2012 (at the latest) to 31 December 2012 (ten months and 24 days) and two of the Infringements lasted from 1 February 2012 (at the latest) to 24 August 2014 (two years, six months and 24 days).⁶⁴⁴ The CMA has accordingly applied a multiplier of 2.75 to the figure reached at the end of step 1.

Step 3 – adjustment for aggravating and mitigating factors

- 7.33 The amount of the penalty, adjusted as appropriate at step 2, may be increased where there are aggravating factors, or reduced where there are mitigating factors.⁶⁴⁵ A non-exhaustive list of aggravating and mitigating factors is set out in the Penalties Guidance.⁶⁴⁶ In the circumstances of this case, the CMA has adjusted the penalty at step 3 to take account of the factors set out below.

Aggravating factors⁶⁴⁷

Involvement of directors or senior management

- 7.34 The involvement of directors or senior management in an infringement can be an aggravating factor. In this case, the CMA has applied an increase to the penalty at step 3 for the involvement in the Infringements of the Board, including Ultra's Managing Director, [Managing Director], and its Chairman, [Director].
- 7.35 Specifically, the Board considered the Trading Guidelines on at least two occasions (before and after receipt of legal advice) and approved their

⁶⁴² *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.12.

⁶⁴³ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.12.

⁶⁴⁴ See paragraph 7.2 above.

⁶⁴⁵ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.13.

⁶⁴⁶ *Ibid*, paragraphs 2.14 and 2.15.

⁶⁴⁷ *Ibid*, paragraph 2.14.

implementation.⁶⁴⁸ It was also sent a slide pack about the trading guidelines prepared for internal sales meetings,⁶⁴⁹ and was updated on progress on at least two occasions after initial implementation.⁶⁵⁰ Further, the Managing Director of UFL at the time was involved in planning the Trading Guidelines.⁶⁵¹

7.36 Further, [Director] (a director and the sole shareholder of UFGL at the time) was copied into Ultra's email of 9 December 2011 concerning the introduction of the Trading Guidelines.⁶⁵² Consequently, the CMA considers that not only were the senior directors of Ultra involved in the Infringements but UFGL was, or should have been, aware of the Trading Guidelines.

7.37 The CMA considers that an increase of 10% for director or senior management involvement is appropriate and proportionate in the circumstances of this case.

*Mitigating factors*⁶⁵³

Cooperation

7.38 The CMA may decrease the penalty at step 3 for cooperation which enables the enforcement process to be concluded more effectively and/or speedily. The Penalties Guidance provides that, for these purposes, what is expected is cooperation over and above respecting time limits specified or otherwise agreed (which will be a necessary but not sufficient criterion).⁶⁵⁴

7.39 The CMA considers that it is appropriate to decrease the penalty at step 3 to reflect Ultra's cooperation in promptly making key staff available for voluntary interviews, and attending meetings at the CMA's offices. [X].

7.40 Ultra's cooperation enabled the enforcement process to be concluded more efficiently. The CMA considers that a 5% reduction for cooperation is appropriate and proportionate in the circumstances of this case.

⁶⁴⁸ See paragraphs 5.28, 5.29 and 5.37 above.

⁶⁴⁹ See paragraph 5.35 above.

⁶⁵⁰ See paragraphs 5.55 and 5.64.3 above.

⁶⁵¹ For example, the Outline Proposal and the Final Proposal stated '[Managing Director] to brief Department heads on reason for the policy and an overview on how it will work'. See Annex D below.

⁶⁵² See paragraph 5.54 above.

⁶⁵³ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.15.

⁶⁵⁴ *Ibid*, paragraph 2.15 and footnote 28.

Compliance

- 7.41 The CMA may decrease the penalty at step 3 where adequate steps have been taken by an undertaking with a view to ensuring future compliance with Articles 101 and 102 TFEU and the Chapter I and Chapter II prohibitions.⁶⁵⁵
- 7.42 Following the CMA's investigation and the settlement discussions in the present case, Ultra has introduced a comprehensive competition law compliance programme, to which its Board has fully and publically committed.
- 7.43 The CMA notes that the identified compliance activities by Ultra demonstrate a clear and unambiguous commitment to and accountability for competition law compliance by Board/senior management, in that they have engaged in appropriate steps relating to risk identification, assessment, mitigation and review. The CMA has been provided with evidence that senior managers will be trained in competition compliance and that a competition policy has been drafted, and is being applied. In addition, Ultra will submit a report to the CMA on its compliance activities every year, for the next three years.
- 7.44 UFGL has committed to ensuring that a culture of compliance and awareness is disseminated throughout the undertaking.
- 7.45 The CMA therefore considers that it is appropriate and proportionate to decrease the penalty by 5% to reflect the Ultra Group's compliance activities.

Step 4 – adjustment for specific deterrence and proportionality

- 7.46 The penalty may be adjusted at this step to achieve the objective of specific deterrence (namely, ensuring that the penalty imposed on the infringing undertaking will deter it from engaging in anti-competitive practices in the future), or to ensure that a penalty is proportionate, having regard to appropriate indicators of the size and financial position of the undertaking as well as any other relevant circumstances of the case.⁶⁵⁶ At step 4, the CMA will assess whether, in its view, the overall penalty is appropriate in the round. Adjustment to the penalty at step 4 may result in either an increase or a decrease to the penalty.

⁶⁵⁵ *Ibid*, paragraph 2.15.

⁶⁵⁶ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.16. The CMA has considered a range of financial indicators in this regard, based on accounting information publicly available and/or provided by the Ultra Group at the time of calculating the penalty. Those financial indicators included total worldwide turnover for the last financial year, total worldwide turnover over a three year average, net assets for the last financial year, adjusted net assets for the last financial year, profit after tax for the last financial year, and profit after tax over a three year average. Specific financial indicators that are not referred to in the body of the Decision are those which did not materially affect the CMA's analysis in reaching its conclusion; for the avoidance of doubt, such financial indicators have been taken into consideration.

7.47 Where necessary, the penalty may be decreased at step 4 to ensure that the level of penalty is not disproportionate or excessive. In carrying out this assessment of whether a penalty is proportionate, the CMA will have regard to the infringing undertaking's size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the undertaking's infringing activity on competition.⁶⁵⁷

7.48 The Ultra Group's penalty after step 3 is £[X]. The CMA considers that this figure should be decreased to ensure that the level of penalty is not disproportionate or excessive. In reaching this view, the CMA has had regard to the following factors:

7.48.1 *The Ultra Group's size and financial position:* Having had regard to a range of financial indicators,⁶⁵⁸ the CMA considers that the Ultra Group's penalty should be decreased to ensure that its penalty is not disproportionate or excessive. For example, the CMA notes that the unadjusted penalty would:

- amount to a substantial proportion of the Ultra Group's total worldwide turnover of £134.5 million in the year ending 31 December 2014 and its average worldwide turnover over the last three financial years
- be significantly in excess of the Ultra Group's profit after tax, both for the year ending 31 December 2014 and as an average over the last three financial years, and
- be significantly in excess of the Ultra Group's net assets, both for the year ending 31 December 2014 and as an average over the last three financial years.

7.48.2 *The nature of the Infringements:* The Infringements were a serious breach of the Chapter I prohibition and Article 101 TFEU.⁶⁵⁹ This factor has been taken into account at step 1 above, and in the

⁶⁵⁷ *Ibid*, paragraph 2.20.

⁶⁵⁸ The Penalties Guidance provides that, in considering whether any adjustments should be made at step 4 for specific deterrence or proportionality, the CMA will have regard to appropriate indicators of the size and financial position of the relevant undertaking as at the time the penalty is being imposed (*Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.16). In the circumstances of this case, the CMA has taken that time to be the date on which the settlement offer by the Ultra Group was accepted by the CMA. In this case, the financial year for which the most recent audited accounts were available at that time is the financial year ending 31 December 2014.

⁶⁵⁹ See paragraph 7.27 above.

circumstances of this case the CMA does not consider that it is necessary to make any adjustment at step 4 in respect of this factor.

7.48.3 *Ultra's role in the infringements:* Ultra played a leading role in driving forward the Infringements. However, it is the only party on which a penalty will be imposed in this case so, in the circumstances of this case, the CMA does not consider that it is necessary to make any adjustment at step 4 in respect of this factor.

7.48.4 *The impact of Ultra's infringing activity on competition:* This factor has been taken into account at step 1 above, and in the circumstances of this case, the CMA does not consider that it is necessary to make any adjustment at step 4 in respect of this factor.

7.49 In view of the foregoing, in the circumstances of this case, the CMA has decreased the Ultra Group's penalty at step 4 by [X]%, to a figure of £983,335. Assessing the resulting penalty in the round, the CMA considers that the adjusted penalty is appropriate to deter the Ultra Group from breaching competition law in the future without being disproportionate or excessive.

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

7.50 The CMA may not impose a penalty for an infringement that exceeds 10% of an undertaking's 'applicable turnover', that is the worldwide turnover of the undertaking in the business year preceding the date of the CMA's decision.⁶⁶⁰ The CMA has assessed the Ultra Group's penalty against this threshold. This assessment has not necessitated any reduction to the penalty at step 5 of the penalty calculation.

7.51 In addition, the CMA must, when setting the amount of a penalty for a particular agreement or conduct, take into account any penalty or fine that has been imposed by the European Commission, or by a court or other body in another Member State in respect of the same agreement or conduct.⁶⁶¹ As there is no such applicable penalty or fine, no adjustments are necessary in this case in that regard.

Step 6 – application of reductions for settlement

⁶⁶⁰ Section 36(8) of the Act and the 2000 Order, as amended. See also *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.21.

⁶⁶¹ *Ibid*, paragraph 2.24.

- 7.52 The CMA will reduce an undertaking's financial penalty at step 6 where the undertaking has agreed to settle the case with the CMA, which will involve, amongst other things, the undertaking admitting its participation in an infringement.⁶⁶²
- 7.53 The Ultra Group expressed a genuine interest and willingness to enter into settlement discussions with the CMA before the CMA issued the Statement of Objections. However, in the circumstances of this case, settlement discussions took place after the CMA had issued the Statement of Objections. This was due to the application of Rule 5(3) of the CMA Rules, pursuant to which the Statement of Objections was addressed only to the Ultra Group and not to any of the counterparties to the agreements or concerted practices with Ultra.⁶⁶³ Therefore, settlement discussions took place after the Resellers had been given an opportunity to make representations on the Statement of Objections.
- 7.54 As part of settlement the Ultra Group cooperated with the CMA and expedited the process for concluding the investigation both before and after the issue of the Statement of Objections.
- 7.55 The Ultra Group has admitted the facts and allegations of infringement as set out in the Statement of Objections, subject to limited representations on manifest factual inaccuracies contained therein,⁶⁶⁴ which are now reflected in the Decision. In light of those admissions, and the Ultra Group's agreement to cooperate in expediting the process for concluding the investigation, the CMA has reduced the Ultra Group's financial penalty by 20% at step 6.

Payment of penalty

- 7.56 The CMA requires the Ultra Group to pay the penalty applicable to it as set out in the table below. Both the individual figures and the final penalty figures are rounded to the nearest pound.

⁶⁶² *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.26.

⁶⁶³ See paragraph E.9 below.

⁶⁶⁴ See paragraph E.14 below.

Step	Description	Adjustment	Figure
	Relevant turnover		£[X]
1	Starting point as a percentage of relevant turnover	18%	£[X]
2	Adjustment for duration	x 2.75	£[X]
3	Adjustment for aggravating and mitigating factors	<i>Aggravating: Senior management involvement</i>	+ 10%
		<i>Mitigating: Cooperation</i>	- 5%
		<i>Mitigating: Compliance</i>	-5%
		Total adjustment	0%
4	Adjustment for specific deterrence and proportionality	- [X]%	£983,335
5	Adjustment to prevent the statutory maximum being exceeded	N/A	N/A
	Total penalty		£983,335
6	Settlement discount	- 20%	- £196,667
	Total penalty payable		£786,668

7.57 The penalty will become due to the CMA in its entirety on 11 July 2016⁶⁶⁵ and must be paid to the CMA by close of banking business on that date. If that date has passed and:

7.57.1 the period during which an appeal against the imposition, or amount, of that penalty may be made has expired without an appeal having been made, or

7.57.2 such an appeal has been made and determined,

⁶⁶⁵ The next working day two calendar months from the expected date of receipt of the Decision.

the CMA may commence proceedings to recover from the undertaking in question, as a civil debt due to the CMA, any amount payable which remains outstanding.⁶⁶⁶

SIGNED:

[]

10 May 2016

Ann Pope, on behalf of the Competition and Markets Authority
Senior Director

⁶⁶⁶ Section 37(1) of the Act.

ANNEX A: LEGAL FRAMEWORK

A. Introduction

- A.1. This section sets out the legal framework within which the CMA has considered the evidence in this case.
- A.2. The relevant legal provisions are set out in section 2(1) of the Act (known as the Chapter I prohibition) and in Article 101 TFEU. The CMA is applying Article 101 TFEU in this case, in addition to the Chapter I prohibition, as the CMA has concluded that the requirement for an effect on trade between EU Member States is met.

B. The Chapter I prohibition/Article 101 TFEU

- A.3. The Chapter I prohibition prohibits agreements and concerted practices between undertakings and decisions by associations of undertakings which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK, unless they are exempt in accordance with the provisions of Part 1 of the Act. The Chapter I prohibition applies only where the agreement, concerted practice or decision is, or is intended to be, implemented in the UK. References to the UK are to the whole or part of the UK.⁶⁶⁷
- A.4. Article 101 TFEU prohibits agreements and concerted practices between undertakings and decisions by associations of undertakings which may affect trade within the European Union (EU) and have as their object or effect the prevention, restriction or distortion of competition within the EU, unless they are exempt in accordance with the provisions of Article 101(3) TFEU. The effect on trade and competition must be appreciable.

C. Application of section 60 of the Act – consistency with EU law

- A.5. Section 60 of the Act sets out the principle that, so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising in relation to competition within the UK should be dealt with in a manner which is consistent with the treatment of corresponding questions under EU competition law.
- A.6. Section 60 of the Act also provides that the CMA must act (so far as it is compatible with the provisions of Part I of the Act) with a view to securing that there is no inconsistency with the principles laid down by the TFEU and the

⁶⁶⁷ The Act, sections 2(1), 2(3) and 2(7).

European Courts, and any relevant decision of the European Courts.⁶⁶⁸ The CMA must, in addition, have regard to any relevant decision or statement of the European Commission (the Commission).⁶⁶⁹

D. Undertakings and the attribution of liability

- A.7. The Chapter I prohibition and Article 101 TFEU apply to agreements and concerted practices between 'undertakings' as well as to decisions by 'associations of undertakings'.

Undertakings

- A.8. The term 'undertaking' has been defined by the CJ to cover '*(...) every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed (...)*'.⁶⁷⁰
- A.9. Accordingly, the key consideration in establishing whether an entity is an undertaking is whether it is engaged in 'economic activity'. An entity is engaged in 'economic activity' where it conducts any activity '*(...) of an industrial or commercial nature by offering goods and services on the market (...)*'.⁶⁷¹
- A.10. The term 'undertaking' encompasses any natural or legal person that engages in economic activity, regardless of legal form. It therefore includes, among others, companies,⁶⁷² partnerships,⁶⁷³ individuals operating as sole traders,⁶⁷⁴ and trade associations.⁶⁷⁵
- A.11. The concept also covers an economic unit, even if in law that unit consists of several natural or legal persons.⁶⁷⁶ The undertaking that committed the infringement can therefore be larger than the legal entity whose representatives actually took part in the infringing activities. When an

⁶⁶⁸ The Act, section 60(2). The 'European Courts' means the Court of Justice ('CJ') (formerly the European Court of Justice) and the General Court (GC) (formerly the Court of First Instance). See the Act, section 59(1).

⁶⁶⁹ The Act, section 60(3). The CJ recently held that national competition authorities '*may take into account*' guidance contained in non-legally binding Commission Notices (specifically the *Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)* [2014] OJ C291/01, but such authorities are not required to do so. See Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, paragraphs 29 and 31.

⁶⁷⁰ Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, EU:C:1991:161, paragraph 21.

⁶⁷¹ Case C-118/85 *Commission v Italian Republic*, EU:C:1987:283, paragraph 7.

⁶⁷² In all their corporate forms, including a limited partnership (see Case 258/78 *L.C. Nungesser KG and Kurt Eisele v Commission*, EU:C:1982:211) or a trust company (see Commission Decision 79/253/EEC *Fides* (Case AF/IV/372) [1979] OJ L57/33).

⁶⁷³ Commission Decision 78/823/EEC *Breeders' rights: roses* (IV/30.017) [1985] L369/9.

