

# Decision of the Competition and Markets Authority

Online resale price maintenance  
in the commercial refrigeration sector

Case CE/9856/14

24 May 2016

© Crown copyright 2016

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence.

To view this licence, visit [www.nationalarchives.gov.uk/doc/open-government-licence/](http://www.nationalarchives.gov.uk/doc/open-government-licence/) or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: [psi@nationalarchives.gsi.gov.uk](mailto:psi@nationalarchives.gsi.gov.uk).

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 Names have been replaced by a general descriptor of the individual's role.

## CONTENTS PAGE

<b>1</b>	<b>INTRODUCTION</b>	<b>5</b>
A	General	5
B	Summary of the relevant facts	5
C	Summary of the Infringements	6
D	Summary of the relevant market and economic context	7
<b>2</b>	<b>GLOSSARY</b>	<b>9</b>
<b>3</b>	<b>PARTIES</b>	<b>11</b>
A	ITW undertaking	11
B	Resellers	12
C	The CMA's approach to assessing liability and its assessment of liability	12
<b>4</b>	<b>INDUSTRY BACKGROUND</b>	<b>13</b>
A	Introduction	13
B	Distribution of Commercial Refrigeration Products	13
C	The importance of the internet	14
<b>5</b>	<b>RELEVANT FACTS</b>	<b>25</b>
A	Introduction	25
B	Summary of the relevant facts	27
C	Implementation of the MAP Policy	28
D	The rationale for the MAP Policy	38
E	Resellers' compliance with the MAP Policy	44
F	Monitoring and enforcement	77
<b>6</b>	<b>LEGAL ASSESSMENT</b>	<b>93</b>
A	Introduction	93
B	Undertakings	96
C	Agreements between undertakings and/or concerted practices	97
D	Object or effect of preventing, restricting or distorting competition	106
E	Appreciable restriction of competition	113
F	Effect on trade between EU Member States	115
G	Effect on trade within the UK	117
H	Exclusion or exemption	117
I	Conclusion on the application of the Chapter I prohibition and Article 101 TFEU	119
<b>7</b>	<b>THE CMA'S ACTION</b>	<b>120</b>
A	Decision	120
B	Directions	121
C	Financial penalties	122

<b>ANNEX A</b>	<b>LEGAL FRAMEWORK</b>	136
A	Introduction	136
B	The Chapter I prohibition/Article 101 TFEU	136
C	Application of section 60 of the Act	136
D	Undertakings and the attribution of liability	137
E	Agreements and/or concerted practices	138
F	Prevention, restriction or distortion of competition	145
G	Appreciable restriction of competition	155
H	Effect on trade between EU Member States	156
I	Effect on trade within the UK	160
J	Exclusion or exemption	161
K	Burden and standard of proof	163
<b>ANNEX B</b>	<b>RELEVANT MARKET</b>	165
A	Introduction	165
B	The relevant product market	166
C	The relevant geographic market	171
D	Conclusion on the relevant market	173
E	UK sales of commercial refrigeration products by suppliers	173
F	Foster's share of supply	174
G	Largest suppliers of commercial refrigeration products in the UK	175
<b>ANNEX C</b>	<b>SUMMARY OF THE OFT/CMA'S FORMAL INVESTIGATION</b>	177
A	Summary of the investigation	177
B	Scope of the investigation	178

## **1. INTRODUCTION**

### **A. General**

1.1 By this Decision, the Competition and Markets Authority (CMA) concludes that ITW Limited (ITW) 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 In this case, the CMA has applied Rule 10(2) of the CMA's procedural rules (the CMA Rules)<sup>1</sup> and has addressed this Decision only to ITW.

### **B. Summary of the relevant facts<sup>2</sup>**

1.3 On 6 January 2012, Foster Refrigerator UK (Foster) issued a 'discounting policy' to its entire network of resellers (the MAP Policy). The MAP Policy prohibited resellers from advertising any Foster products below a minimum advertised price (MAP) both online and offline. The MAP was to be calculated by reference to Foster's regional nett price, plus a [✂] mark-up.

1.4 The MAP Policy was introduced to improve the margins available to resellers from selling Foster products, and to reduce competitive pressure on Foster's traditional dealers from lower prices available online.

1.5 Following the introduction of the MAP Policy, Foster regularly monitored resellers' websites to check that resellers were not advertising Foster's products for sale below the MAP. Foster also requested its resellers to report instances where Foster products were advertised for sale below the MAP.

1.6 Further, where Foster identified instances where resellers' online prices for Foster products were below the MAP, Foster took enforcement action to compel resellers to change their online prices so that they were no lower than the MAP. In particular, from time to time, Foster:

1.6.1 requested resellers to change their online prices so that they were no lower than the MAP;

1.6.2 threatened to reduce resellers' wholesale terms of supply if prices were not amended so that they were no lower than the MAP;

---

<sup>1</sup> The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (SI 2014/458).

<sup>2</sup> See Chapter 5, 'RELEVANT FACTS'.