⁶⁷⁴ Case 210/81 *Oswald Schmidt, trading as Demo-Studio Schmidt, v Commission*, EU:C:1983:277.

⁶⁷⁵ Case 71/74 *Nederlandse Vereniging voor de fruit- en groentenimporthandel, Nederlandse Bond van grossiers in zuidvruchten en ander geïmporteerd fruit "Frubo" v Commission and Vereniging de Fruitunie*, EU:C:1975:61.

⁶⁷⁶ Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 55.

undertaking infringes the competition rules, it is for that undertaking, according to the principle of personal responsibility, to answer for that infringement.⁶⁷⁷

Attribution of liability

General

A.12. In determining who is liable for any infringement and therefore, who will be the addressee of an infringement decision, it is necessary to identify the relevant legal or natural persons who form part of the undertaking involved in the infringement.

Attribution of liability in relation to undertakings

A.13. For each party that the CMA finds to have infringed the Act, the CMA will first identify the legal entity that was directly involved in the infringement. It will then determine whether liability for the infringement should be on a joint and several basis with another legal entity on the basis that both form part of the same undertaking.

Parent/subsidiary considerations

A.14. Companies belonging to the same corporate group will often constitute a single undertaking within the meaning of the Chapter I prohibition/Article 101 TFEU.

A.15. The fact that a subsidiary company has separate legal personality as such does not prevent legal responsibility for its conduct being attributed to its parent company. It is well established in EU law that the conduct of a subsidiary may be imputed to its parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.⁶⁷⁸ In such a situation, since the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of the Chapter I prohibition/Article 101 TFEU, the CMA may address an infringement decision

⁶⁷⁷ Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 56.

⁶⁷⁸ Case C-48/69 *Imperial Chemical Industries Ltd. v Commission*, EU:C:1972:70, paragraphs 132–133; and Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 58. See also Joined cases C-628/10 P and C-14/11 P *Alliance One International Inc. and Standard Commercial Tobacco Co. Inc. v European and Commission v Alliance One International Inc. and Others*, EU:C:2012:479, paragraph 43; Case T-399/09 *Holding Slovenske elektrarne d.o.o. (HSE) v Commission*, EU:T:2013:647, paragraph 14; and Case C-90/09 P *General Química SA and Others v Commission*, EU:C:2011:21, paragraph 37.

imposing fines to the parent company, without having to establish its personal involvement in the infringement.⁶⁷⁹

A.16. A parent company can be held jointly and severally liable for an infringement committed by a subsidiary company where, at the time of the infringement, that parent company:

A.16.1. is able to exercise ‘decisive influence’ over the conduct of the subsidiary, and

A.16.2. does in fact exercise decisive influence,⁶⁸⁰

such that the two entities can be regarded as a single economic unit and thus jointly and severally liable.

A.17. In the case of a wholly-owned subsidiary, the CJ has held that there is a rebuttable presumption that the parent company exerts decisive influence over the subsidiary company’s conduct and that the parent and subsidiary company constitute a single undertaking.⁶⁸¹ It is for the parent company in question to rebut the presumption by adducing sufficient evidence to demonstrate that the subsidiary company acts independently on the market.⁶⁸² The GC has indicated, among other things, that the lack of any direct involvement in, or knowledge of the facts which constitute the infringement by directors of the parent company, is not sufficient, in itself, to rebut the presumption.⁶⁸³

A.18. As to the interpretation of ‘decisive influence’, the CAT noted in *Durkan*⁶⁸⁴ that such influence may be indirect and can be established even where the parent does not interfere in the day-to-day business of the subsidiary, or where the influence is not reflected in instructions or guidelines emanating from the

⁶⁷⁹ Case T-517/09 *Alstom v Commission*, EU:T:2014:999, paragraph 55; and Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 59.

⁶⁸⁰ Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 60–61; and Case T-24/05 *Alliance One International, Inc., formerly Standard Commercial Corp. and Others v Commission*, EU:T:2010:453, paragraphs 126–130. See also Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission*, EU:C:1983:293, paragraph 50.

⁶⁸¹ Case T-517/09 *Alstom v Commission*, EU:T:2014:999, paragraph 55; Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraphs 60–61. Case T-24/05 *Alliance One International, Inc., formerly Standard Commercial Corp. and Others v Commission*, EU:T:2010:453, paragraphs 126–130; and Case T-325/01 *DaimlerChrysler AG v Commission*, EU:T:2005:322, paragraphs 217–221.

⁶⁸² Case T-517/09 *Alstom v Commission*, EU:T:2014:999, paragraph 55; Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraphs 61; Case T-24/05 *Alliance One International, Inc., formerly Standard Commercial Corp. and Others v Commission*, EU:T:2010:453, paragraphs 131; Case T-399/09 *Holding Slovenske elektrarne d.o.o. (HSE) v Commission*, EU:T:2013:647, paragraph 16; Case C-90/09 P *General Química SA and Others v Commission*, EU:C:2011:21, paragraph 39–40; and Case C-289/11 P *Legrís Industries SA v Commission*, EU:C:2012:270, paragraph 46.

⁶⁸³ Case T-189/06 *Arkema France SA v Commission*, EU:T:2011:377, paragraph 65.

⁶⁸⁴ *Durkan Holdings Limited and Others v Office of Fair Trading* [2011] CAT 6.

parent to the subsidiary. Instead, one must look generally at the relationship between the two entities, and the factors to which regard may be had when considering the issue of decisive influence '*are not limited to commercial conduct but cover a wide range*'.⁶⁸⁵

- A.19. Where the presumption does not apply, there is a need to show that at the time of the infringement the parent company is able to and does exercise 'decisive influence'⁶⁸⁶ over the conduct of the subsidiary.
- A.20. In examining whether a parent company has the ability to exercise decisive influence over the market conduct of its subsidiary, account must be taken of all the relevant factors relating to the economic, organisational and legal links which tie the subsidiary to its parent company and, therefore, of economic reality.⁶⁸⁷ The exercise of decisive influence may be inferred from a body of consistent evidence, even if some of that evidence, taken in isolation, is insufficient to establish the existence of influence.⁶⁸⁸
- A.21. These factors, among others, include:
- A.21.1. the size of the shareholding and whether the parent company owns the majority stake in the subsidiary enabling it to exercise a decisive influence over the conduct of the subsidiary⁶⁸⁹
 - A.21.2. board composition and board representation by the parents on the board of the subsidiary⁶⁹⁰
 - A.21.3. overlapping senior management⁶⁹¹
 - A.21.4. sole representation by the parent company in the administrative proceedings⁶⁹²

⁶⁸⁵ *Durkan Holdings Limited and Others v Office of Fair Trading* [2011] CAT 6 [22].

⁶⁸⁶ This will be based on factual evidence in each case. See eg Case T-399/09 *Holding Slovenske elektrarne d.o.o. (HSE) v Commission*, EU:T:2013:647, paragraph 29.

⁶⁸⁷ See Joined cases C-293/13 P and C-294/13 P *Fresh Del Monte Produce Inc. v Commission and Commission v Fresh Del Monte Produce Inc.*, EU:C:2015:416, paragraph 76. See also Case C-440/11 P *European Commission v Stichting Administratiekantoort Portielje and Gosselin Group NV*, EU:C:2013:514, paragraph 66; and Case T-45/10 *GEA Group AG v Commission*, EU:T:2015:507, paragraph 133.

⁶⁸⁸ See Case C-407/08 P *Knauf Gips KG v Commission*, EU:C:2010:389, paragraph 65. See also Case T-399/09 *Holding Slovenske elektrarne d.o.o. (HSE) v Commission*, EU:T:2013:647, paragraph 29–30 ff, where a series of different factors were considered.

⁶⁸⁹ Case C-521/09 P *Elf Aquitaine SA v Commission*, EU:C:2011:620 (97.5 % in that case); Joined cases C-293/13 P and C-294/13 P *Fresh Del Monte Produce Inc. v Commission and Commission v Fresh Del Monte Produce Inc.*, EU:C:2015:416 (indirect interest of 80%); Case T-395/09 *Gigaset AG, formerly Arques Industries AG v Commission*, EU:T:2014:23 (57%); Case T-399/09 *Holding Slovenske elektrarne d.o.o. (HSE) v Commission*, EU:T:2013:647 (74%); and Case T-45/10 *GEA Group AG v Commission*, EU:T:2015:507 (71.4%).

⁶⁹⁰ Case T-399/09 *Holding Slovenske elektrarne d.o.o. (HSE) v Commission*, EU:T:2013:647, paragraph 38.

⁶⁹¹ Case T-132/07 *Fuji Electric Co. Ltd v Commission*, EU:T:2011:344, paragraph 184.

⁶⁹² Case C-286/98 P *Stora Kopparbergs Bergslags AB v Commission*, EU:C:2000:630.

A.21.5. presence of the parent company in the same business sector⁶⁹³

A.21.6. minority shareholding with veto rights and/or rights that are greater to those afforded to minority shareholders such as to allow for decisive influence over the conduct of the subsidiary⁶⁹⁴

A.21.7. the filing of consolidated accounts,⁶⁹⁵ and

A.21.8. parent and subsidiary presenting themselves to the outside world as forming part of the same group, such as references in the annual reports, description of being part of the same group.⁶⁹⁶

E. Agreements and/or concerted practices

General

A.22. The Chapter I prohibition and Article 101 TFEU apply to ‘agreements’ as well as to ‘concerted practices’ and ‘decisions by associations of undertakings’. The European Courts have confirmed that it is not necessary, for the purpose of finding an infringement, to distinguish between them, or to characterise conduct as exclusively an agreement, a concerted practice or a decision by an association of undertakings. The concepts are not mutually exclusive and there is no rigid dividing line between the two. As explained by the CJ, *‘the definitions of “agreement”, “decisions by associations of undertakings” and “concerted practice” are intended, from a subjective point of view, to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves’*.⁶⁹⁷

A.23. In the recent *MasterCard* case, the CJ confirmed the principle:

‘(...) it is settled case-law that, although Article [101 TFEU] distinguishes between ‘concerted practice’, ‘agreements between undertakings’ and ‘decisions by associations of undertakings’, the aim is to have the prohibition of that article catch different forms of coordination between undertakings of

⁶⁹³ Commission Decision 2007/691/EC *Fittings* (COMP/F/38.121) [2007] OJ L283/63.

⁶⁹⁴ Case T-132/07 *Fuji Electric Co. Ltd v Commission*, EU:T:2011:344 (where the representation on the board, the size of the shareholding, evidence of influencing commercial policy and other factors were also considered); and Joined cases T-141/07, T-142/07, T-145/07 and T-146/07 *General Technic-Otis Sàrl and Others v Commission*, EU:T:2011:363 (with a 25% share).

⁶⁹⁵ Case T-399/09 *Holding Slovenske elektrarne d.o.o. (HSE) v Commission*, EU:T:2013:647, paragraphs 33–36 and 62–66.

⁶⁹⁶ Case T-399/09 *Holding Slovenske elektrarne d.o.o. (HSE) v Commission*, EU:T:2013:647, paragraphs 33–36 and 62–66.

⁶⁹⁷ Case C-8/08 *T-Mobile Netherlands BV and others v NMa*, EU:C:2009:343, paragraph 23 (citing Case C-49/92P *Commission v Anic Participazioni* [1999] EU:C:1999:356, paragraph 131). See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, [206(ii)].

*their conduct on the market (...) and thus to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they coordinate their conduct’.*⁶⁹⁸

- A.24. Although it is essential to show the existence of a joint intention to act on the market in a specific way in accordance with the terms of the agreement and/or concerted practice, it is not necessary to establish a joint intention to pursue an anti-competitive aim.⁶⁹⁹ The fact that a party may have played only a limited part in setting up an agreement, or may not be fully committed to its implementation, or may have participated only under pressure from other parties, does not mean that it is not party to the agreement.⁷⁰⁰

Agreements

- A.25. The Chapter I prohibition and Article 101 TFEU are intended to catch a wide range of agreements, including oral agreements and 'gentlemen's agreements'.⁷⁰¹ An agreement may be express or implied by the parties, and there is no requirement for it to be formal or legally binding, nor for it to contain any enforcement mechanisms.⁷⁰² An agreement may also consist of either an isolated act, or a series of acts, or a course of conduct.⁷⁰³
- A.26. An undertaking may be party to an anti-competitive agreement where the purpose of its conduct, as coordinated with that of other undertakings, is to restrict competition on a specific relevant market, even if that undertaking is not active on that relevant market itself.⁷⁰⁴ An undertaking may also be party

⁶⁹⁸ Case C-382/12 P, *MasterCard Inc. v. European Commission*, EU:C:2014:2201, paragraph 63 and the case law cited. The unlawful co-ordination between undertakings may, for example, be characterised as a 'concerted practice' during the first phase of an infringement, but may subsequently have solidified into an 'agreement', and then been further affirmed, or furthered or implemented by, a 'decision of an association. This does not prevent the competition authority from characterising the co-ordination as a single continuous infringement. See Case T-9/99 *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and Others v Commission*, EU:T:2002:70, paragraphs 186–188; Case C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, EU:C:2006:734, paragraph 32. See also Case T-305/94 etc *NV Limburgse Vinyl Maatschappij v Commission*, ECLI:EU:T:1999:80, paragraph 696: '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, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [101] of the Treaty.'

⁶⁹⁹ Case T-168/01 *GlaxoSmithKline Services Unlimited v. Commission*, EU:T:2006:265, paragraph 77 (upheld on appeal in Joined cases C-501/06P etc *GlaxoSmithKline Unlimited v Commission*, EU:C:2009:610).

⁷⁰⁰ *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 2.8. See also e.g. Joined cases T-25/95 etc *Cimenteries CBR and Others v Commission*, EU:T:2000:77, paragraphs 1389 and 2557 (this judgment was upheld on liability by the CJ in Joined cases C-204/00 P etc *Aalborg Portland A/S and Others v Commission*, EU:C:2004:6, although the fine was reduced); and Case C-49/92 P *Commission v Anic Participazioni SpA*, EU:C:1999:356, paragraphs 81–82.

⁷⁰¹ Case C-41/69 *ACF Chemiefarma NV v Commission*, EU:C:1970:71, in particular, paragraphs 106–114.

⁷⁰² *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24 [658]; Commission Decision 1999/271/EC *Greek Ferries* (IV/34466) [1999] OJ L109/24, paragraph 141 (upheld on appeal).

⁷⁰³ Case C-49/92 P *Commission v Anic Participazioni SpA*, EU:C:1999:356, paragraph 81.

⁷⁰⁴ Case T-99/04 *AC-Treuhand AG v Commission*, EU:T:2008:256, paragraph 122.

to an anti-competitive agreement even if it does not restrict its own freedom of action on the market on which it is primarily active.⁷⁰⁵

- A.27. The key question is whether there has been *‘a concurrence of wills between at least two parties, the form in which it is manifested being unimportant, so long as it constitutes the faithful expression of the parties’ intention’*.⁷⁰⁶
- A.28. An agreement may be inferred from the conduct of the parties, including conduct that appears to be unilateral.⁷⁰⁷ As held by the GC:⁷⁰⁸ *‘(...) it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (...)’*.
- A.29. In the absence of an explicit agreement (ie laid down or based on a contract) expressing the concurrence of wills⁷⁰⁹ or joint intention⁷¹⁰ by the parties to conduct themselves on the market in a specific way, acquiescence may be sufficient to give rise to an agreement for the purpose of the Chapter I prohibition/Article 101 TFEU.⁷¹¹
- A.30. The Commission’s Vertical Guidelines, summarising the relevant case law and citing the judgments of the CJ,⁷¹² describe the two ways (which can be used jointly) to establish acquiescence to a unilateral policy.⁷¹³

‘First, the acquiescence can be deduced from the powers conferred upon the parties in a general agreement drawn up in advance. If the clauses of the agreement drawn up in advance provide for or authorise a party to adopt subsequently a specific unilateral policy which will be binding on the other

⁷⁰⁵ *ibid*, paragraph 127.

⁷⁰⁶ Case T-41/96 *Bayer AG v Commission*, EU:T:2000:242, paragraph 69 (upheld on appeal in Joined cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG*, EU:C:2004:2, paragraphs 96–97). See also *European Commission Guidelines on Vertical Restraints* [2010] OJ C130/1 (*‘Vertical Guidelines’*), paragraph 25(a). See also Commission Decision 2003/675/EC *Video Games, Nintendo Distribution and Omega-Nintendo* (COMP/35.587 etc) [2003] OJ L255/33, paragraph 247.