- 1.6.3 temporarily or permanently ceased supply of Foster's products, or threatened to do so; and
  - 1.6.4 permanently closed a reseller's account.
- 1.7 In the light of the evidence set out in this Decision, the CMA finds that Foster's prohibition on advertising prices below the MAP genuinely restricted in practice the ability of resellers to determine their online sales prices at a price below the MAP and, as such, amounted to resale price maintenance (RPM) in respect of online sales of Foster products. This is specifically demonstrated in relation to three resellers, where the evidence demonstrates that they adhered to the MAP Policy.

### **C. Summary of the Infringements<sup>3</sup>**

- 1.8 In light of the CMA's findings of fact (see Chapter 5 below), the CMA has concluded that ITW infringed the Chapter I prohibition and Article 101 TFEU by participating between 6 January 2012 and 31 December 2014 (the Relevant Period) in an agreement and/or concerted practice with certain of its resellers, which had as its object the prevention, restriction or distortion of competition.
- 1.9 Specifically, the CMA finds the following:
- 1.9.1 From 6 January 2012 to 31 December 2014, Foster, as a division of ITW, and [Reseller 1] were party to an agreement and/or concerted practice that [Reseller 1] would not advertise Foster products online below the minimum advertised price (MAP) set out in Foster's MAP Policy, which had as its object the appreciable prevention, restriction, or distortion of competition (through resale price maintenance) in relation to the supply of commercial refrigeration products in the UK.
  - 1.9.2 From 6 January 2012 to 31 December 2014, Foster, as a division of ITW, and [Reseller 2] were party to an agreement and/or concerted practice that [Reseller 2] would not advertise Foster products online below the MAP, which had as its object the appreciable prevention, restriction, or distortion of competition (through resale price

---

<sup>3</sup> See Chapter 6.

maintenance) in relation to the supply of commercial refrigeration products in the UK.

- 1.9.3 From 6 January 2012 to 31 December 2014, Foster, as a division of ITW, and [Reseller 3] were party to an agreement and/or concerted practice that [Reseller 3] would not advertise Foster products online below the MAP, which had as its object the appreciable prevention, restriction, or distortion of competition (through resale price maintenance) in relation to the supply of commercial refrigeration products in the UK.

(together, the Infringements).

#### **D. Summary of the relevant market and economic context<sup>4</sup>**

- 1.10 The Infringements affect the supply of commercial refrigeration products within the UK.
- 1.11 The CMA finds that, for the purposes of this case:
- 1.11.1 the relevant product market for the Infringements is the supply of commercial refrigeration products to resellers; and
  - 1.11.2 the relevant geographic market for the supply of commercial refrigeration products is the UK.
- 1.12 The internet is an important driver of price competition between sales made through both online and offline channels, due to
- 1.12.1 the increased transparency of prices on the internet; and
  - 1.12.2 the ability of resellers using the online sales channel to sell at lower prices.
- 1.13 The ability to advertise and sell products at discounted prices on the internet can intensify price competition, both between online resellers and between online and offline resellers. Increased price competition increases resellers' incentives to act efficiently and pass on cost savings to customers in the form

---

<sup>4</sup> See Chapter 4 and Annex B.

of lower resale prices. In turn, this enables customers to obtain better value for money.

1.14 Therefore, preventing or restricting resellers from determining their own online resale prices, by preventing resellers from advertising prices online below a fixed level, would:

1.14.1 reduce price competition from sales of commercial refrigeration products made online; and

1.14.2 reduce downward pressure on the price of commercial refrigeration products and thereby increase the price end-users are likely to pay.



## 2. GLOSSARY

### *Glossary of terms*

Term	Definition
[✂]	[✂]
[✂]	[✂]
Act	The Competition Act 1998
Agreements	The agreements and/or concerted practices (in each case between Foster and each Reseller) that the Reseller would not advertise Foster products online below the Minimum Advertised Price, as set out in Chapter 6 of this Decision
Arrangements	The agreements and concerted practices as described in Chapter 6 of this Decision
Article 101	Article 101 TFEU
CAT	Competition Appeal Tribunal
CAT team	Customer Action Team
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
Customer Action Team	A team of administrators at Foster
Decision	This Decision, dated 24 May 2016
EA02	The Enterprise Act 2002
Enforcement Procedure	Foster's internal procedure for enforcing the MAP Policy
EU	The European Union
European Courts	Includes the CJ and the GC

<b>Term</b>	<b>Definition</b>
Foster	Foster Refrigerator, which is a division of ITW
Foster products	Foster commercial refrigeration products as sold under the 'Foster' and 'Xtra by Foster' brands
GC	The General Court of the European Union (formerly the Court of First Instance)
Infringements	The infringements of the Chapter I prohibition and Article 101 as set out at Chapter 6 of this Decision
ITW	ITW Limited
MAP	Minimum Advertised Price
MAP Policy	Foster's Minimum Advertised Price Policy
Market price	Prevailing price of Foster products in the market
OFT	The Office of Fair Trading
Penalties Guidance	Guidance as to the appropriate amount of a penalty (OFT423, September 2012), adopted by the CMA Board
RBM	Regional Business Manager
Relevant Documents	The documents on the CMA's file which are directly relied on and referred to in this Decision
Relevant Period	6 January 2012 to 31 December 2014
Resellers	The three Foster Resellers ([Reseller 1], [Reseller 2] and [Reseller 3]) found by the CMA in each case to have entered into the Agreement with Foster.
RPM	Resale price maintenance
SO	The Statement of Objections dated 28 January 2015
TFEU	Treaty on the Functioning of the European Union
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.