⁷⁰⁷ Case T-7/89 *SA Hercules Chemicals NV v Commission*, EU:T:1991:75, paragraph 256–258. See also Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission*, EU:T:2006:265; and Case C-74/04 P *Commission v Volkswagen AG* EU:C:2006:460, paragraph 37.

⁷⁰⁸ Case T-7/89 *SA Hercules Chemicals NV v Commission*, EU:T:1991:75, paragraph 256.

⁷⁰⁹ Case T-41/96 *Bayer AG v Commission*, EU:T:2000:242, paragraph 69 (upheld on appeal in Joined cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG*, EU:C:2004:2, paragraphs 96–97).

⁷¹⁰ Case T-7/89 *SA Hercules Chemicals NV v Commission*, EU:T:1991:75, paragraph 256.

⁷¹¹ Case C-74/04 P *Commission v Volkswagen AG* EU:C:2006:460, paragraph 39; and Vertical Guidelines, paragraph 25.

⁷¹² See eg Case T-41/96 *Bayer AG v Commission*, EU:T:2000:242 and Case C-74/04 P *Commission v Volkswagen AG*, EU:C:2006:460. In the latter case, also known as *Volkswagen II*, signing a dealership agreement was not held to be sufficient to give prior consent to all measures adopted in this relationship. The case concerned subsequent warnings and circulars that were issued by Volkswagen. In *Volkswagen II*, the contract itself did not authorise the binding price instructions and the Commission did not try to argue ‘acquiescence’. The CJ overturned the judgement of the GC. The GC erroneously held that a lawful clause could never authorise a call contrary to Article 101 TFEU. In *Volkswagen I*, mentioned previously, the export ban restriction was incorporated in the pre-existing contract between the manufacturers and the dealers.

⁷¹³ Vertical Guidelines, paragraph 25(a).

party, the acquiescence of that policy by the other party can be established on the basis thereof.

Secondly, in the absence of such an explicit acquiescence, the Commission can show the existence of tacit acquiescence. For that it is necessary to show first that one party requires explicitly or implicitly the cooperation of the other party for the implementation of its unilateral policy and second that the other party complied with that requirement by implementing that unilateral policy in practice’.

- A.31. The Vertical Guidelines provide examples of when tacit acquiescence may be deduced. Evidence of coercive behaviour or compulsion may point towards tacit acquiescence and is a relevant factor to consider. For instance:

*‘(...) for vertical agreements, **tacit acquiescence may be deduced from the level of coercion** exerted by a party to impose its unilateral policy on the other party or parties to the agreement in combination with the number of distributors that are actually implementing in practice the unilateral policy of the supplier. For instance, **a system of monitoring and penalties, set up by a supplier to penalise those distributors that do not comply with its unilateral policy, points to tacit acquiescence with the supplier's unilateral policy if this system allows the supplier to implement in practice its policy**’.*⁷¹⁴

- A.32. However, a system of monitoring and penalties may not be necessary in all cases for there to be a concurrence of wills based on tacit acquiescence.⁷¹⁵

Concerted practices

- A.33. The concepts of ‘agreements’, ‘decisions by associations of undertakings’ and ‘concerted practices’ are intended to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves’.⁷¹⁶

- A.34. The Court of Appeal has noted that *‘concerted practices can take many different forms, and the courts have always been careful not to define or limit what may amount to a concerted practice for [the] purpose’* of determining

⁷¹⁴ Vertical Guidelines, paragraph 25(a) (emphasis added).

⁷¹⁵ Case C-260/09 P *Activision Blizzard Germany GmbH v Commission*, EU:C:2011:62, paragraph 77.

⁷¹⁶ Case C-8/08 *T-Mobile Netherlands and Others v NMa*, EU:C:2009:343, paragraph 23, see also Case C- 49/92P *Commission v Anic Partecipazioni* , EU:C:1999:356, paragraph 131 and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, [206(ii)].

whether there is consensus between the undertakings said to be party to a concerted practice.⁷¹⁷

- A.35. Although the nature and extent of a concerted practice is addressed in the case law primarily in the context of so-called horizontal relationships (that is, between actual or potential competitors), it is also applicable to vertical relationships (that is, between non-competitors).⁷¹⁸ The Court of Appeal has observed that:

*‘The Chapter I prohibition catches agreements and concerted practices whether between undertakings at different levels or between those at the same level of commercial operation. An agreement between a supplier and a commercial customer, which may be called a vertical agreement, may breach the prohibition as much as an agreement between competing suppliers of the same product or the same type of product, which can be referred to as a horizontal agreement’.*⁷¹⁹

- A.36. For present material purposes, the following key points arise from the case law on the concept of a concerted practice:

- A.36.1. 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 market, including the choice of the persons and undertakings to which it makes offers or sells.⁷²⁰
- A.36.2. A concerted practice is *‘a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition’*.⁷²¹

⁷¹⁷ *Argos Limited and Others v Office of Fair Trading* [2006] EWCA Civ 1318, [22].

⁷¹⁸ See, for example, Case T-43/92 *Dunlop Slazenger International Ltd v Commission*, EU:T:1994:259 paragraph 101 ff (concerted practice between Dunlop Slazenger and certain of its exclusive distributors in respect of various measures to enforce an export ban). See also the Commission Decision 2003/675/EC Video Games, Nintendo Distribution and Omega-Nintendo (COMP/35.587 etc) [2003] OJ L255/33, paragraphs 323–324 (agreements and/or concerted practices between Nintendo and its independent distributors to restrict parallel trade). Other examples include: Commission Decision 72/403/CEE *Pittsburgh Corning Europe* (IV/26894) [1972] L272/35 (where a concerted practice was found between a supplier and a distributor); and Commission Decision 88/172/EEC *Konica* (IV/31.503) [1988] OJ L78/34, paragraph 36 (where there was a concerted practice between a supplier and a distributor).

⁷¹⁹ *Argos Limited and Others v Office of Fair Trading* [2006] EWCA Civ 1318, [28].

⁷²⁰ Cases 40/73 etc *Suiker Unie v Commission*, EU:C:1975:174, paragraph 173 (the CJ added that the concept of a concerted practice does not require the working out of an actual plan). See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, [206(iv)].

⁷²¹ Cases 48/69 etc *ICI Ltd v Commission*, EU:C:1972:70, paragraph 64. See also Case C-8/08 *T-Mobile Netherlands and Others v NMa*, EU:C:2009:343, paragraph 26; *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, [151]–[153]; and Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65, in which the Commission stated at recital 47 (in a vertical context) that: “For a concerted practice to exist it is sufficient for an

The CJ has added that: '*By its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants*'.⁷²²

A.36.3. The coordination (which is prohibited by the requirement of independence) comprises 'any direct or indirect contact' between undertakings,⁷²³ which has the object or effect⁷²⁴ of influencing the conduct on the market of an undertaking⁷²⁵ thereby creating conditions of competition which do not correspond to the normal conditions of the market in question.⁷²⁶

A.36.4. It follows that '*a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two*'.⁷²⁷ However, that does not necessarily mean that the conduct should produce the concrete effect of restricting, preventing or distorting competition.⁷²⁸

A.37. In terms of the nature of the impact of a concerted practice on the conditions of competition, the CJ has held (for example) that:

A.37.1. It is '*especially the case*' that a concerted practice leads to conditions of competition which do not correspond to the normal conditions of

independent undertaking knowingly and of its own accord to adjust its behaviour in line with the wishes of another undertaking".

⁷²² Cases 48/69 etc *ICI Ltd v Commission*, EU:C:1972:70, paragraph 65. See also *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, [151].

⁷²³ Cases 40/73 etc *Suiker Unie v Commission*, EU:C:1975:174, paragraph 174. See also Case C-8/08 *T-Mobile Netherlands and Others v NMa*, EU:C:2009:343, paragraph 33; and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, [206(v)].

⁷²⁴ Cases 40/73 etc *Suiker Unie v Commission*, EU:C:1975:174, paragraph 174. See also Case C-8/08 *T-Mobile Netherlands and Others v NMa*, EU:C:2009:343, paragraph 33; and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, [206(v)]. The case law provides that a concerted practice also arises in the situation in which the object or effect of the direct or indirect contact is to disclose to a competitor the course of conduct which the disclosing party has decided to adopt or contemplates adopting on the market.

⁷²⁵ Cases 40/73 etc *Suiker Unie v Commission*, EU:C:1975:174, paragraph 174. See also Case C-8/08 *T-Mobile Netherlands and Others v NMa*, EU:C:2009:343, paragraph 33; and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, [206(v)]. Although the case law has referred to this part of the test in the context of influencing the conduct of an actual or potential competitor, the CMA considers that the point of principle is not confined to such situations - it extends to relationships between non-competitors and an infringement exists where the other constituent elements of the Chapter I prohibition are satisfied. See *Argos Limited v Office of Fair Trading* [2004] CAT 24, [760] to [762].

⁷²⁶ Case 172/80, *Gerhard Züchner v Bayerische Vereinsbank*, EU:C:1981:178, paragraph 14; Case C-49/92P *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 117; and Case C-8/08 *T-Mobile Netherlands and Others v NMa*, EU:C:1999:356, paragraph 33. The CJ (in those cases) added that regard must be had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of the market in question.

⁷²⁷ Case C-49/92P *Commission v Anic Partecipazioni*, [EU:C:1999:356, paragraph 118. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, [206(ix)].

⁷²⁸ Case C-49/92P *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 124. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, [206(xi)].

the market *'if the [conduct in question] is such as to enable those concerned to attempt to stabilize prices at a level different from that to which competition would have led, and to consolidate established positions to the detriment of ... the freedom of consumers to choose their suppliers'*.⁷²⁹

- A.37.2. A concerted practice would affect significantly conditions of competition in the market if, in particular, it enabled the undertakings participating in it *'to congeal conditions in their present state thus depriving their customers of any genuine opportunity to take advantage of services on more favourable terms which would be offered to them under normal conditions of competition'*.⁷³⁰

F. Prevention, restriction or distortion of competition

- A.38. As noted above, the Chapter I prohibition and Article 101 TFEU prohibit agreements between undertakings or concerted practices which *'have as their object or effect the prevention, restriction or distortion of competition'*.
- A.39. If an agreement has as its object the prevention, restriction or distortion of competition, it is not necessary to prove that the agreement has had, or would have, any anti-competitive effects in order to establish an infringement.⁷³¹ The actual effects do not need to be considered where it is apparent that the object of the agreement is to prevent, restrict or distort competition.⁷³²

Anti-competitive object

- A.40. The CJ has held that object infringements are those forms of coordination between undertakings that can be regarded, by their very nature, as being harmful to the proper functioning of normal competition⁷³³ or, in other words,

⁷²⁹ Cases 48/69 etc *ICI Ltd v Commission*, EU:C:1972:70, paragraph 67.

⁷³⁰ Case 172/80, *Gerhard Züchner v Bayerische Vereinsbank*, EU:C:1981:178, paragraphs 19 and 20.

⁷³¹ See eg Joined cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission*, EU:C:1966:41, page 342; Joined cases C-204/00 P etc *Aalborg Portland A/S and Others v Commission*, EU:C:2004:6, paragraph 261; Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, EU:C:2006:592, paragraph 125; Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd.*, EU:C:2008:643, paragraph 16; Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, paragraph 35; Case C-8/08 *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, EU:C:2009:343, paragraph 30 and the case law cited there; and *Cityhook Limited v Office of Fair Trading* [2007] CAT 18 [269].

⁷³² Joined cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission*, EU:C:1966:41, page 342; Case C-8/08 *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, EU:C:2009:343, paragraph 29; Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd.*, EU:C:2008:643, paragraph 16. See also Opinion of Advocate General Wathelet in Case C-373/14 P *Toshiba Corporation v Commission*, 25 June 2015, which summarises the case law on 'object infringements' (judgement pending).

⁷³³ Case C-32/11 *Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal*, EU:C:2013:160, paragraph 35. This has been affirmed most recently in Case C-67/13 P *Groupeement des cartes bancaires v*

reveal a sufficient degree of harm to competition such that there is no need to examine their effects.⁷³⁴

- A.41. The object of an agreement is to be identified primarily from an examination of objective factors, such as the content of its provisions, its objectives and the legal and economic context of the agreement.⁷³⁵ When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.⁷³⁶ Where appropriate, the way in which the coordination (or collusive behaviour) is implemented may be taken into account.⁷³⁷
- A.42. Anti-competitive subjective intentions on the part of the parties can also be taken into account in the assessment, but they are not a necessary factor for a finding that there is an anti-competitive restrictive object.⁷³⁸
- A.43. Furthermore, the fact that an agreement pursues other legitimate objectives does not preclude it being regarded as having a restrictive object.⁷³⁹ Moreover, the CJ has held that the aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a

Commissio (Cartes Bancaires), EU:C:2014:2204, paragraph 50 and Case C-382/12 P *MasterCard Inc. and Others v Commission* (Mastercard), EU:C:2014:2201, paragraph 185. Both in *Cartes Bancaires* (paragraphs 49–50 and 57) and *MasterCard* (paragraph 184–185), the CJ stated that it is apparent from the case law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects. It went on to state that that case law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition. See also Case C-286/13 P *Dole Food Company Inc. and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, paragraph 114.

⁷³⁴ Case C-67/13 P *Groupement des cartes bancaires v Commission*, EU:C:2014:2204, paragraph 49.

⁷³⁵ Case C-32/11 *Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal*, EU:C:2013:160, paragraph 36; and Case C-67/13 P *Groupement des cartes bancaires v Commission*, EU:C:2014:2204, paragraph 53. See also Joined cases C-501/06 P etc *GlaxoSmithKline Services Unlimited and Others v Commission*, EU:C:2009:610, paragraph 58; Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd.*, EU:C:2008:643, paragraph 16 and 21; and Joined cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd*, EU:C:2011:631, paragraph 136.

⁷³⁶ Case C-67/13 P *Groupement des cartes bancaires v Commission*, EU:C:2014:2204, paragraph 53; and Case C-32/11 *Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal*, EU:C:2013:160, paragraph 36.

⁷³⁷ *Cityhook Limited v Office of Fair Trading* [2007] CAT 18 [268], which noted the provisions of paragraph 22 of the Commission Notice *Guidelines on the Application of Article 81(3) of the EC Treaty* [2004] OJ C101/97 ('Article 101(3) Guidelines'), paragraph 22, which provides that: 'The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect'.

⁷³⁸ Case C-32/11 *Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal*, EU:C:2013:160, paragraph 37; Case C-67/13 P *Groupement des cartes bancaires v Commission*, EU:C:2014:2204, paragraph 54; Joined cases C-501/06 P etc *GlaxoSmithKline Services Unlimited and Others v Commission*, EU:C:2009:610, paragraph 58; and *Cityhook Limited v Office of Fair Trading* [2007] CAT 18 [270], citing Case C-551/03 P *General Motors BV v Commission*, EU:C:2006:229, paragraphs 77–78.

⁷³⁹ Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd.*, EU:C:2008:643, paragraph 21; and Case C-551/03 P *General Motors BV v Commission*, EU:C:2006:229, paragraphs 64. See also, most recently, Case C-67/13 P *Groupement des cartes bancaires v Commission*, EU:C:2014:2204, paragraph 70.

finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU.⁷⁴⁰

- A.44. Whilst vertical agreements are, by their nature, often less damaging to competition than horizontal agreements, the fact that an agreement is entered into in the vertical context does not exclude the possibility that it constitutes a restriction of competition by object.⁷⁴¹
- A.45. The CJ has held that the notion of restriction of competition by object should not be limited to the examples of anticompetitive agreements of Article 101(1) TFEU.⁷⁴²

Resale Price Maintenance

- A.46. Article 101(1)(a) TFEU and section 2(2)(a) of the Act expressly prohibit agreements and/or concerted practices which '*directly or indirectly fix purchase or selling prices*'.
- A.47. Resale Price Maintenance (RPM) is defined in the Vertical Guidelines as '*agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer*'.⁷⁴³ RPM has been found consistently in EU and national decisional practice (including the UK) to constitute a restriction of competition by object.⁷⁴⁴ The CJ has also held that the imposition of fixed or minimum resale prices on distributors is restrictive of competition by object.⁷⁴⁵
- A.48. According to the Vertical Guidelines, where an agreement includes RPM, that

⁷⁴⁰ Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Commission*, ECLI:EU:C:2011:649, paragraph 46.

⁷⁴¹ Case C-32/11 *Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal*, EU:C:2013:160, paragraph 43.

⁷⁴² Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd.*, EU:C:2008:643, paragraph 23.

⁷⁴³ Vertical Guidelines, paragraph 48.

⁷⁴⁴ See cases further below in this section, including cases such as: Commission Decision 73/322/EEC *Deutsche Phillips* (IV/27.010) [1973] OJ L293/40; Commission Decision 77/66/EEC *GERO-fabriek* (IV/24.510) [1977] OJ L16/8; Commission Decision 80/1333/EEC *Hennessy-Henkell* (IV/26.912) [1980] OJ L383/13; Commission Decision 97/123/EC *Novalliance/Systemform* (IV/35.679) [1997] OJ L47/11; Commission Decision 2001/135/EC *Nathan-Bricolux* (COMP.F.1/36.516) [2001] OJ L 54/1, paras 86–90; in *Volkswagen II*, Commission Decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4, annulled on appeal, Case T-208/01 *Volkswagen AG v Commission* EU:T:2003:326 and Case C-74/04 P *Commission v Volkswagen AG*, EU:C:2006:460; *CD prices*, Commission Press Release IP/01/1212, 17 August 2001; Commission Decision 16 July 2003 *PO/Yamaha* (COMP/37.975)., See also *HUSKY*, Czech NCA decision of 28 January 2011, upheld on appeal by Brno Regional Court judgment of 26 April 2012; *Young Digital Planet*, Polish NCA decision of 30 October 2012; *Hyundai Motor Vehicles*, Bulgarian NCA decision of 6 November 2012; *Vila*, Danish NCA settlement decision of 30 October 2013; *Pioneer v Bundeswettbewerbsbehörde*, Austrian Cartel Court rulings of March–June 2014; *Witt Hvidevarer*, Danish NCA settlement of 10 July 2014; and, decision by the Austrian Competition Authority against *Samsung Electronics Austria GmbH* of 4 November 2015 (BWB/K-396).

⁷⁴⁵ Vertical Guidelines, paragraphs 223–229. See also Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, [2010] OJ L102/1 (VABER), recital 10.

agreement is presumed to restrict competition and to fall within Article 101(1) TFEU. It also gives rise to the presumption that the agreement is unlikely to fulfil the conditions of Article 101(3) TFEU, for which reason the block exemption does not apply.⁷⁴⁶

- A.49. The European Courts have established that it is not unlawful for a supplier to impose a maximum resale price or to recommend a particular resale price. However, describing a price as a ‘recommended’ retail price does not prevent this from amounting to *de facto* RPM, if the reseller does not remain genuinely free to determine its resale price (for example, if there is pressure or coercion exerted by the supplier to adhere to the recommended price).⁷⁴⁷
- A.50. The CJ has confirmed that ‘*it is necessary to ascertain whether such a retail price is not, in reality, fixed by indirect or concealed means, such as the fixing of the margin of the [reseller],*⁷⁴⁸ *threats, intimidation, warnings, penalties or incentives*’.⁷⁴⁹ This would include, for example, threats to delay or suspend deliveries or to terminate supply in the event that the retailer does not observe a given price level.⁷⁵⁰ Other measures include the withdrawal of credit facilities, prevailing on other dealers not to supply⁷⁵¹ and threatened legal action, pressuring telephone calls and letters.⁷⁵²
- A.51. In *Volkswagen*, the Commission found that various measures taken to enforce ‘price discipline’ among dealers amounted to RPM, including threats of legal action against dealers offering discounts, dealers reporting discounts to Volkswagen and telephone calls and letters from Volkswagen demanding the cessation of discounts and promotions.⁷⁵³ The decision was overturned on appeal to the GC due to the Commission’s flawed assessment of whether or not there was an agreement between Volkswagen and its dealers. However, the Commission’s analysis of RPM remains relevant and this case confirms that RRP’s could involve unlawful RPM.

⁷⁴⁶ Vertical Guidelines, paragraph 223.

⁷⁴⁷ Order in Case C-506/07 *Lubricantes y Carburantes Galaicos SL v GALP Energía España SAU*, EU:C:2009:504; and Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, EU:C:2008:485. See also VABER, Article 4(a); and Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis*, EU:C:1986:41, paragraph 25.

⁷⁴⁸ Vertical Guidelines, paragraph 48.

⁷⁴⁹ Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, EU:C:2008:485, paragraph 71. See also Case C-260/07 *Pedro IV Servicios SL v Total España SA*, EU:C:2009:215, paragraph 80; and Commission Decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4 (which includes warnings against deep discounting).

⁷⁵⁰ Vertical Guidelines, paragraph 48. See also Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65; and Commission Decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4.

⁷⁵¹ Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65.

⁷⁵² Commission Decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4.

⁷⁵³ Commission Decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4, paragraphs 44–55.

- A.52. RPM can be achieved not only directly, for example, via a contractual provision that directly sets a fixed or minimum resale price,⁷⁵⁴ but also indirectly.⁷⁵⁵ As previously stated, whether or not there is indirect RPM in any particular case will depend on whether the ability of resellers to determine their resale prices has genuinely been restricted.⁷⁵⁶
- A.53. Examples of indirect RPM include the following:
- A.53.1. fixing the maximum level of discount that resellers can grant from a prescribed price level⁷⁵⁷
 - A.53.2. incentives to adhere to a given price level⁷⁵⁸
 - A.53.3. requiring the consent of the supplier if the retailer wishes to fix the prices above or below certain pre-defined levels, and/or pre-authorisation of discounts,⁷⁵⁹ and
 - A.53.4. clauses setting a maximum resale price in combination with a prohibition on commercial conduct liable to damage the supplier's brand (eg a ban on promotional activity/discounts).⁷⁶⁰
- A.54. Furthermore, restrictions on advertising prices below a certain level have been found to lead to *de facto* RPM. The Commission has considered the application of Article 101(1) TFEU to advertising restrictions imposed by manufacturers in supply agreements in a number of investigations. The relevant restrictions have taken different forms in different cases. For example:
- A.54.1. In *Yamaha*, the Commission objected to:

⁷⁵⁴ Case 243/83 *SA Binon & Cie v SA Agence et messageries de la presse*, EU:C:1985:284; Case 311/85 *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, EU:C:1987:418; Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC*, EU:C:1988:183; Commission Decision 16 July 2003 *PO/Yamaha* (COMP/37.975); *Agreements between Lladro Comercial SA and UK retailers fixing the price for porcelain and stoneware figures*, CP/0809-01, 31 March 2003.

⁷⁵⁵ See analysis of the case law that follows. See also Vertical Guidelines, paragraph 48.

⁷⁵⁶ Order in Case C-506/07 *Lubricantes y Carburantes Galaicos SL v GALP Energía España SAU*, EU:C:2009:504; and *VABER*, Article 4(a).

⁷⁵⁷ Case C-260/07 *Pedro IV Servicios SL v Total España SA*, EU:C:2009:215, paragraph 80.

⁷⁵⁸ Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, EU:C:2008:485, paragraph 71; and Case C-260/07 *Pedro IV Servicios SL v Total España SA*, EU:C:2009:215, paragraph 80. For example rebates or reimbursement of advertising costs conditional upon observance.

⁷⁵⁹ Commission Decision 80/1333/EEC *Hennessy-Henkell* (IV/26.912) [1980] OJ L383/13.

⁷⁶⁰ Commission Decision 2001/135/EC *Nathan-Bricolux* (COMP.F.1/36.516) [2001] OJ L 54/1.

- restrictions contained in selective distribution agreements which prevented dealers from advertising prices which were different to Yamaha's list prices,⁷⁶¹ and
- a contractual requirement not to produce advertising material which included prices different from the supplier's price list without the supplier's approval.⁷⁶²

A.54.2. In *Hasselblad*, the Commission objected to a clause in a selective distribution agreement which allowed the manufacturer, Hasselblad, to prohibit adverts by a dealer.⁷⁶³

A.54.3. In *Groupeement des Fabricants de Papiers Peints de Belgique*, the Commission found that a contractual requirement (agreed between members of a trade association) requiring them to display the supplier's list price and prohibiting any public announcement of rebates on those prices infringed Article 101(1) TFEU. The possibility of resellers being able to grant discounts did not prevent the restriction from infringing Article 101(1) TFEU.⁷⁶⁴

A.55. In the UK, the OFT found in *Lladró* that a prohibition on dealers mentioning discounts or price reductions in any advertising materials, advertisements or promotional campaigns constituted an infringement of the Chapter I prohibition.⁷⁶⁵

⁷⁶¹ Commission Decision 16 July 2003 *PO/Yamaha* (COMP/37.975), paragraphs 125–126, where it was held that the Yamaha Guidelines '(...) clearly prevented the dealer from announcing either within or outside the shop a price other than the one established in the price list. Even if discounts may have been possible, it is clear that the dealer was severely restricted in its freedom to communicate to the customer the price it fixed and that such discounts, if the dealer was still willing to offer them, could not be communicated in a way contrary to the guidelines.' The circular sent to Dutch dealers 'constitutes a restriction of the dealer's ability to determine its sales prices. This practice has the object of fixing the maximum level of discounts and, as a consequence, the minimum level of resale prices, thereby restricting or distorting price competition'.

⁷⁶² *ibid.* The Commission found at paragraphs 133–135 that 'the dealers' freedom to set prices is strictly limited. Dealers cannot attract clients by advertising prices that differ from the 'published prices' of [Yamaha], nor by indicating prices in their shops different from those indicated by [Yamaha]'. The Commission concluded that Yamaha's agreements had the object of influencing resale prices, thereby restricting or distorting price competition.

⁷⁶³ Commission Decision 82/367/EEC *Hasselblad* (IV/25.757) [1982] OJ L161/18; upheld on appeal in Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65. The Commission found (at recital 60) that 'this extensive right of intervention enables Hasselblad (GB) to prevent actively competing and price-cutting dealers (...), from advertising their activities, the more so as Hasselblad (GB) is not required to give any justification for its censorship measures.' The Commission concluded (at recital 66) that Hasselblad's distribution policy (including Hasselblad's right to prohibit adverts) 'interferes with the freedom of the authorised dealers to fix their prices, using the dealers' fear of termination of the Dealer Agreement as a means of hindering price competition between authorised dealers'.

⁷⁶⁴ Case 73/74 *Groupeement des Fabricants de Papiers Peints de Belgique and others v Commission* EU:C:1975:160.

⁷⁶⁵ *Agreements between Lladró Comercial SA and UK retailers fixing the price for porcelain and stoneware figures*, CP/0809-01, 31 March 2003. The OFT held that the advertising of resale prices, including discounts, promotes price transparency between retailers and provides a significant incentive for retailers to compete on

A.56. Lastly, RPM can be made more effective when combined with measures to identify price-cutting distributors, such as the implementation of a price-monitoring system or the obligation on resellers to report other members of the distribution network who deviate from the standard price level.⁷⁶⁶ However, the use of such measures does not, in itself, constitute RPM.⁷⁶⁷

G. Appreciable restriction of competition

A.57. An agreement and/or concerted practice will not infringe Article 101(1) TFEU or the Chapter I prohibition if the impact of the agreement and/or concerted practice on competition is not appreciable.⁷⁶⁸

A.58. In *Völk v Vervaecke*, the CJ held that:

*‘an agreement falls outside the prohibition in Article [101(1) TFEU] when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question’.*⁷⁶⁹

A.59. However, the CJ held in *Expedia* that an agreement (whether between competing or non-competing undertakings) which has the object of preventing, restricting or distorting competition constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction of competition.⁷⁷⁰

A.60. The CMA considers that the principle established in *Expedia* also applies to its analysis of appreciable effect under the Chapter I prohibition. In particular, section 60(2) of the Act provides that, when determining a question in relation to application of Part I of the Act (which includes the Chapter I prohibition), a court must act with a view to securing that there is no inconsistency with any relevant decision of the European Court.⁷⁷¹

price. Where provisions restrict a retailer's freedom to inform potential customers of discounts which are being offered, this removes a key incentive for, and constitutes an obstacle to, price competition between retailers.

⁷⁶⁶ Vertical Guidelines, paragraph 48.

⁷⁶⁷ *ibid.*

⁷⁶⁸ *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 2.15. See also *North Midland Construction plc v Office of Fair Trading* [2011] CAT 14 [45], [52ff].

⁷⁶⁹ Case 5/69 *Franz Völk v S.P.R.L. Ets J. Vervaecke*, EU:C:1969:35, paragraphs 5–7. See also Case C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, EU:C:2006:734, paragraph 50.

⁷⁷⁰ Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, paragraphs 37; and De Minimis Notice, paragraphs 2 and 13.

⁷⁷¹ See *Carewatch and Care Services Limited v Focus Caring Services Limited and Others* [2014] EWHC 2313 (Ch) [148ff].

H. Effect on trade between EU Member States

- A.61. Article 101 TFEU applies to agreements and/or concerted practices which may affect trade between EU Member States. Moreover, in order to fall within the scope of Article 101 TFEU, the agreement or concerted practice must be capable of affecting trade between Member States to an appreciable extent.⁷⁷²
- A.62. Where the CMA applies national competition law to agreements or concerted practices which may affect trade between Member States, the CMA must also apply Article 101 TFEU.⁷⁷³
- A.63. An effect on trade means that the agreement or concerted practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.⁷⁷⁴
- A.64. For the purposes of assessing whether an agreement or concerted practice may affect trade between Member States, the CMA follows the approach set out in the Commission's Effect on Trade Guidelines.⁷⁷⁵ Whilst not binding on the CMA,⁷⁷⁶ the CMA will have regard to the Effect on Trade Guidelines when determining whether Article 101 TFEU applies.⁷⁷⁷

'Trade between Member States'

- A.65. In order for an agreement to have an effect on trade between EU Member States, it must be capable of having an impact on cross-border economic activity involving at least two Member States.⁷⁷⁸ This requirement is independent of the definition of the geographic scope of the market and may be fulfilled even if the relevant market is national or sub-national.⁷⁷⁹
- A.66. The concept of 'trade' has been interpreted widely and covers not only the supply of goods or services, but also the establishment of a presence in a Member State.⁷⁸⁰ It also encompasses an effect on the competitive structure

⁷⁷² Case 22/71 *Béguelin Import Co. v S.A.G.L. Import Export*, EU:C:1971:113, paragraph 16.

⁷⁷³ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1, Article 3.

⁷⁷⁴ Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH*, EU:C:1966:38, [1966] OJ Spec Ed 249.

⁷⁷⁵ Commission Notice *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* [2004] OJ C101/07 ('Effect on Trade Guidelines').

⁷⁷⁶ This is clear from the wording of paragraph 3 of the Effect on Trade Guidelines and was also confirmed in Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795.

⁷⁷⁷ *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 2.23.

⁷⁷⁸ Effect on Trade Guidelines, paragraph 21.

⁷⁷⁹ Effect on Trade Guidelines, paragraph 22.

⁷⁸⁰ Effect on Trade Guidelines, paragraph 19.

of the market, for example where an agreement eliminates or threatens to eliminate a competitor.⁷⁸¹

'May affect'

A.67. It is not necessary to demonstrate that an agreement has had an actual impact on trade between EU Member States, simply that it 'may' affect trade.⁷⁸² However, hypothetical or speculative effects are not sufficient.⁷⁸³ The CJ has held that in order that trade may be affected by an agreement:

*'(...) it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that an agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States (...).'*⁷⁸⁴

A.68. The assessment of whether an agreement is capable of affecting trade between Member States involves consideration of various qualitative and quantitative factors which, taken individually, may not be decisive.⁷⁸⁵ These factors include the nature of the agreement, the nature of the products covered by the agreement, the position and importance of the undertakings concerned, and the economic and legal context of the agreement.

(a) Nature of the agreement

A.69. Agreements which are confined to a single Member State (or even part of a Member State) may still give rise to an effect on trade between Member States.

A.70. The Effect on Trade Guidelines⁷⁸⁶ explain that agreements involving RPM in respect of 'tradeable'⁷⁸⁷ products and which cover the whole of a single Member State may have direct effects on trade between Member States by increasing imports from other Member States or by decreasing exports from

⁷⁸¹ Joined Cases T-24/93 etc *Compagnie Maritime Belge SA and Others v Commission*, EU:T:1996:139, paragraph 203.

⁷⁸² Joined cases T-202/98 etc *Tate & Lyle plc and Others v Commission*, EU:T:2001:185, paragraph 78; and Case T-29/92 *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and Others v Commission*, EU:T:1995:34, paragraph 235.

⁷⁸³ Effect on Trade Guidelines, paragraph 43.

⁷⁸⁴ Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH*, EU:C:1966:38, [1966] OJ Spec Ed page 249. See further eg Joined cases 209/78 etc *Heintz van Landewyck SARL and others v Commission*, EU:C:1980:248, paragraph 170; Case 126/80 *Maria Salonia v Giorgio Poidomani and Franca Baglieri, née Giglio*, EU:C:1981:136, paragraph 12; and Case 42/84, *Remia BV and others v Commission*, EU:C:1985:327, paragraph 22.