### **3. PARTIES**

#### **A. ITW undertaking**

- 3.1 Foster Refrigerator UK, which is a division of ITW Limited, is a UK-based manufacturer and supplier of commercial refrigeration products. In the UK, Foster has manufacturing, warehousing and distribution facilities in King's Lynn in Norfolk. In addition to having staff and facilities at its head office in Norfolk, Foster has a network of overseas agents and branches in a number of EU Member States, Switzerland, Hong Kong, the Middle East, Singapore, South Africa and the United States.<sup>5</sup>
- 3.2 Foster manufactures, imports and supplies various different commercial refrigeration products, including refrigerated storage cabinets and counters, under counters, blast chillers and freezers, walk-in cold rooms, ice makers and water coolers. It supplies them under the 'Foster' and 'Xtra by Foster' brands (Foster products).
- 3.3 As noted above, Foster is one of the principal operating divisions of ITW, a private limited company registered at Companies House under company number 00559693 on 6 January 1956. As at the date of this Decision, the company directors are [Director], [Director] and [Director].<sup>6</sup> During the period of the Infringements, the company directors were [Director], [Director], [Director], [Director], [Director] and [Director].<sup>7</sup> ITW had turnover of £552.2 million in 2012, £534.3 million in 2013 and £534.2 million in 2014.<sup>8</sup>
- 3.4 ITW is, indirectly, through a number of wholly-owned subsidiaries, 100% owned by Illinois Tool Works Inc.<sup>9</sup> Illinois Tool Works Inc is a manufacturer of a diversified range of industrial products and equipment. Illinois Tool Works Inc comprises a group of companies which has operations in 57 countries with

---

<sup>5</sup> Foster website, 'International Contacts' page, accessed 26 January 2016 (URN F0054).

<sup>6</sup> Companies House website, ITW Limited current officers, accessed 27 January 2016 (URN F0057).

<sup>7</sup> ITW audited accounts year ended 31 December 2011 (URN FD0569) and year ended 31 December 2012 (URN FD0570); ITW audited accounts year ended 31 December 2013 (URN FD0571) and ITW audited accounts year ended 31 December 2014 (URN F0052).

<sup>8</sup> Turnover figures taken from ITW audited accounts year ended 31 December 2012 (URN FD0570), ITW audited accounts year ended 31 December 2013 (URN FD0571) and ITW audited accounts year ended 31 December 2014 (URN F0052).

<sup>9</sup> [REDACTED] (URN FC0114.1).

approximately 49,000 employees and had a turnover of \$13.9 billion in 2012, \$14.1 billion in 2013 and \$14.5 billion in 2014.<sup>10</sup>

**B. Resellers**

- 3.5 Foster supplies to resellers of commercial refrigeration products.<sup>11</sup> The Infringements relate to arrangements between Foster and its resellers. Further information regarding the relevant resellers is set out in Chapters 5 and 6.

**C. The CMA's approach to assessing liability and its assessment of liability**

- 3.6 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.
- 3.7 As noted above, Foster is a division of ITW and the CMA has therefore identified ITW as the legal entity which is liable for the Infringements.
- 3.8 In the course of the investigation ITW has made submissions<sup>12</sup> to the CMA about the degree of autonomy that Foster enjoys as a division of ITW. It noted that Foster operates as a small business, on a devolved basis in accordance with the culture of the ITW group. Further, it states that Foster, as an ITW division, had complete autonomy as to how it operated its business. The CMA does not consider that these arguments alter its identification of ITW as the legal entity which directly entered into the Infringements.
- 3.9 As set out in paragraph 1.8 above, and in the light of the CMA's conclusions in Chapter 6, the CMA finds that ITW, through its division, Foster, was directly involved in the Infringements during the Relevant Period.
- 3.10 In light of the CMA's conclusions in Chapter 6, the CMA finds that ITW Limited is liable for the Infringements for the entire Relevant Period.

---

<sup>10</sup> Turnover figures taken from Illinois Tool Works Inc audited accounts year ended 31 December 2012 (URN FD0567) Illinois Tool Works Inc audited accounts year ended 31 December 2013 (URN FD0568) and Illinois Tool Works Inc audited accounts year ended 31 December 2014 (URN F0053).

<sup>11</sup> Also known in the industry as distributors or dealers.

<sup>12</sup> [§] (URN FC0114.1).

## **4. INDUSTRY BACKGROUND**

### **A. Introduction**

- 4.1 The Infringements affect the supply of commercial refrigeration products 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 commercial refrigeration products to resellers; and
  - 4.2.2 the relevant geographic market for the supply of commercial refrigeration products is the UK.<sup>13</sup>

### **B. Distribution of commercial refrigeration products**

- 4.3 Commercial refrigeration products may be supplied to end-users via catering equipment distributors (including catering equipment resellers,<sup>14</sup> scheme distributors<sup>15</sup> and hybrid distributors<sup>16</sup>). Sales are also made directly to end customers. Some larger customers negotiate directly with manufacturers on the price of the equipment. A distributor may then invoice the customer on the supplier's behalf, as well as managing the delivery and installation. Some suppliers, such as Foster,<sup>17</sup> sell via resellers and direct to end-users.<sup>18</sup>
- 4.4 Foster has explained that it operates an [REDACTED], by which it makes its product widely available to equipment resellers.<sup>19</sup> [REDACTED].<sup>20</sup> This includes both catering

---

<sup>13</sup> See Annex B, paragraphs B.17 and B.28.

<sup>14</sup> Catering equipment resellers are a group of resellers that usually stock a variety of different commercial catering equipment, one type of which will be commercial refrigeration products.

<sup>15</sup> Scheme distributors will typically sell catering equipment, including refrigeration, as part of a scheme to build new kitchens or refurbish existing ones. In many of these cases, the equipment supplier will be required not simply to provide the equipment, but also to plan and design the kitchen, possibly project manage the fit out and install the equipment.

<sup>16</sup> Hybrid distributors offer both styles of selling. This may include a website and staff offering equipment sales and installation with a parallel part of the business providing design and project management based services.

<sup>17</sup> [REDACTED] (Questions 24.2 and 24.3 of Foster's response to section 26 Notice dated 5 March 2015 (URN FC0046.2)). [REDACTED]

<sup>18</sup> [Supplier] stated that [Supplier], Foster and [Supplier] supply products through distributors and direct. (See question 3 [Supplier]'s response to section 26 notice (URN F290005.2)).

<sup>19</sup> Question 14, page 8 of Schedule 1 of Foster's response to section 26 Notice dated 5 March 2015 (URN FC0046.2).

<sup>20</sup> [REDACTED] (Part B1, paragraph 2, page 2 of the letter from Steptoe & Johnson (representing ITW) to the CMA dated 18 September 2014 in response to section 26 notice dated 28 August 2014 (URN FC0008.1)). [REDACTED] (see Question 26 of Foster's response to section 26 notice dated 5 March 2015 (URN FC0052.2)) [REDACTED]. See question 11.1 of Foster's response to the CMA's section 26 notice dated 22 May 2015: [REDACTED] (URN FD0644). [Sales employee] of

equipment resellers and scheme distributors. [REDACTED].<sup>21</sup> The vast majority of these smaller resellers are relatively small operators who do not have physical retail premises or outlets but instead sell Foster products online.<sup>22</sup>

- 4.5 To 'authorise' a reseller, Foster considers a reseller's application form and checks that the reseller is credit-worthy.<sup>23</sup> If accepted, the reseller receives a letter of appointment by Foster<sup>24</sup> and is authorised to use Foster logos and images. The reseller may also access support such as training programmes, marketing and design services and is given access to a suite of documents.<sup>25</sup>

### C. The importance of the internet

- 4.6 Sales of commercial refrigeration products by catering equipment resellers are made through a variety of sales channels, namely:

- 4.6.1 face-to-face via a network of local sales agents;
- 4.6.2 telephone sales; and
- 4.6.3 online sales.

#### *The growth of the online sales channel*

- 4.7 The internet is an important and growing sales channel. A number of suppliers told the CMA that one of the main changes in competitive conditions in recent years is the growth of online marketing and sales placing downward pressure on prices. For instance, [Supplier] stated that *'on-line purchasing has grown significantly with on-line only retailers selling predominately with a value-led*

---

Foster explained during an interview with the CMA that [REDACTED] See line 2, page 9 of transcript of interview with [Sales employee] of Foster dated 29 July 2015 [REDACTED] (URN FD0685).

<sup>21</sup> See Question 26 of Foster's response to section 26 notice dated 5 March 2015 (URN FC0052.2). As noted in footnote 17 [REDACTED].

<sup>22</sup> Part B1, paragraph 2, page 2 of the letter from Steptoe & Johnson (representing ITW) to the CMA dated 18 September 2014 in response to section 26 notice dated 28 August 2014 (URN FC0008.1).

<sup>23</sup> See lines 17–18, page 68 of transcript of interview with [Sales employee] dated 29 July 2015 (URN FD0685).

<sup>24</sup> See question 1 of Foster's response to the CMA's section 26 notice dated 22 May 2015 (URN FD0634). See also lines 7–25, page 90 and lines 1–11, page 91 of transcript of interview with [Sales employee] dated 28 July 2015 (URN FD0684).

<sup>25</sup> Resellers that were appointed as Foster resellers were granted access to the following suite of documents available on the FosterTradeDirect.co.uk website: a regional Green NETT Price List setting out the resellers' buying prices (the Green price list), the UK List Blue Price Book setting out the market full list prices, a Regional Product Selection Guide, a Map of Business Managers' Areas and a Regional Dealer Certificate. This is the position for resellers appointed as at November 2013. See for instance Foster's response to section 26 notice dated 28 August 2014: email from [Sales employee] (Foster) to [Reseller] dated 2 October 2013, (URN FD0534) or email from [Sales employee] (Foster) to [Reseller] dated 14 November 2013.