⁷⁸⁵ Case C-250/92 *Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA*, EU:C:1994:413, paragraph 54.

⁷⁸⁶ Effect on Trade Guidelines, paragraph 88.

⁷⁸⁷ A product is tradeable if there is cross-border demand for it or if the product constitutes a significant factor in the choice made by undertakings from other Member States whether to establish themselves in the Member State in question.

the Member State in question. Such agreements may also affect patterns of trade in much the same way as horizontal cartels. To the extent that the price resulting from RPM is higher than that prevailing in other Member States, this price level is only sustainable if imports from other Member States can be controlled.

(b) Nature of the product

- A.71. Where the relevant products are easily traded across borders or are important for undertakings that want to enter or expand their activities in other EU Member States, an effect on trade is more easily established than in cases where there is limited demand for products offered by suppliers from other Member States or where the products are of limited interest from the point of view of cross-border establishment or the expansion of the economic activity carried out from such place of establishment.⁷⁸⁸

(c) The position and importance of the undertakings concerned

- A.72. The market position of the undertakings concerned and their sales volumes are indicative, from a quantitative perspective, of the ability of an agreement to affect trade between EU Member States.⁷⁸⁹

(d) The economic and legal context

- A.73. It is relevant to consider whether there are barriers to cross-border trade between EU Member States.⁷⁹⁰ It is also relevant to take into account whether the agreement is part of a network of similar agreements.⁷⁹¹

Appreciable effect on trade

- A.74. The assessment of whether an agreement has an 'appreciable' effect on trade between Member States depends on the circumstances of each case.
- A.75. Where an agreement is by its nature capable of affecting trade between Member States, the appreciability threshold is lower than in the case of agreements that are not by their nature capable of affecting trade between Member States.⁷⁹² In addition, the stronger the market position of the

⁷⁸⁸ Effect on Trade Guidelines, paragraph 30.

⁷⁸⁹ Effect on Trade Guidelines, paragraph 31.

⁷⁹⁰ Effect on Trade Guidelines, paragraph 32.

⁷⁹¹ Effect on Trade Guidelines, paragraph 49.

⁷⁹² Effect on Trade Guidelines, paragraph 45.

undertakings concerned, the more likely it is that an agreement that is capable of affecting trade between Member States can do so appreciably.⁷⁹³

A.76. In past cases, the CJ has considered the appreciability requirement to be fulfilled when the sales of the undertakings concerned accounted for approximately 5% of the relevant market.⁷⁹⁴ However, market share alone is not always determinative. The turnover of an undertaking in the products concerned is also relevant and may, in certain circumstances, be sufficient to establish an appreciable effect.⁷⁹⁵ The relative market position of the parties compared to other market players is also important. In *Musique Diffusion Française*,⁷⁹⁶ the products in question accounted for just above 3% of sales on the markets concerned. The CJ held that the agreements, which restricted parallel trade, were capable of appreciably affecting trade between Member States due to the high turnover of the parties and the relative market position of the products, compared to those of products produced by competing suppliers.

A.77. As well as the nature of the agreement and the market position of the parties, it is relevant to have regard to any cumulative effects of parallel networks of similar agreements. However, it is still necessary that the individual agreement makes a significant contribution to the overall effect on trade.⁷⁹⁷

I. Effect on trade within the UK

A.78. By virtue of section 2(1)(a) of the Act, the Chapter I prohibition applies to agreements which '(...) *may affect trade within the United Kingdom*'. It is possible that an agreement may be caught by the Chapter I prohibition even if it only affects trade in a limited geographical area. For the purposes of the Chapter I prohibition, the UK includes any part of the UK in which an agreement operates or is intended to operate.⁷⁹⁸ An agreement or concerted practice is not in fact required to affect trade provided it is capable of doing so.⁷⁹⁹

A.79. Unlike the position under Article 101(1) TFEU, there is no requirement that the effect on trade within the UK should be appreciable. This was clarified by the

⁷⁹³ Effect on Trade Guidelines, paragraphs 45–47.

⁷⁹⁴ Case 19/77 *Miller International Schallplatten GmbH v Commission*, EU:C:1978:19, paragraphs 9-10; and Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission*, EU:C:1983:293, paragraph 58.

⁷⁹⁵ Effect on Trade Guidelines, paragraph 46 and 48.

⁷⁹⁶ Joined cases 100/80 etc *SA Musique Diffusion Française and Others v Commission*, EU:C:1983:158, paragraphs 86.

⁷⁹⁷ Effect on Trade Guidelines, paragraph 49.

⁷⁹⁸ The Act, section 2(7).

⁷⁹⁹ Joined cases T-202/98 etc *Tate & Lyle plc and Others v Commission*, EU:T:2001:185, paragraph 78.

CAT in *Aberdeen Journals*.⁸⁰⁰ Effect on trade within the UK is a purely jurisdictional test to demarcate the boundary line between the application of EU competition law and national competition law. The CAT has clarified that given a close nexus between appreciable effect on competition and appreciable effect on trade within the United Kingdom, if one was satisfied, the other was likely to be so.⁸⁰¹

J. Exclusion or exemption

Exclusion

A.80. Section 3 of the Act provides that the Chapter I prohibition does not apply to any of the cases in which it is excluded by or as a result of Schedules 1 to 3 of the Act as follows:

A.80.1. Schedule 1 covers mergers and concentrations

A.80.2. Schedule 2 covers competition scrutiny under other enactments, and

A.80.3. Schedule 3 covers general exclusions.

Exemption

Block exemption

A.81. An agreement is exempt from Article 101(1) TFEU if it falls within a category of agreement which is exempt by virtue of a block exemption regulation.

A.82. Similarly, pursuant to section 10 of the Act, an agreement is exempt from the Chapter I prohibition if it does not affect trade between EU Member States but otherwise falls within a category of agreement which is exempt from Article 101(1) TFEU by virtue of a block exemption regulation.

A.83. It is for the parties wishing to rely on these provisions to adduce evidence that the exemption criteria are satisfied.⁸⁰² The CMA will consider such evidence against the likely impact of the restrictive agreement on competition when assessing whether the criteria in section 9 of the Act are satisfied.

A.84. Vertical agreements that restrict competition may be exempt from the Chapter I prohibition/Article 101(1) TFEU if they fall within the Vertical Agreements Block Exemption Regulation (VABER). The VABER allows for a 'safe harbour'

⁸⁰⁰ *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11 [459]–[460]. The CAT considered this point also in *North Midland Construction plc v Office of Fair Trading* [2011] CAT 14 [48]–[51] and [62] but considered that it was 'not necessary (...) to reach a conclusion'.

⁸⁰¹ *North Midland Construction plc v Office of Fair Trading* [2011] CAT 14 [62].

⁸⁰² The Act, section 9(2).

where the relevant market shares of the supplier and the buyer are each below 30%, unless the agreement contains one of the hard-core restrictions in Article 4 of the VABER.

- A.85. Article 4(a) of the VABER provides that the exemption provided for under Article 2 of the VABER does not apply to those agreements, which directly or indirectly have as their object:

'the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend 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'.

Individual exemption

- A.86. Agreements which satisfy the criteria set out in section 9 of the Act/Article 101(3) TFEU benefit from an exemption from the Chapter I prohibition/Article 101(1) TFEU.

- A.87. These criteria are that:

- A.87.1. the agreement contributes to improving production or distribution or promoting technical or economic progress
- A.87.2. while allowing consumers a fair share of the resulting benefits, but
- A.87.3. does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives, or
- A.87.4. afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

- A.88. In considering whether an agreement satisfies the criteria set out in section 9 of the Act/Article 101(3) TFEU, the CMA will have regard to the Commission's Article 101(3) Guidelines.⁸⁰³

- A.89. Severe restrictions of competition are unlikely to benefit from individual exemption as such restrictions generally fail the first two conditions for exemption (objective economic benefits and benefits to consumers) and the

⁸⁰³ Commission Notice *Guidelines on the Application of Article 81(3) of the EC Treaty* [2004] OJ C101/97 (Article 101(3) Guidelines). See also *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 5.5.

third condition (indispensability).⁸⁰⁴ In the presence of hard-core restrictions, it is unlikely that the agreement can be exempted under Article 101(3) TFEU. The burden of proving that the conditions of Article 101(3) TFEU are met is on the party against which the allegations of infringement of the competition rules is made.⁸⁰⁵

K. Burden and standard of proof

Burden of proof

A.90. The burden of proving an infringement of the Chapter I prohibition/Article 101 TFEU lies with the CMA.⁸⁰⁶

A.91. This burden does not preclude the CMA from relying, where appropriate, on inferences or evidential presumptions. In *Napp*, the CAT stated that:

*'[t]hat approach does not in our view preclude the Director,⁸⁰⁷ in discharging the burden of proof, from relying, in certain circumstances, from inferences or presumptions that would, in the absence of any countervailing indications, normally flow from a given set of facts, for example (...) that an undertaking's presence at a meeting with a manifestly anti-competitive purpose implies, in the absence of explanation, participation in the cartel alleged (...).'*⁸⁰⁸

Standard of proof

A.92. The CMA is required to demonstrate that an infringement has occurred on the balance of probabilities which is the civil standard of proof.⁸⁰⁹ The CAT clarified in the *Replica Kit* appeals that:⁸¹⁰

'(...) 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'.

⁸⁰⁴ Article 101(3) Guidelines, paragraph 46 and 79 (in respect of severe and so-called 'hard-core' restrictions).

⁸⁰⁵ Vertical Guidelines, paragraphs 47 and 223 (in the context of RPM).

⁸⁰⁶ *Napp Pharmaceutical Holdings Ltd and Subsidiaries v Director General of Fair Trading* [2002] CAT 1 [95] and [100]. See also *JJB Sports plc v Office of Fair Trading* [2004] CAT 17 [164] and [928]–[931]; and *Tesco Stores Limited and Others v Office of Fair Trading* [2012] CAT 31 [88].

⁸⁰⁷ References to the 'Director' are to the former Director General of Fair Trading (DGFT). The post of DGFT was abolished under the Enterprise Act 2002 and the functions of the DGFT were transferred to the OFT. From 1 April 2014 the OFT's competition and certain consumer functions were transferred to the CMA by virtue of the Enterprise and Regulatory Reform Act 2013.

⁸⁰⁸ *Napp Pharmaceutical Holdings Ltd and Subsidiaries v Director General of Fair Trading* [2002] CAT 1 [110].

⁸⁰⁹ *Tesco Stores Limited and Others v Office of Fair Trading* [2012] CAT 31 [88].

⁸¹⁰ *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17 [204]. See also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24 [164]–[166].

A.93. The Supreme Court has further clarified that this standard of proof is not connected to the seriousness of the suspected infringement.⁸¹¹ The CAT has also expressly accepted the reasoning in this line of case law.⁸¹²

⁸¹¹ *Re S-B (Children)* [2009] UKSC 17 [34]. See also *Re B (Children)* [2008] UKHL 35 [72]–[73].

⁸¹² *North Midland Construction plc v Office of Fair Trading* [2011] CAT 14 [15]–[16].

ANNEX B: RELEVANT MARKET & ULTRA'S MARKET POSITION

A. Relevant Market

Introduction

- B.1. The CMA is not obliged to define the relevant market for the purposes of deciding whether there has been an infringement of the Chapter I prohibition and/or Article 101 TFEU, unless it is impossible without such a definition to determine whether the agreement and/or concerted practice had as its object or effect the appreciable prevention, restriction or distortion of competition.⁸¹³ Such a situation does not apply in this case.⁸¹⁴
- B.2. However, for the purposes of establishing the level of any financial penalties that may be imposed on an undertaking for a breach of the Chapter I prohibition and/or Article 101 TFEU, the CMA will consider an undertaking's 'relevant turnover'.⁸¹⁵ The relevant turnover is the turnover of the undertaking in the relevant product and geographic markets affected by the infringement in the undertaking's last business year.⁸¹⁶ Therefore, the CMA must consider which products or services are most likely to account for relevant turnover for the purposes of establishing a financial penalty.
- B.3. To that effect, the CMA must be '*satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement*'.⁸¹⁷ The Court of Appeal has made clear that the market which is taken for the purposes of penalty assessments may properly be assessed on a broad view of the particular trade which has been affected by the proved infringement, rather than by a relatively exact application of principles that would be relevant for a formal analysis.⁸¹⁸

⁸¹³ See Case T-62/98 *Volkswagen AG v Commission* [2000] ECR II-2707, at paragraph 230 and Case T-29/92 *SPO and Others v Commission* [1995] ECR II-289, at paragraph 74.

⁸¹⁴ 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, ('[i]n Chapter I cases, unlike Chapter II cases, determination of the relevant market is neither intrinsic to, nor normally necessary for, a finding of infringement', at [178].

⁸¹⁵ *Guidance as to the appropriate amount of a penalty* (OFT 423, September 2012), adopted by the CMA Board, paragraphs 2.1 and 2.3 to 2.11.

⁸¹⁶ *Guidance as to the appropriate amount of a penalty* (OFT 423, September 2012), adopted by the CMA Board, paragraph 2.7.

⁸¹⁷ *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, paragraph 170.

⁸¹⁸ *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, paragraph 173

The relevant product market

Introduction

- B.4. For the purposes of defining the relevant market, the CMA considers the competitive pressure faced by companies active in the market. It does so by:
- B.4.1. establishing the closest substitutes to the product(s) or service(s) that is or are the focus of the investigation (the ‘focal product(s)’),⁸¹⁹ and
 - B.4.2. considering whether they exercise a competitive constraint on the ability to raise prices of those focal products.⁸²⁰
- B.5. The products affected by the Infringements are those products covered by the Online Discounting Restriction. The CMA has therefore identified the focal products as all types of bathroom fittings sold under the Hudson Reed and Ultra brands.
- B.6. The Infringements constitute vertical agreements and/or concerted practices which were entered into between Ultra in its capacity as a supplier, and the Resellers.⁸²¹ The CMA considers that both levels of the supply chain are affected by the Infringements. However, given that demand at the upstream level is likely to be driven by demand at the downstream level, for the purposes of this Decision the CMA has focused on the upstream supply of bathroom fittings through resellers.

Broader product market: brands

- B.7. The CMA has considered whether the relevant product market may be wider than bathroom fittings sold under the Hudson Reed and Ultra brands, and also includes (i) other brands sold by Ultra, (ii) brands owned by other manufacturers of bathroom fittings and (iii) unbranded bathroom fittings.
- B.8. While formal definition of the market is not necessary for the purposes of this Decision,⁸²² in the context of this case the CMA considers that the relevant market is likely to include all bathroom fittings regardless of whether these are

⁸¹⁹ See *Market Definition: understanding Competition Law* (OFT403, December 2004), adopted by the CMA Board, paragraph 3.2.

⁸²⁰ *Market definition: understanding Competition Law* (OFT403, December 2004), adopted by the CMA Board, paragraphs 2.9 to 2.10. The Guidelines note that where there is more than one product under investigation, the test will usually be applied separately for each of the products (footnote 11).

⁸²¹ See paragraphs 1.10 to 1.11 above.

⁸²² See paragraph B.1 above.

branded or unbranded, and regardless of whether they are supplied by Ultra or another manufacturer.

- B.8.1. **Other Ultra brands:** The CMA has seen evidence of switching between Ultra's brands to suggest that they may be in the same product market. For example, the CMA notes that a number of Ultra's online customers switched from purchasing Hudson Reed or Ultra products to purchasing Premier products in response to the imposition of the Online Discounting Restriction on Hudson Reed and Ultra branded products.⁸²³ This suggests that Premier, Hudson Reed and Ultra branded products were viewed as close substitutes from the demand perspective.⁸²⁴
- B.8.2. **Other manufacturers' brands:** The CMA has seen evidence to suggest that Ultra competes against the full range of manufacturer brands. For example, the CMA notes that market reports referred to by Ultra in internal documents discuss competition between Ultra and a variety of manufacturers.⁸²⁵
- B.8.3. **Unbranded bathroom fittings:**⁸²⁶ The CMA has seen evidence to suggest that Ultra's branded products compete with unbranded bathroom fittings. For example, during the course of its investigation, the CMA has received evidence that suggests some resellers view branded and unbranded bathroom fittings products as substitutes.⁸²⁷

⁸²³ In an internal business review in September 2013, Ultra commented on how it lost sales when it introduced the Trading Guidelines but then regained them when it introduced equivalent products under the Premier brand without the online restrictions. See Ultra Finishing Monthly Business Review, September 2013, page 7: '*Online Customers: Sales continue to grow with this customer base and we are back up to the total sales figure we were achieving prior to the launch of the online trading guidelines (averaging around [£] a month mark). Marketing have continued to work with these customers to grow sales back. **Introducing equivalents in Premier and promoting this brand has clearly recovered the majority of business.***' (Emphasis added by CMA) (URN UD0517).