*message has reduced market prices significantly, particularly at the budget end of the market.*<sup>26</sup> [Supplier] stated that *'the biggest change to the market has been the increase in e-commerce and the move away from distributors that actually 'stock' equipment. The internet allows distributors to keep costs down.'*<sup>27</sup> Whilst many resellers offer a 'full-service' business model, offering advice on a customer's specific requirements and making sales face-to-face or over the telephone, many resellers also have the facility to make online sales.<sup>28</sup>

- 4.8 The internet has facilitated the emergence of a new group of resellers that sell only or principally over the internet. Such resellers are sometimes referred to as 'box-shifters' within the industry, and are characterised as price-focused online specialists, selling at low margins with minimal pre- or post-sale service. A reseller described these online-only resellers to the CMA as follows: *'A number of dealers now shift boxes instead of considering what is best for the customer's requirements because price has become a focal point.'*<sup>29</sup> A manufacturer has explained: *'the UK commercial refrigeration sector has seen extensive growth in online sales, with a large number of internet-only dealers entering the market and competing primarily on price.'*<sup>30</sup>
- 4.9 However, the internet has also substantially altered the 'traditional' retail landscape of sales through sales representatives and telephone orders. Although the evidence indicates that the total proportion of sales of commercial refrigeration products made online is low,<sup>31</sup> the percentage has been increasing over the years.<sup>32</sup>

---

<sup>26</sup> Question 7 of [Supplier]'s response to section 26 notice (URN F280005.1).

<sup>27</sup> Question 7 of [Supplier]'s response to section 26 notice (URN F320003). See also [Reseller]'s comment: *'online sales have increased over the last five years'* (Question 8 of [Reseller]'s response to Section 26 notice dated 4 September 2015 (URN F110223.1)).

<sup>28</sup> Foster noted that most of its resellers sell online (Part B1, paragraph 2, page 2 of the letter from Steptoe & Johnson (representing ITW) to the CMA dated 18 September 2014 in response to section 26 notice dated 28 August 2014 (URN FC0008.1)). The CMA has identified at least 26 Foster resellers with a transactional website allowing end-users to purchase a Foster product online (URN F0005 to F0046).

<sup>29</sup> Question 8, Part B of [Reseller]'s response to section 26 notice dated 4 September 2015 (URN F140014.1). Another reseller, [Reseller], told the CMA: *'online sales margins are different because there is no additional overhead, you are just shifting a box. If a customer wants to buy a cooker, they can do this online and it will arrive in a box. However, if a customer is buying a cooker as part of a scheme it might take three months from start to finish, requiring a lot of resource and you cannot sell it at the same price.'* (See paragraph 16, pages 5–6 of note of telephone call between the CMA and [Reseller] on 6 May 2015 (URN F160006)).

<sup>30</sup> See question 7, Part B of [Supplier]'s response to section 26 notice (F290005.2).

<sup>31</sup> [Director] (Foster) estimated the sale of Foster products online to be less than 3% of all Foster sales in 2010. Email from [Director] (Foster) to [Employee] ([Reseller]) dated 25 May 2010 (URN FD0572).

<sup>32</sup> In November 2013 Foster noted that there has been a *'continued growth of on-line selling and a many e-commerce based catering equipment platforms available'* (see document 'Taking sales beyond price' attached to

- 4.10 Many catering equipment dealers have added online sales to their traditional sales model, allowing them to build on their existing business and geographic reach. [Supplier] explained to the CMA that the *‘development and expansion of regional trade dealers extending their business model to include online web based marketing and sales activities promoted on a national basis’* has been a significant change to the competitive environment for the UK commercial refrigeration sector.<sup>33</sup>

*The impact of online sales on price competition*

- 4.11 The CMA has received evidence that resellers of commercial refrigeration products emphasise different aspects of their value proposition, such as pre-sales advice or installation services. A reseller of Foster stated that:

*[W]hilst offline catering equipment resellers (or resellers operating predominantly offline) are also focussed on pricing, such resellers typically also seek to provide additional (added value) features as part of their customer offering, such as site visits, product support/after care, flexible delivery and/or credit terms.*<sup>34</sup>

- 4.12 However, price is an important element of competition for commercial refrigeration products, particularly as commercial refrigeration products are often expensive, and represent a large, occasional outlay for most end-users.<sup>35</sup>
- 4.13 Some resellers have websites which allow customers to buy products on a ‘click-to-buy’ basis. Where customers buy the products online (ie ‘click-to-buy’ sales), the price advertised on the website is typically the final price that the customer would expect to pay.

- 4.13.1 The CMA’s internal research confirmed that for all the transactional websites the CMA checked, the final purchase price for the selected product was identical to the price displayed on the homepage. The CMA reviewed 35 websites of Foster resellers (including each of the

---

an email from [Sales employee] (Foster) to Foster’s employees dated 11 November 2013, (URN FD0128)). See also quotes above at paragraph 4.7.

<sup>33</sup> Question 7 of [Reseller]’s response to section 26 notice (URN F180009.3).

<sup>34</sup> Question 17 of [Reseller]’s response to section 26 notice dated 7 September 2015 (URN F20015.1).