⁸²⁴ This is also demonstrated by the fact that, when communicating with resellers about the Trading Guidelines, Ultra offered the Premier brand to resellers as an alternative to the Hudson Reed and Ultra brands. For example, the Final Proposal stated that a point to note in calls with customers was that '*Premier product available as an alternative with no branding restrictions*'. See Annex D.

⁸²⁵ See, for example, discussion of competitors in an internal Ultra document discussing its market share (URN UD0515), based on AMA reports 'Bathroom market report UK 2013-2017 analysis' and 'Shower market report UK 2013-2017 analysis'.

⁸²⁶ Unbranded bathroom fittings are typically resold under the reseller's own branding.

⁸²⁷ For example, according to [Reseller], '*The [own-brand] products are of identical if not better quality than branded bathroom products; many such branded products come from the same factories as the own-brand items.*' Question 8 of [Reseller]'s response to CMA's letter dated 13 May 2015 (URN U20069.1), according to [Reseller] '*It was simply more profitable to sell your own brand products. Established brands command a better price in the market place due to their unique selling points thus sell less compared to unbranded/ own branded/ less established brands.*' Question 8(b) of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U100002.1) (See questions at URN U100001.1), according to [Reseller], '*We sell a large range of our own brand as it allows us the ability to avoid the issue of price matching and offer our customers the best product possible.*'

B.9. In the light of the above, the CMA considers that the relevant product market includes all bathroom fittings regardless of brand.

Narrower segmentation of bathroom fittings:

B.10. The CMA has also considered whether the relevant product market should be defined more narrowly than the supply of all bathroom fittings, and should be segmented by end-use, eg shower enclosures.

B.11. The CMA notes that the bathroom fittings supplied by Ultra include a wide range of permanent fixtures and fittings used in bathrooms and toilets, including:

B.11.1. shower enclosures

B.11.2. bath/shower screens

B.11.3. shower trays

B.11.4. shower accessories

B.11.5. baths and sanitary ware (including wash basins, pedestals, WC suites and bidets)

B.11.6. brassware (including shower mixers as well as other taps and mixers)

B.11.7. bathrooms accessories (including towel warmers, bath panels, WC seats, mirrors & fittings)

B.11.8. bathroom furniture, and

B.11.9. whirlpools and spas.⁸²⁸

B.12. The CMA's finding is that the Online Discounting Restriction applied to the full range of Hudson Reed and Ultra branded products, including each of the categories listed above. It would therefore make no difference to the CMA's

Question 8(b) of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U140009.1) (See questions at URN U140003.1). In addition, in an internal document, Ultra notes that '*imports from low cost countries, particularly China and Eastern Europe, continue to grow exposing the market to a high level of price competition*', [8], page 32 (URN UD0686).

⁸²⁸ Internal Ultra document discussing its market share (URN UD0515), based on definitions used in AMA reports 'Bathroom market report UK 2013-2017 analysis' and 'Shower market report UK 2013-2017 analysis'. Mintel categorises bathroom fittings into different categories, namely: showers, baths, accessories, basins, WCs, mixers and taps, bathroom furniture, shower enclosures, shower screens, shower trays. According to Mintel, 'sanitary ware' means wash basins, WCs and baths (URN UD0257 & UD0256). The parties in the *Sanitec/Sphinx* decision submitted that the bathroom products market may be divided into 12 relevant product markets, which broadly align with the categories above (Case M.1578 *Sanitec/Sphinx*, paragraph 9).

calculation of ‘relevant turnover’ whether the CMA separates out the above categories into individual product markets, or aggregates the turnover of the individual categories and use this as a basis for calculating any applicable financial penalty. Therefore, for the purposes of this Decision, the CMA has not made any formal finding as to the existence of narrower product markets on the basis of the above categories of products. Instead, the CMA has aggregated the product market to include the supply of all bathrooms fittings.

The relevant geographic market

Introduction

B.13. While formal definition of the market is not necessary for the purposes of this Decision,⁸²⁹ the evidence in the CMA’s possession suggests that, in the context of this case, the geographic scope of the market is not likely to be narrower than national. For example:

- B.13.1. suppliers of bathroom products tend to supply their products across the UK based on national distribution strategies⁸³⁰
- B.13.2. most resellers purchase branded products as a minimum from across the UK from UK-based suppliers or distributors, rather than on a regional basis,⁸³¹ and
- B.13.3. the Infringements cover the supply of bathroom fittings across the whole of the UK.⁸³²

B.14. The CMA has also considered whether the evidence may suggest a wider than national geographic scope.

B.15. Some of the most prominent names and parties with strongest market shares in the UK continue to be those with historical ties to the UK, suggesting that

⁸²⁹ See paragraph B.1 above.

⁸³⁰ [38] In addition, a report by AMA (Bathroom Market Report UK 2013-2017 Analysis, Fourteenth Edition, August 2013, page 74) (URN UD0257) notes in relation to brassware: ‘*The distributors are the main route to market for importers, particularly products targeted at the upper end of the market. Several major importers targeting the mass market sector now operate UK distribution subsidiaries.*’

⁸³¹ Indeed, the CMA has evidence that some resellers would be willing to purchase products from further afield. For example, [Reseller] explains that ‘*[a] few of the high end brands come from abroad [...] but most of these have UK agents. We don’t really import our own items, but rely on agents for foreign brands that try and establish them in the market*’, Question 11(a) of [Reseller]’s response to section 26 notice dated 8 May 2015 (URN U90002.1) (See questions at URN U90001.1). See also *Sanitec/Sphinx*, where the Commission noted that the vast majority of wholesalers and retailers of bathroom fittings purchase their products on a national basis (Case M.1578 *Sanitec/Sphinx*, paragraph 77).

⁸³² For example, Ultra has national distribution capabilities and services a range of customers located throughout the UK, from large national chains, through to smaller regional retail chains, independent retailers, online retailers, smaller merchants and national distributors. [39], pages 12 and 48 (URN UD0686).

competitive conditions have strong national characteristics.⁸³³ The CMA notes AMA's assessment that:

'[t]raditionally, the UK market for bathroom products differs considerably from many European markets. The UK generally operates on low pressure water systems, bathrooms are normally 'dry' environments in the UK as opposed to 'wet' (ie. tiled floors, walls), and bathing is much more popular in the UK than Europe, where showers are more prevalent.

*These characteristics have meant that the major UK manufacturers in the traditional product areas have historically dominated the UK market. However, the characteristics of the bath and sanitaryware market have changed in recent years, due in part to standardised legislation and concentrating distribution. The level of imports has increased considerably and, as a result, the UK market is now exposed to product and design trends from a variety of sources, particularly Europe and also wider supply sources, such as the Far East.'*⁸³⁴

B.16. In line with the above statement, the CMA has seen some evidence of entry by manufacturers of branded products, with retailers indicating that they have been introduced to new overseas brands by way of a UK distributor or agent.⁸³⁵ Previous decisions in the sector have also indicated a geographic scope that may be wider than national but not EEA-wide.⁸³⁶

B.17. In addition, the evidence suggests that some resellers and distributors, particularly those selling online, import bathroom fittings directly into the UK from China and elsewhere.⁸³⁷ These direct overseas purchases by resellers

⁸³³ In *Sanitec/Sphinx*, the Commission noted that European manufacturers tended to have their strongest presence, both in terms of production and sales, in their domestic markets, which was a clear indication that conditions of competition were not homogenous throughout the EEA (Case M.1578, *Sanitec/Sphinx*, paragraphs 71 and 72).

⁸³⁴ AMA (Bathroom Market Report UK 2013-2017 Analysis, Fourteenth Edition, August 2013, page 7) (URN UD0257) In addition, according to AMA, 'Many online plumbing retailers are moving away from more expensive UK and European products and towards a more cost effective global sourcing strategy.' AMA (Internet Plumbing and Heating Market Report UK 2014-2018 Analysis, Third Edition, January 2014, page 50). (URN U0013) See also *Sanitec/Sphinx*, where the Commission noted a gradual shift in production capacity to countries offering more competitive production costs, and that all major European players in the field of bathroom products produce at low-cost plants in countries like Bulgaria, Hungary, Poland and the Czech Republic (Case M.1578, *Sanitec/Sphinx*, paragraph 48).

⁸³⁵ For example, [Reseller] explains that '[a] few of the high end brands come from abroad [...] but most of these have UK agents. We don't really import our own items, but rely on agents for foreign brands that try and establish them in the market', Question 11(a) of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U90002.1) (See questions at URN U90001.1).

⁸³⁶ Case M.1578, *Sanitec/Sphinx*, paragraphs 115, 125 and 136.

⁸³⁷ According to AMA, 'Many online plumbing retailers are moving away from more expensive UK and European products and towards a more cost effective global sourcing strategy.' AMA (Internet Plumbing and Heating Market Report UK 2014-2018 Analysis, Third Edition, January 2014, page 50). (URN U0013). [Reseller] noted that it purchases bathroom products from China, Turkey and Spain, Question 11(a) of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U100002.1) (See questions at URN U100001.1).

tend to be unbranded own-label products.⁸³⁸ As explained at paragraph B.8.3 above, it seems likely that such imports would represent a certain constraint on suppliers of branded products as resellers have chosen to stock such products instead of, or as well as, branded products.⁸³⁹

B.18. However, the CMA notes that the practice of resellers sourcing unbranded product from outside the UK is not universal.⁸⁴⁰ In addition, whilst there is some evidence of imports from outside the UK, the CMA considers that the available evidence is not sufficiently comprehensive or compelling to define a market broader than the UK.

B.19. In the light of the above, the CMA considers that a cautious approach to establishing relevant turnover for the purposes of setting fines is to take the relevant geographic market as the UK.

⁸³⁸ For example, [Reseller] noted that [Reseller] selects a significant amount of its own-branded products from the manufacturers' catalogues and these products are sourced from a number of low-cost production countries. In addition, [Reseller] stated, '[Reseller] had a limited range of own brand products. [...] This included [§] and possibly others', Question 8 of [Reseller]'s response to CMA's letter dated 13 May 2015 (URN U20069.1), [Reseller] stated: 'We initially came into the bathroom sector as a company importing all our own brand products from China and not selling any branded products and this is still the core of our business.' Question 8 of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U140009.1) (See questions at URN U140003.1), [Reseller] noted 'We source all of our [unbranded] products from the Far East, mainly China.' Question 8 of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U130006.1) (See questions at URN U130001.1).

⁸³⁹ For example, according to [Reseller], 'The [own-brand] products are of identical if not better quality than branded bathroom products; many such branded products come from the same factories as the own-brand items.' Question 8 of [Reseller]'s response to CMA's letter dated 13 May 2015 (URN U20069.1), according to [Reseller] 'It was simply more profitable to sell your own brand products. Established brands command a better price in the market place due to their unique selling points thus sell less compared to unbranded/ own branded/ less established brands.' Question 8(b) of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U100002.1) (See questions at URN U100001.1), according to [Reseller], 'We sell a large range of our own brand as it allows us the ability to avoid the issue of price matching and offer our customers the best product available.' Question 8(b) of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U140009.1) (See questions at URN U110003.1). In addition, [§] Ultra notes that 'imports from low cost countries, particularly China and Eastern Europe, continue to grow exposing the market to a high level of price competition,' [§] page 32 (URN UD0686).

⁸⁴⁰ For example, [Reseller] does not import any products itself, Question 11(a) of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U30014.2), [Reseller] does not buy any products from outside the UK, Question 11(a) of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U110010.1) (See questions at URN U110003.1), [Reseller] does not import anything itself, Question 11(a) of [Reseller]'s response to section 26 notice dated 8 May 2015 (URN U90002.1) (See questions at URN U90001.1).

Conclusion on the relevant market

B.20. For the purposes of this case, the CMA finds that:

- B.20.1. the relevant product market for the Infringements is the supply of bathroom fittings, and
- B.20.2. the relevant geographic market for the supply of bathroom fittings is the UK.

B.21. This market definition is without prejudice to the CMA's discretion to adopt a different market definition in any subsequent case in the light of the relevant facts and circumstances in that case, including the purpose for which the market is defined.

B. Ultra's market position

Size of the UK market for bathroom fittings

B.22. There is little reliable public data available on the size of the UK bathrooms fittings sector, by value or volume of sales. However, market reports estimate the size of the UK market for bathroom fittings to be £1.11 billion in 2013 based on manufacturers' selling prices.⁸⁴¹

Ultra's position in the market

B.23. In 2013, Ultra generated turnover of £46.7 million.⁸⁴² In 2013, Ultra's largest single product category was [REDACTED], closely followed by [REDACTED]. The next most significant segments in decreasing order were [REDACTED].⁸⁴³

B.24. Ultra's market share in relation to particular products within the market for bathroom fittings⁸⁴⁴ varies between [REDACTED]% and [REDACTED]%, except for bath/shower screens and whirlpool and spas, where Ultra's market share is lower.⁸⁴⁵ This

⁸⁴¹ A report by AMA (Bathroom Market Report UK 2013-2017 Analysis, Fourteenth Edition, August 2013, page 9) (URN UD0257) forecast that the bathroom products sector in the UK would have a total value of £738 million at manufacturers' selling price (MSP) in 2013 (this compares to its estimate that the market in 2012 had been £731m); and a report by AMA (Shower Market Report UK 2013-2017 Analysis, Fourteenth Edition, June 2013) (URN UD0256) forecast that the shower equipment sector in the UK would have a total value of £425 million at MSP in 2013. In combining these two figures the CMA has made a minor adjustment to account for the fact that 'bath/shower mixers' is captured in both reports and the fact that the bathroom market report also includes the value of 'kitchen sink brassware'.

⁸⁴² Ultra audited accounts year end 31 December 2013 (URN U0002).

⁸⁴³ [REDACTED]

⁸⁴⁴ See paragraph B.11 above.

⁸⁴⁵ Figures estimated by Ultra in an internal document, in which it calculated market share on the basis of Ultra's own revenue figures using the estimate of the total value of the market segment provided by AMA (URN UD0515).

equates to an overall aggregated share of around [X]% of the supply of all bathroom fittings in the UK, but this may have fluctuated over time.

ANNEX C: THE 2009 ONLINE DISCOUNTING POLICY

A. Introduction

- C.1. From as early as 2006, Ultra received complaints from a range of customers about heavy discounting on Ultra's products by resellers making sales online. On 29 March 2006, [Sales Agent] of Ultra emailed [Sales and Marketing Director] of Ultra, noting the following:

'I have had 2 showrooms who will not put Hudson Reed products on display [...]. I have now had three companies who are considering taking Hudson Reed from their displays [...]. All this has been in the past two weeks'.⁸⁴⁶

- C.2. [Sales Agent] of Ultra went on to comment that a reseller had expressed the view that this was due to excessive discounting of Hudson Reed branded products on the internet. [Sales Agent] of Ultra noted that Ultra may wish to consider attempting to control heavy discounting:

'I understand that you had a conversation with [Reseller] who think that this is down to excessive discounts on the internet of Hudson Reed products.

It is a shame considering all the hard work of getting the display on, the fitting of them, and all the work that has gone with it, is now being jeopardised.

There may be a mechanism where we can ensure that heavy discounting is not an ongoing factor'.⁸⁴⁷ (Emphasis added by CMA)

- C.3. On 11 March 2008, [Marketing Manager] of Ultra sent an email to internal 'Marketing', Telesales' and 'Customer Care' distribution lists referring to 'at least one' instance where a customer complained about the prices that Ultra products were being sold at online. In this email [Marketing Manager] of Ultra asked staff to inform her if they received calls from customers complaining about Ultra's branded products being heavily discounting online.⁸⁴⁸
- C.4. Following this email, on 28 March 2008, [Marketing Manager] of Ultra sent [Sales and Marketing Director] of Ultra and [Commercial Director]⁸⁴⁹ of Ultra

⁸⁴⁶ Email from [Sales Agent] (Ultra) to [Sales and Marketing Director] (Ultra) dated 29 March 2006 (URN UD0175).

⁸⁴⁷ Email from [Sales Agent] (Ultra) to [Sales and Marketing Director] (Ultra) dated 29 March 2006 (URN UD0175).

⁸⁴⁸ Email from [Marketing Director] (Ultra) to Marketing, Telesales and Customer Care (Ultra) dated 11 March 2008 (URN UD0174).

⁸⁴⁹ Question 5 of Ultra's response to section 26 notice dated 15 July 2015 (URN UC0117.1).

an email describing a number of Ultra customers complaining about discounting online, including online discounting by [Reseller]

'[...] from speaking to the Reps we have the following examples:

[Employee] advised [Reseller] and [Reseller] have been complaining about [Reseller] discounting and [Reseller] just have a general grievance with HR discounting online.

A couple examples off [Employee] are [Reseller] – not happy about the price of the Marquis on [Reseller]'s website and [Reseller] generally unhappy about our products being discounted on the web. [...]

[Employee] made a sweeping statement a lot of his customers are unhappy about discounting online but couldn't remember examples!'⁸⁵⁰

B. The 2009 Online Discounting Policy

- C.5. On or around 17 April 2009, [Sales and Marketing Director] of Ultra sent letters to certain resellers containing the 2009 Online Discounting Policy, stated to take effect from 1 May 2009. This letter demonstrates that the 2009 Online Discounting Policy was introduced in response to complaints from Ultra's customers about online discounting, and that its purpose was to try to prevent online discounting of its Hudson Reed and Home of Ultra⁸⁵¹ branded products below a set level:

'After a number of discussions with our online trading customers about the level of discounting spiralling out of control, being totally unwarranted and damaging our brands; we will put in place a new policy detailed below.

With effect from the 1st May 2009, no Ultra customer shall offer either Hudson Reed or Home of Ultra online, via whatever medium, at a discount greater than 20% from our suggested retail prices. [...] We believe this action is in the best interest of all concerned and the further development of our brands [...].'⁸⁵² (Emphasis added by CMA)

- C.6. As part of the 2009 Online Discounting Policy, Ultra resellers were also required to sign up to the 2009 Online Discounting Agreement which, in accordance with the letter dated 17 April 2009, required resellers to agree that

⁸⁵⁰ Email from [Marketing Director] (Ultra) to [Sales and Marketing Director] and [Commercial Director] (Ultra) dated 28 March 2008 (URN UD0163).

⁸⁵¹ The 'Home of Ultra' brand is the previous name of the 'Ultra' brand. See footnote 5 above.

⁸⁵² Letter from [Sales and Marketing Director] (Ultra) to [Reseller] dated 17 April 2009 (URN U30007.4A). See also Ultra template of the same letter (URN UD0147).

they would not offer Hudson Reed and Home of Ultra products online at a discount greater than 20% from Ultra's suggested retail prices.⁸⁵³ Resellers were required to sign up to the agreement in order to receive CDs of images of Ultra products and a spreadsheet containing product codes, descriptions and RRP's:

'In order to maintain the high standard of the Hudson Reed and Home of Ultra brands, we have an Online Discounting Policy. Under this policy, no Ultra customers shall offer either Hudson Reed or Home of Ultra online, via whatever medium, at a discount greater than 20% from our suggested retail prices.

In order to receive our support in marketing our products on-line please sign the acknowledgement below to confirm that your website will conform to this policy.

Once we receive your signed agreement we can supply you with CDs of our images, an Excel spreadsheet containing product codes, descriptions and RRP's'.⁸⁵⁴

- C.7. Ultra has stated that it has no records showing which resellers were sent, signed or returned the 2009 Online Discounting Agreement.⁸⁵⁵ Instead, it provided the CMA with a spreadsheet dated 11 November 2010 used to monitor reseller's compliance with the 2009 Online Discounting Policy.⁸⁵⁶ This document lists over [3] resellers.⁸⁵⁷ The CMA infers that at least those resellers listed in the spreadsheet dated 11 November 2010 were sent the 2009 Online Discounting Agreement.
- C.8. On 6 May 2009, [Sales and Marketing Director] of Ultra sent a further letter to certain resellers, which referred to '*many*' customers supporting the 2009

⁸⁵³ Ultra template agreement titled '*On-Line Discounting Agreement*' (URN UD0139).

⁸⁵⁴ Ultra template agreement titled '*On-Line Discounting Agreement*' (URN UD0139).

⁸⁵⁵ See question 10.1 of Ultra's response to the follow up section 26 notice dated 19 November 2014 (URN UC0055.1).

⁸⁵⁶ Questions 12a, 12b and 12c of Ultra's response to section 26 notice dated 15 July 2015 (URN UC0117.1) and document 10.46 of Ultra's response to section 26 notice dated 28 August 2014 (URN UD0184).

⁸⁵⁷ The list includes [Reseller], [Reseller] and [Reseller].

Online Discounting Policy by agreeing not to offer discounts of ‘*greater than 20%*’ from Ultra’s RRP:

*‘Further to my letter of the 17th April, we are pleased that many of you supported our policy and are no longer offering discounts greater than 20% from our suggested retail prices. [...]’*⁸⁵⁸

Monitoring of the 2009 Online Discounting Policy

- C.9. Ultra monitored resellers’ behaviour to check whether they were complying with the 2009 Online Discounting Policy. For example, on 21 May 2009, [Sales Co-ordinator] of Ultra sent an email to [Sales and Marketing Director] of Ultra including a link to a reseller’s eBay website:

*‘Have come across another item at more than -20%’*⁸⁵⁹

- C.10. In addition, Ultra maintained a spreadsheet to track whether resellers were complying with the 2009 Online Discounting Policy.⁸⁶⁰ The spreadsheet noted whether retailers were complying with the 2009 Online Discounting Policy on various dates in July 2009.⁸⁶¹ The version dated 20 July 2009 recorded that approximately 50% of the resellers were ‘complying’.

- C.11. Ultra also encouraged resellers to report to Ultra any other resellers that were not complying with the 2009 Online Discounting Policy. In particular, [Sales and Marketing Director] of Ultra’s letter to resellers dated 17 April 2009 stated *‘Should anyone find otherwise, please contact [National Sales Manager] [of Ultra] or myself and we will take action to encourage the offending company to comply’*.⁸⁶²

- C.12. Certain resellers accordingly advised Ultra of resellers selling Hudson Reed products in breach of the 2009 Online Discounting Policy. For example, on 1 June 2009 [National Sales Manager] of Ultra received an email from [Employee] of [Reseller] forwarding the results of a price check he had asked for on Hudson prices. The email was entitled *‘Hudson Reed – Over 20%’* and included links to a number of resellers’ websites that were offering discounts of more than 20% off RRP on Hudson Reed branded products.

⁸⁵⁸ Template letter from [Sales and Marketing Director] (Ultra) to Customers, dated 6 May 2009, page 4 (URN UD0147).

⁸⁵⁹ Email from [Sales Co-ordinator] (Ultra) to [Sales and Marketing Director] (Ultra) dated 21 May 2009 (URN UD0146).

⁸⁶⁰ Question 14 of Ultra’s response to section 26 notice dated 15 July 2015 (URN UC0117.1) and Ultra spreadsheet titled *‘Online Discounting Policy’*, dated 2009 (URN UD0182).

⁸⁶¹ Ultra spreadsheet titled *‘Online Discounting Policy’*, dated 2009 (URN UD0182).

⁸⁶² Letter from [Sales and Marketing Director] (Ultra) to [Reseller] dated 17 April 2009 (URN U30007.4A). See also Ultra template of the same letter (URN UD0147).

C.13. [National Sales Manager] of Ultra forwarded this email from [Reseller] to [Marketing Executive] of Ultra, asking

*'Can you have a look at this and send out the letter 1 2 3'.*⁸⁶³

C.14. Ultra has confirmed that that *'Letter 4'* was a template letter advising resellers that were not complying with the Online Discounting Policy that they would have their terms reduced and permission to use Ultra's images online withdrawn.⁸⁶⁴ Therefore, the CMA infers that *'letter 1 2 3'* was also based upon one of the templates provided to the CMA by Ultra.⁸⁶⁵

Enforcement of the 2009 Online Discounting Policy

C.15. Ultra made it clear to its resellers that there would be consequences for failure to comply with the 2009 Online Discounting Policy. The letter from Ultra to resellers dated 17 April 2009 stated *'we will take action to encourage the offending company to comply [with the 2009 Online Discounting Policy]'*.⁸⁶⁶ A further letter to resellers dated 6 May 2009 (ie *'Letter 4'*) stated: *'any accounts found to be disregarding this policy from Friday morning 8th May, will have their terms reduced and we will withdraw our agreement to use our copyrighted images on their online shops'*.⁸⁶⁷

C.16. The evidence demonstrates that Ultra acted on this threat on at least one occasion. On 15 May 2009 [Sales and Marketing Director] of Ultra sent an email to a reseller that stated:

'All you need to do to revert to your previous terms and have access to our images is to fall in line with our online trading policy of offering no more than 20% discount from our suggested retail prices'.⁸⁶⁸

C.17. In addition, on 6 July 2009, [Marketing Manager] of Ultra instructed [Marketing Executive] of Ultra to send out a letter to four resellers that were not complying with the 2009 Online Discounting Policy. The draft letter stated:

⁸⁶³ Email from [National Sales Manager] (Ultra) to [Marketing Executive] (Ultra) dated 1 June 2009, forwarding an email from [Employee] ([Reseller]) to [National Sales Manager] (Ultra) dated 1 June 2009 (URN UD0143).

⁸⁶⁴ See question 11(b) of Ultra's response to the CMA's letter dated 20 February 2015 (URN UC0080.1) and template letter from [Sales and Marketing Director] (Ultra) to Customers, dated 6 May 2009, page 4 (URN UD0147).

⁸⁶⁵ See Ultra template letters (URN UD0147).

⁸⁶⁶ Letter from [Sales and Marketing Director] (Ultra) to [Reseller], dated 17 April 2009, (URN U30007.4A). See also Ultra template of the same letter (URN UD0147).

⁸⁶⁷ Template letter from [Sales and Marketing Director] (Ultra) to Customers, dated 6 May 2009, page 4 (URN UD0147).

⁸⁶⁸ Email from [Sales and Marketing Director] (Ultra) to [Employee] [company unknown] dated 15 May 2009, titled: *'On-Line Discounting'* (URN UD0141). Given the content of this email, the CMA infers that [Employee] was working for a reseller.

*'Following your earlier conversation with [Marketing Manager], in which we highlighted products that are not conforming to the online pricing policy (a maximum discount of 20%), it is necessary to reinforce the following. Any accounts found to be disregarding this policy from close of business on Wednesday 8th July will have their terms reduced and we will withdraw our agreement to use our copyrighted images on their online shops'.*⁸⁶⁹ (Emphasis added by CMA)

- C.18. The spreadsheet described at paragraph C.10 above also indicates that Ultra took enforcement action against resellers specifically in relation to their online sales prices. For example, it includes a reference to a reseller, [Reseller], not complying in the week commencing 6 July 2009 because it was offering an *'Additional 10% at checkout (on top of 20%)'*. Under the *'Action taken'* column, the spreadsheet records against [Reseller]: *'Phone call and Letter 4'*.⁸⁷⁰

Withdrawal of the 2009 Online Discounting Policy

- C.19. On 4 August 2009, [Sales and Marketing Director] of Ultra sent a letter to certain resellers⁸⁷¹ stating that Ultra had taken the decision to rescind the 2009 Online Discounting Policy with immediate effect. The letter stated:

'As you are aware we introduced a policy on the 1st May 2009 to try to persuade those customers that are trading online to do so at reasonable discounts. Initially this was warmly received as it was clear to most that excessive discounting is unsustainable in the long term. We were encouraged by the support that was shown to this policy.

However, there are a number of accounts that have not followed the spirit of the policy and have continued to discount at higher levels. They are perfectly at liberty to do so and legally there is nothing we can do to convince them otherwise.

⁸⁶⁹ Email from [Marketing Manager] (Ultra) to [Marketing Executive] (Ultra) dated 6 July 2009, forwarding a letter from [Sales and Marketing Director] (Ultra) dated 6 July 2009 (URN UD0145).

⁸⁷⁰ Ultra spreadsheet titled *'Online Discounting Policy'*, dated 2009 (URN UD0182). *'Letter 4'* was a template letter warning resellers that were not complying with the Online Discounting Policy that they would have their terms reduced and permission to use Ultra's images online withdrawn. Template letter from [Sales and Marketing Director] (Ultra) to Customers, dated 6 May 2009, page 4 (URN UD0147). This was confirmed by Ultra, see question 11(b) of Ultra's response to the CMA's letter dated 20 February 2015 (URN UC0080.1).

⁸⁷¹ Ultra does not have a complete record of the recipients of the letter. The CMA infers that at least those resellers listed as 'complying' in the spreadsheet described at paragraph C.10 above were sent the letter rescinding the 2009 Online Discounting Policy on 4 August 2009.

Therefore, we have taken the decision to rescind this policy with immediate effect. Our customers will continue to be able to determine what level of discounting online is viable to their business'.⁸⁷²

C. Conclusion on the 2009 Online Discounting Policy

- C.20. The evidence above demonstrates that Ultra was concerned about online discounting of its products in 2009 and implemented its 2009 Online Discounting Policy to try to prevent resellers from offering online discounts greater than 20% off RRP. Ultra used threats of withdrawing resellers' rights to use images of Ultra products or reducing wholesale terms as a means of enforcing the policy.⁸⁷³ Ultra withdrew the 2009 Online Discounting Policy in August 2009 because a number of resellers continued to offer discounts greater than 20% off RRP.⁸⁷⁴

⁸⁷² Template letter from [Sales and Marketing Director] (Ultra) to Customers, dated 4 August 2009, page 9 (URN UD0147).

⁸⁷³ See paragraphs C.15 to C.18 above.

⁸⁷⁴ See paragraph C.19 above.

ANNEX D: THE OUTLINE PROPOSAL AND THE FINAL PROPOSAL

	Outline Board Proposal	Final Board Proposal
Objective	<p>To implement an online pricing policy to ensure the long term success of the Hudson Reed and Ultra brands.</p> <p>The maximum discount off RRP's to be 25% to ensure showrooms can be [sic] compete and are encouraged to promote the brand.</p>	<p>To implement an online policy to ensure the long term success of the Hudson Reed and Ultra brands.</p> <p>Various recommendations to be made to online accounts to ensure showrooms can compete and are encouraged to promote the brand.</p>
Timetable (December 2011 to Spring/ Summer 2012)	<p><u>Date of implementation</u></p> <p>February 2012 (to coincide with the new brochures/prices)</p>	<p><u>Date of implementation</u></p> <p>February 2012 (to coincide with the new brochures)</p>
	<p><u>How will the objective be met?</u></p> <p>October 11</p> <ol style="list-style-type: none"> 1. All online sellers to be identified via search engines and from our system (current estimates are there are approx. [✂] direct accounts selling online). 2. The customer and website domains to be identified providing a starting point for all customers to be contacted. 3. Start online research to fully understand situation. 4. Research trade press for similar case studies. 5. [Managing Director] to brief Department heads on reason for the policy and an overview on how it will work. 6. October profit share meeting – all Directors/Department heads to brief their teams on why we are introducing the policy and an overview of how it will work. 7. Larger accounts ie [Reseller] or [Reseller] will need an introduction to the project from [Sales and Marketing Director] before Marketing telephone. 	<p><u>How will the objective be met?</u></p> <p>October 11</p> <ol style="list-style-type: none"> 1. All online sellers to be identified via search engines and from our system (current estimates are there are approx. [✂] direct accounts selling online). 2. The customer and website domains to be identified providing a starting point for all customers to be contacted. 3. Start online research to fully understand situation. 4. Research trade press for similar case studies. 5. [Managing Director] to brief Department heads on reason for the policy and an overview on how it will work. 6. October profit share meeting – all Directors/Department heads to brief their teams on why we are introducing the policy and an overview of how it will work.