<sup>35</sup> *Key Note Market Update 2013 – Catering Equipment* (15<sup>th</sup> Edition, January 2013), page 23 (URN F0048). A number of suppliers, including Foster, have introduced more affordable product ranges designed for more price-sensitive customers, suggesting that price is indeed an important element for the end-user when contemplating a purchase (see [Reseller]’s response to question 7, page 4 of [Reseller]’s response to Section 26 notice dated 26 May 2015 (URN F110205.1), which noted that *‘market leaders such as [Supplier] and Foster have introduced their own entry level product ranges.’*



Resellers) to investigate whether (i) the websites were ‘transactional’, ie they have the ability to process financial transactions; and (ii) the prices displayed on the homepage of the website for a particular product accurately represented the final purchase price for that product. The research showed that 26 websites out of the 35 reviewed, including the websites for each of the Resellers, were ‘transactional’. For all of these websites, including for the websites for each of the Resellers, the final purchase price for the selected product was identical to the price displayed on the homepage for that product.<sup>36</sup>

- 4.13.2 The CMA asked resellers of Foster products whether it is possible for a customer to make a purchase through their website at a price other than the price which was first displayed when the customer arrived on the product homepage.<sup>37</sup> The evidence demonstrates

---

<sup>36</sup> Successful dummy transactions on the websites of: [Reseller] (URN F0006), [Reseller] (URN F0008), [Reseller] (URN F0009), [Reseller] (URN F0010 and F0037), [Reseller] (F0011), [Reseller] (F0012), [Reseller] (F0013), [Reseller] (URN F0015 and F0039), [Reseller] (URN F0016), [Reseller] (URN F0017 and F0029), [Reseller] (URN F0018), [Reseller] (URN F0019), [Reseller] (URN F0020), [Reseller] (URN F0021 and F0042), [Reseller] (URN F0022), [Reseller] (URN F0024), [Reseller] (URN F0025 and F0032), [Reseller] (URN F0027), [Reseller] (URN F0031), [Reseller] (URN F0035), [Reseller] (URN F0036 and F0038), [Reseller] (URN F0040), [Reseller] (URN F0041), [Reseller] (F0043), [Reseller] (URN F0044) and [Reseller] (URN F0045); and unsuccessful dummy transactions on the websites of [Reseller] (URN F0007), [Reseller] (URN F0014), [Reseller] (F0023), [Reseller] (URN F0026), [Reseller] (URN F0028), [Reseller] (URN F0030), [Reseller] (URN F0033), [Reseller] (URN F0034) and [Reseller] (URN F0046).

<sup>37</sup> Section 26 responses: See [Reseller]’s response to section 26 notice dated 8 September 2015 (URN F330006.1), [Reseller]’s response to section 26 notice dated 3 September 2015 (URN F340005.1), [Reseller]’s response to section 26 notice dated 2 September 2015 (URN F350005.1), [Reseller]’s response to section 26 notice dated 7 September 2015 (URN F20015.1), [Reseller]’s response to section 26 notice dated 7 September 2015 (URN F30052.1), [Reseller]’s response to section 26 notice dated 7 September 2015 (URN F40024.1), [Reseller]’s response to section 26 notice dated 4 September 2015 (URN F50027.1), [Reseller]’s response to section 26 notice dated 4 September 2015 (URN F370009.1), [Reseller]’s response to section 26 notice dated 2 September 2015 (URN F360004.1), [Reseller]’s response to section 26 notice dated 2 September 2015 (URN F380004.1), [Reseller]’s response to section 26 notice dated 3 September 2015 (URN F390009), [Reseller]’s response to section 26 notice dated 14 October 2015 (URN F470006), [Reseller]’s response to section 26 notice dated 8 September 2015 (URN F480004.1), [Reseller]’s response to section 26 notice dated 7 September 2015 (URN F70032.1), [Reseller]’s response to section 26 notice dated 8 September 2015 (F400004.1), [Reseller]’s response to section 26 notice dated 9 September 2015 (F80014), [Reseller]’s response to section 26 notice dated 4 September 2015 (URN F900038.1), [Reseller]’s response to section 26 notice dated 2 September 2015 (URN F410007.2), [Reseller]’s response to section 26 notice dated 7 September 2015 (URN F100030.10), [Reseller]’s response to section 26 notice dated 4 September 2015 (URN F110223.1), [Reseller]’s response to section 26 notice dated 8 September 2015 (URN F120004.1), [Reseller]’s response to section 26 notice dated 2 September 2015 (URN F420006.1A), [Reseller]’s response to section 26 notice dated 2 September 2015 (URN F430005), [Reseller]’s response to section 26 notice dated 4 September 2015 (URN F140014.1) and [Reseller]’s response to section 26 notice dated 8 September 2015 (URN F160021.1).

that few of the 20 resellers that confirmed they had a transactional website offered such a facility [X].<sup>38</sup>

4.14 Given the ease with which end-users can, and do, compare the prices available for a particular product between online resellers, online price competition for individual branded products is likely to be particularly intense. In submissions to the CMA, resellers commented on the intensity of online price competition within the sector:

4.14.1 [Reseller]: *'Online sales have [...] allowed customers to quickly and conveniently search many potential suppliers for the best prices. I believe this has likely precipitated an increase in competition amongst resellers'<sup>39</sup> and 'Price comparison websites act as a catalyst to the lowering of prices as resellers undercut each other.'*<sup>40</sup>

4.14.2 [Reseller]: *'Online sales have had a huge impact on competition between resellers and [...] margins have been significantly reduced.'*<sup>41</sup>

4.14.3 [Reseller]: *'Price comparison websites enable customers to compare prices more easily and provide resellers with customer exposure.'*<sup>42</sup>

4.15 This is further facilitated by online price comparison tools such as Google shopping, that allow rapid price comparison across multiple sellers (see Figure 4.1 below).<sup>43</sup>

---

<sup>38</sup> [Reseller]'s response to section 26 notice dated 4 September 2015 (URN F90038.1). See also [Reseller]'s response to section 26 notice dated 4 September 2015 (URN F110223.1): *'Standard web prices are available to all those who visit the website. [X].'*

<sup>39</sup> Question 8 of [Reseller]'s response to section 26 notice dated 4 September 2015 (URN F50027.1).

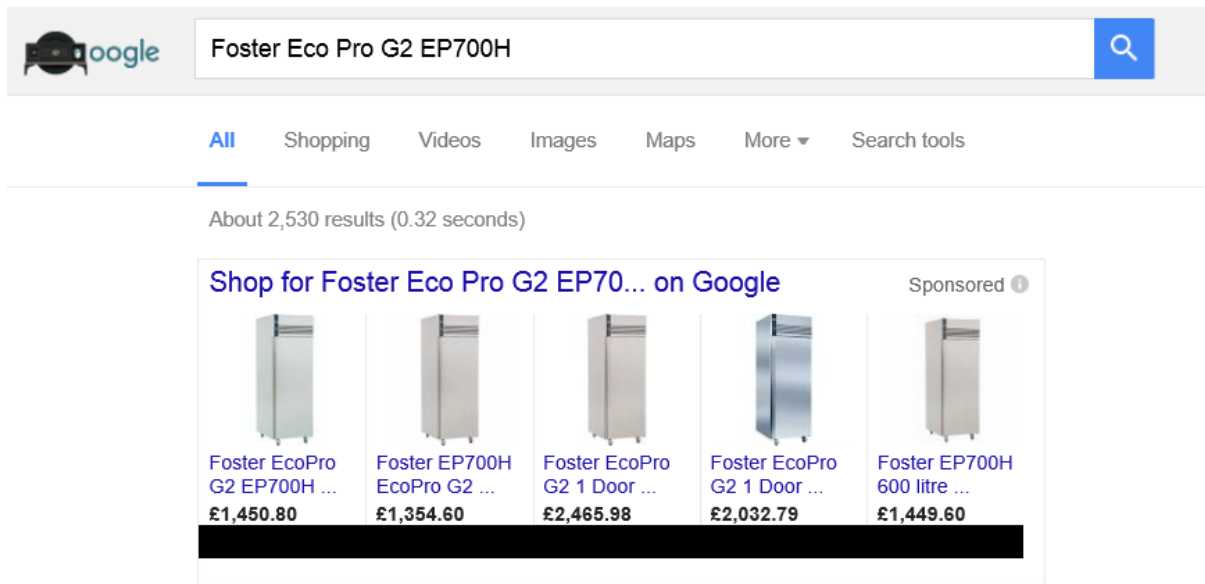
<sup>40</sup> Question 11 of [Reseller]'s response to section 26 notice dated 4 September 2015 (URN F50027.1).

<sup>41</sup> Question 8, Part B of [Reseller]'s response to section 26 notice dated 8 September 2015 (URN F480004.1).

<sup>42</sup> Question 12 of [Reseller]'s response to section 26 notice dated 4 September 2015 (URN F90038.1).

<sup>43</sup> See Question 17 of [Reseller]'s response to section 26 notice dated 7 September 2015 (URN F100030.10), which stated: *'google [sic] shopping is the most important way shoppers compare prices and delivery times etc for each product, customer will buy normally from the top 3 sellers who have the better feedback/reviews and the best price'*; Question 12, Part B of [Reseller]'s response to section 26 notice dated 2 September 2015 (URN F360004.1): *'With all products on Google Shopping and other price comparison sites they are sold strongly/solely on price – cheapest first, with little further company information, this has compounded the pricing issue with margins on sales being constantly eroded.'*

**Figure 4.1: Sample result from Google Shopping comparison<sup>44</sup>**



- 4.16 For online resellers, this heightened price transparency means that the price on a reseller's website is often a key factor in attracting online shoppers. This was confirmed by a number of resellers. For instance [Reseller] noted: *'online resellers of catering equipment products are typically particularly price-focussed in their value proposition to customers'*<sup>45</sup> and [Reseller] explained: *'Sellers who only have an on-line marketplace, generally will sell at low margins to win business.'*<sup>46</sup>
- 4.17 Complaints made to Foster demonstrate that online price competition was intense. For instance [Reseller] told Foster: *'we do have concerns over the **constant online price wars** that we are always finding ourselves against.'*<sup>47</sup> (Emphasis added.) See also [Reseller]'s statement to Foster: *'**we are often under price pressure from lower cost competitors and we need to find a way to compete.**'*<sup>48</sup> (Emphasis added.)

<sup>44</sup> Screenshot showing Google Shopping comparison, accessed by the CMA on 26 January 2016 (URN F0055).

<sup>45</sup> Question 17 of [Reseller]'s response to section 26 notice dated 7 September 2015 (URN F20015.1).