		<p>7. Larger accounts ie [Reseller] or [Reseller] will need an introduction to the project from [Sales and Marketing Director] before Marketing telephone.</p> <p>8. Plan required for sales team so their actions promote the success of the policy – [✂]</p>
	<p>November 11</p> <p>Marketing ring all online customers selling the benefits of the new policy (providing 3 months' notice).</p> <ul style="list-style-type: none"> Outline script to be drafted but other points to note: <ul style="list-style-type: none"> Premier product available as an alternative with no branding restrictions. [✂] They will be advised they will be sent all the information they require to comply first week in December, giving 2 months for them to update site. <p>Contact will be made with Distributers to advise of new company policy and consider how we manage their customers selling brands online. Support from Sales Director required.</p>	<p>November 11</p> <p>Marketing ring all online customers selling the benefits of the new policy (providing 3 months' notice). We would provide sales advice and suggest we recommend the right price for products is a maximum of 25% off our retail prices.</p> <ul style="list-style-type: none"> Outline script to be drafted but other points to note: <ul style="list-style-type: none"> Premier product available as an alternative with no branding restrictions. They will be advised they will be sent all the information they require to comply first week in December, giving 2 months for them to update site. <p>Contact will be made with Distributers to advise of new company policy and consider how we manage their customers selling brands online. Support from Sales Director required.</p>
	<p>December 11</p> <ol style="list-style-type: none"> Follow up calls advising “we are emailing them all the information they require to represent the brand appropriately online from 1st Feb” – providing 2 months for them to make all alternations [sic]. An e-mail with the full data pack of information (including .csv price files, images and line drawings) will be sent. Can we include “an example online marketing price” ie a column on price list which is our new retail price less 	<p>December 11</p> <ol style="list-style-type: none"> E-mail sent to customer with copy of contract and also price file showing recommending online discount *not legally binding. Paper version of contract sent out to all customers, recorded delivery. Upon receipt of the signed contract – data pack will be released to customer

	<p>25%? This will remove a lot of activity and confusion in February with miscalculations causing “minor offences”.</p> <p>3. We make a follow up call to confirm receipt. Focus will be on making it as easy as possible for customers to make updates.</p> <p>4. We then contact all customers again before Christmas to track progress.</p> <p><i>(It is essential we have price increase signed off by November Board meeting and in an appropriate .csv pricing file to email first week in December.)</i></p>	<p>4. Responses will be logged on the master spread sheet to identify customers who have not returned contract.</p> <p>5. We make a follow up call to confirm receipt. Focus will be on making it as easy as possible for customers to make updates.</p> <p>6. We then contact all customers again before Christmas to track progress.</p> <p><i>(It is essential we have price increase signed off by November Board meeting and in an appropriate .csv pricing file to email first week in December.)</i></p>
	<p>January 2012</p> <p>By now we will have a fairly good idea of who is supporting the policy.</p> <p>Policing and phone calls to customers will be stepped up further throughout the month as we remind them of approaching deadline. More focus will be given to communicating consequences where necessary.</p>	<p>January 2012</p> <p>By now we will have a fairly good idea of who is supporting the policy.</p> <p>Phone calls to customers will be stepped up further throughout the month as we remind them of approaching deadline.</p>
	<p>February 12</p> <p>[blank]</p>	<p>February 12</p> <p>We must not link any consequences to customers [sic] selling out prices. Any reference to prices must be a recommendation and not legally binding.</p> <p>Verbally we could suggest “you don’t adhere to our recommendations for selling online”. We need to outline all recommendations for selling products online and not just focus on discounts. We only want to work with accounts who market our products appropriately is the key.</p>
	<p>Major offence –Definition: no effort made by the company to comply</p> <p>All customers who aren’t inline will be put on stop (<i>clarify we can do this legally</i>). They will be advised verbally by Marketing. This action only applies to those accounts that have</p>	<p>Major offence – Definition: no effort made by the company to support our online policy</p> <p>Customers who aren’t inline will be given notification their account will be put on stop in 48 hours if they don’t adhere to our online policy (it is important they have notice to fulfil their</p>

	<p>made no effort to comply. The on stop option will only be used in February to force all inline as quickly as possible. Once the customer confirms the website is correct we will double check and release. (Find out what is automated when account goes "on stop" ie do they receive email/letter from Admin – this would not be relevant to these accounts.)</p>	<p>outstanding orders. They are more likely to get lawyers involved or seek legal advice if they are being sued for being unable to fulfil orders). They will be advised verbally by Marketing. This action only applies to those accounts that have made no effort to comply. The on stop option will only be used in February to force all inline as quickly as possible. Once the customer confirms the website is correct we will double check and release.</p>
	<p>Minor offence – Definition: evidence that most products are discounted correctly, customer's oversight on a few products/miscalculations.</p> <p>We will call these customers to advise them of the oversight. They will have 48 hours to bring discounting inline or they will be put on stop. No exceptions. Once the customer confirms the website is correct we will double check and release.</p> <p>List of all accounts put on stop to be provided to Admin. They will be provided with a script for dealing with these calls and given a direct line through to Marketing.</p> <p>By the end of February all accounts will be taken off stop, however will have their terms changed to less [✂]% permanently. They will be advised of this consequence throughout the month.</p>	<p>Minor offence – Definition: evidence that most of the site is marketed correctly, customer's genuine oversight.</p> <p>[We will call these customers to advise them of the oversight. They will have 48 hours to bring their website inline or we will reduce their terms. If they correct within 48 hours they will be provided with a credit.]</p> <p>List of all accounts put on stop to be provided to Admin. They will be provided with a script for dealing with these calls and given a direct line through to Marketing.</p> <p>By the end of February all accounts will be taken off stop, however will have their terms changed to less [✂]% permanently. They will be advised of this consequence throughout the month.]</p>

	<p><u>Spring/Summer 2012</u></p> <p>[✂]</p>	<p><u>Spring/Summer 2012</u></p> <p>[✂]</p>
	<p>[✂]</p> <p>Hudson Reed & Ultra – PR and advertising marketing campaign to promote all selling points of brands (ie new products, UK shower manufacturer, guarantees, service, etc etc). Objective to give brand a real push to the trade and increase awareness. Consideration to be given to how we promote online policy.</p>	<p>[✂]</p> <p>Hudson Reed & Ultra – PR and advertising marketing campaign to promote all selling points of brands (ie new products, UK shower manufacturer, guarantees, service, etc etc). Objective to give brand a real push to the trade and increase awareness. Consideration to be given to how we promote online policy.</p>
	<p><u>Sales team</u></p>	<p><u>Sales team</u></p> <p>1. We believe from November it is also important they stay away from their online accounts and focus on the</p>

	<ol style="list-style-type: none"> 1. We believe from November it is also important they stay away from their online accounts and focus on the Showrooms and creating awareness of the new policy. 2. After successful implementation Marketing will focus on communication with onliners. Sales team should focus on visiting every showroom updating them on company policy and pushing display requests (and ensuring they have brochures!). [✂] 3. [✂] This would encourage them to focus on Showrooms and provide less resistance to potentially one of their largest accounts losing sales to others as it becomes a level playing field. 	<p>Showrooms and creating awareness of the new policy. Detailed plan needs developing. [✂]</p> <ol style="list-style-type: none"> 2. After successful implementation Marketing will focus on communication with onliners. Sales team should focus on visiting every showroom updating them on company policy and pushing display requests (and ensuring they have brochures!). [✂] 3. [✂] This would encourage them to focus on Showrooms and provide less resistance to potentially one of their largest accounts losing sales to others as it becomes a level playing field.
Enforcement sanctions	March 2012	[blank]
	<p><u>Ongoing procedure</u></p> <p>Managing the situation going forward will be down to commercial decisions and the relationships built up with the customers.</p> <p>However, below are guidelines:</p>	<p><u>Ongoing procedure</u></p> <p>Managing the situation going forward will be down to commercial decisions and the relationships built up with the customers.</p> <p>However, below are guidelines:</p>
	<p><u>Minor offence</u></p> <p>If it appears a genuine oversight (several prices out by a marginal amount they will be given 2 days to sort it out). We will offer all the help we can to resolve (ie price lists, etc). They will be informed after 2 days, if the issue isn't resolved, we will reduce their terms. If every effort is made thereafter by the customer to correct the situation we will credit (commercial online credit analysis required).</p> <p>If a customer starts trying to push the boundaries with regular minor offences we will remove their terms on the 3rd occasion. They will start on implications of "second offence" outlined below.</p>	<p><u>Minor offence</u></p> <p>If it appears a genuine oversight. We will offer all the help we can to resolve. They will be informed after 2 days, if the issue isn't resolved, we will reduce their terms. If every effort is made thereafter by the customer to correct the situation we will credit (commercial online credit analysis required).</p> <p>If a customer starts trying to push the boundaries with regular minor irregularities we will remove their terms on the 3rd occasion. They will start on implications of "second offence" outlined below.</p>

	<p><i>There really aren't any excuses as customers will have had all the correct prices for at least 3 months and we will supply info required at every opportunity.</i></p> <p><u>Major offence</u></p> <p><i>First offence</i> - Customers who intentionally change all their prices, or all those in a product group, to gain a competitive advantage will have their terms reduced to [✂]%, if they correct within 48 hours they will be credited. (It will be made clear the credit option will only be offered the first time they offend.)</p> <p><i>Second offence</i> - their terms will be reverted after the site has been sorted but no credits will be given.</p> <p><i>Third offence</i> - their terms will be removed permanently to [✂]%. A central control spreadsheet will be maintained within Marketing for information and traceability.</p>	<p><i>There really aren't any excuses as customers will have had all the information for at least 3 months and we will supply info required at every opportunity.</i></p> <p><u>Major offence</u></p> <p><i>First offence</i> - Customers who pay no attention to our recommendations will have their terms reduced to [✂]%, if they correct within 48 hours they will be credited. (It will be made clear the credit option will only be offered the first time they offend.)</p> <p><i>Second offence</i> - their terms will be reverted after the site has been sorted but no credits will be given.</p> <p><i>Third offence</i> - their terms will be removed permanently to [✂]%. A central control spreadsheet will be maintained within Marketing for information and traceability.</p>
Miscellaneous	<p><u>Other points</u></p> <ol style="list-style-type: none"> 1. [✂] 2. All personnel in contact with customers must be briefed and understand the policy. Marketing can provide training but this needs reinforcing by the departments relevant line managers/ department head/Director on a day to day basis and in internal meetings. 3. Any contact the sales team, Telesales or Admin have must offer a consistent response “it is a company policy to secure the future of the brand. If you require any further information please contact tel ??? ?????” (direct line number in to Marketing required). 4. We firmly believe the success is dependent on whether Ultra Finishing staff pull together presenting a united 	<p><u>Other points</u></p> <ol style="list-style-type: none"> 1. [✂] All personnel in contact with customers must be briefed and understand the policy. Marketing can provide training but this needs reinforcing by the departments relevant line managers/ department head/Director on a day to day basis and in internal meetings. 2. Any contact the sales team, Telesales or Admin have must offer a consistent response “it is a company policy to secure the future of the brand. If you require any further information please contact tel ??? ?????” (direct line number in to Marketing required). 3. We firmly believe the success is dependent on whether Ultra Finishing staff pull together presenting

	<p>“company” front on the policy and provide a uniform response.</p> <p>5. Some concerns by the team that they will be involved in illegal practises relating to price fixing need to be addressed. We propose to complete majority of communication verbally, however clarification of what we can and can't say and what, if anything, we can put in writing is essential – legal advice required</p> <p>6. We need to be able to deal with potential calls from Trading Standards and have confidence what we are saying is correct – legal advice required.</p> <p>7. We propose to handle online E-bay shops in the same way as the details in the proposal outlined.</p> <p>8. Review company T & Cs, if appropriate, to cover Ultra Finishing and be clear on how we trade with new accounts.</p> <p>9. New online accounts must be identified to Marketing. They will be briefed on our brand online policy and be provided with all info once we are satisfied they will adhere to our online policy.</p>	<p>a united “company” front on the policy and provide a uniform response.</p> <p>4. We need to be able to deal with potential calls from Trading Standards and have confidence what we are saying is correct.</p> <p>5. We propose to handle online E-bay shops in the same way as the details in the proposal outlined.</p> <p>6. Include “we can revoke a credit limit at any time” on T&C – amend and reissue.</p> <p>7. New online accounts must be identified to Marketing. They will be briefed on our brand online policy and be provided with all info once we are satisfied they will adhere to our online policy.</p> <p>8. Risk of short term loss of sales - it is unclear how many consumers purchase HR online because of the brand or because it is a nice product at a heavily discounted price. HR doesn't have strong brand recognition with end users. There will need to be a focused effort by the Sales team selling to the Showrooms to create consumer demand from displays. This will be supported by a marketing campaign.</p>
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A. Introduction

- ⁸⁸² Draft commitments letter received from Ultra on 15 December 2014 (URN UC0055.2).

31A of the Act.⁸⁸³ After due consideration of the offer, the CMA considered that it would not be appropriate to accept formal commitments in this investigation.⁸⁸⁴ In reaching this decision, the CMA took into account that, in this case, not to complete its investigation would undermine deterrence.

- E.8. On 21 July 2015, Ultra expressed a genuine interest and willingness to enter into settlement discussions with the CMA in relation to the case.
- E.9. On 28 January 2016, the CMA issued a Statement of Objections to Ultra and UFGL, in which it proposed to make a decision that Ultra had infringed the Chapter I prohibition of the Act and/or Article 101 TFEU. The purpose of the Statement of Objections was to give Ultra and UFGL an opportunity to make representations on the CMA's proposed decision.
- E.10. Under Rule 5(3) of the CMA Rules, where the CMA considers that an agreement infringes the Chapter I prohibition or the prohibition in Article 101(1) TFEU, the CMA may address its proposed infringement decision to fewer than all the persons who were a party to that agreement. In the circumstances of this case the CMA applied Rule 5(3) and addressed the Statement of Objections to the Ultra Group only and not to any of the counterparties to the agreements or concerted practices with Ultra.⁸⁸⁵
- E.11. The CMA informed the Resellers that it had issued the Statement of Objections to the Ultra Group. The CMA provided the Resellers with an opportunity to request a non-confidential version of the Statement of Objections and to make representations on the CMA's proposed decision. Two of the Resellers (namely [Reseller 1] and [Reseller 2]) made such a request and the CMA provided them with a non-confidential version of the Statement of Objections.
- E.12. Following receipt of the non-confidential version of the Statement of Objections, neither [Reseller 1] nor [Reseller 2] made representations on the CMA's proposed decision.
- E.13. Following receipt of the Statement of Objections, the Ultra Group re-confirmed its interest in settlement discussions.
- E.14. Following such discussions, on 20 April 2016, the Ultra Group offered to settle the case. The Ultra Group voluntarily, clearly and unequivocally admitted the

⁸⁸³ As inserted by the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004 (SI 2004/1261), Regulation 18.

⁸⁸⁴ Letter from CMA to Shulmans LLP dated 19 December 2014 (URN UC0060.1).

⁸⁸⁵ Likewise, the CMA has applied Rule 10(2) of the CMA Rules and addressed this Decision to the Ultra Group only. See paragraphs E.18 and E.19 below.

facts and allegations of infringement as set out in the Statement of Objections, subject to limited representations on manifest factual inaccuracies contained therein, which are now reflected in the Decision. As part of settlement, the Ultra Group agreed to cooperate in expediting the process for concluding the case. On 20 April 2016, the CMA confirmed that it would settle the case with the Ultra Group and that it intended to proceed to issue an infringement decision.⁸⁸⁶

B. Scope of the investigation

Manufacturers

E.15. The CMA has reasonable grounds to suspect that other manufacturers of bathrooms fittings may have adopted restrictions similar in nature to the Online Discounting Restriction.⁸⁸⁷ The CMA had to consider how to make the best use of its limited resources. The CMA decided to pursue the investigation into Ultra's arrangements having had regard to the evidence in its possession and the CMA's Prioritisation Principles.⁸⁸⁸

Resellers

E.16. The CMA has reasonable grounds to suspect that Ultra entered into agreements similar to the Agreements with a number of its resellers, including all resellers selling Hudson Reed and Ultra branded products online. However, for reasons of administrative efficiency, the CMA considered it reasonable and proportionate to seek to reduce the number of resellers included as counterparties to agreements with Ultra. In order to determine which undertakings should be included or excluded as counterparties to agreements with Ultra, the CMA had regard to the evidence in its possession and the CMA's Prioritisation Principles.⁸⁸⁹

E.17. As a result, the CMA decided to include [Reseller 1], [Reseller 2], and [Reseller 3] as counterparties to this Decision. The CMA has identified these three Resellers as examples from the generality of resellers of Ultra products in order to demonstrate the existence of an infringing agreement and/or concerted practice with Ultra.

Use of Rule 10(2)

E.18. Under Rule 10(2) of the CMA Rules, where the CMA considers that an agreement infringes the Chapter I prohibition or the prohibition in Article

⁸⁸⁶ This was publicly announced by the CMA on 26 April 2016.

⁸⁸⁷ See paragraph 4.22 and 4.23 above.

⁸⁸⁸ Available at: <https://www.gov.uk/government/publications/cma-prioritisation-principles>.

⁸⁸⁹ Available at: <https://www.gov.uk/government/publications/cma-prioritisation-principles>.

101(1) TFEU, the CMA may address its infringement decision to fewer than all the persons who were a party to that agreement.

- E.19. The evidence provided to the CMA demonstrates that Ultra introduced the Online Discounting Restriction as a standard policy which it communicated to all of its resellers selling Hudson Reed and Ultra branded products online, and which it monitored and enforced. The CMA therefore considers it reasonable and proportionate to apply Rule 10(2) in this case and address this Decision to the Ultra Group only.