<sup>46</sup> Question 17, Part B of [Reseller]'s response to section 26 notice dated 8 September 2015 (URN F160021.1). For a further example see Question 17, Part B of [Reseller]'s response to section 26 notice dated 8 September 2015 (URN F330006.1): *'[Online resellers] win business by offering the lowest price.'*

<sup>47</sup> Email from [Employee] ([Reseller]) to [Sales employee] (Foster) dated 11 July 2013 (URN FD0186).

<sup>48</sup> Email from [Employee] ([Reseller]) to [Employee] (Foster) dated 28 November 2011 (URN F90014.8).

- 4.18 Even relatively small differences in price can affect the volume of sales a reseller will make.<sup>49</sup>

*Price competition between online and offline sales channels*

- 4.19 The internet is also an important driver of price competition between sales made through both online and offline channels (ie via face-to-face or telephone sales). There are two reasons for this:

- 4.19.1 the increased transparency of prices on the internet; and
- 4.19.2 the ability of online resellers to sell at lower prices.

*Increased transparency of online prices*

- 4.20 Many end-users will use the internet as a search and comparison tool, regardless of where they ultimately purchase the commercial refrigeration products. The ease of searching and the ease of making price comparisons on the internet educates buyers on price, product differences and potential sources of supply. Resellers told the CMA:

- 4.20.1 *The internet is a great tool for the customer to research a product and read reviews, read blogs and articles as well as check prices and availability. [...] [N]ormally when the item has been chosen they will then spend the time to see who is the most competitive with the stock available.*<sup>50</sup>
- 4.20.2 *Customers use the internet to check specifications, availability and prices across multiple different retailers. Products are commodities and the models are easily*

---

<sup>49</sup> See Question 12 of [Reseller]'s response to section 26 notice dated 4 September 2015 (URN F110223.1): 'We frequently see product prices reduced by small amounts, daily or weekly, by some resellers, to take them to a selling price marginally below their competitors who also feature on Google shopping'. For contemporaneous evidence, see for instance [Reseller]'s internal email explaining that Foster will not agree to prices advertised at one penny below the minimum advertised price as even one penny makes a difference: '[Foster] will not allow any selling prices which are less than this, eg if the MAP is £4,277.00 then 4276.99 is not acceptable. **They insist on this as previously [Reseller] have used this to slowly erode down [sic] the MAP by pennies then pounds, which defeats the purpose.**' [Emphasis added] (Email from [Employee] ([Reseller]) to [Employee] and [Employee] ([Reseller]) dated 1 July 2013 (URN F110096). See also the email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 17 June 2013, in which [Sales employee] stated: '**I also appreciate that price parity is vitally important in the online market**' (URN F50012.13). In order to prevent resellers from advertising just below the minimum advertised price, Foster amended the MAP Policy in October 2013 to require resellers to comply with a fixed minimum advertised price (rather than the nett price plus [£]) (see paragraph 5.18.1).

<sup>50</sup> Question 11 of [Reseller]'s response to section 26 notice dated 7 September 2015 (URN F100030.10).

*searched for via model name or number which enables the easy and quick comparison of retailers' offerings.*<sup>51</sup>

4.20.3 *Customers typically use the internet to research and compare prices of commercial refrigerator products.*<sup>52</sup>

4.20.4 *Customers can look at the price of a particular product advertised by 20 different companies in five minutes.*<sup>53</sup>

4.21 The increased transparency of available prices on the internet creates a 'reference price' for both online and offline sales and empowers end-users to demand a better deal from the offline channels by, for example, requesting an offline reseller to 'price-match' an offer made online.<sup>54</sup>

4.22 In its communication to offline resellers, Foster stated that the MAP Policy was designed to protect both offline and online resellers from competition resulting from the increased transparency of prices:

*This policy is designed to set an advertised selling price for those distributors who sell online. I know this does not apply to your company but we want to let our key distributors know what we are doing to try to protect margin and stop internet price wars. **This affects all our distributors as their customers check price online.** [...] I know you do not actively sell online **but the policy is there to protect margin for our loyal distributors.***<sup>55</sup> [Emphasis added.]

#### *Lower prices available online*

4.23 Online resellers tend to operate with lower overheads than rivals selling through bricks-and-mortar showrooms (eg the cost of establishing and maintaining physical premises and staff costs).<sup>56</sup> Therefore, online resellers

---

<sup>51</sup> Question 11 of [Reseller]'s response to section 26 notice dated 4 September 2015 (URN F110223.1).

<sup>52</sup> Question 11 of [Reseller]'s response to section 26 notice dated 4 September 2015 (URN F90038.1).

<sup>53</sup> Paragraph 40, page 12 of note of telephone call between the CMA and [Reseller] on 27 April 2015 (URN F130010).

<sup>54</sup> The CMA asked 25 resellers in section 26 notices whether they 'ever get asked to reduce [their] price or match prices to win the business of customers who have seen Foster products advertised online for less?' Eighteen resellers (out of 25 resellers) responded positively (references to resellers' section 26 responses at set out above at footnote 37).

<sup>55</sup> See email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 8 October 2013 (URN FD0083).

<sup>56</sup> The CMA understands that both scheme distributors and equipment dealers operate relatively high-cost business models. In the case of scheme distributors this will involve assisting the customer develop a project over a protracted period, including site visits and discussions. In the case of catering equipment dealers, many of these emphasised the investment they made in discussing requirements with customers and conducting site surveys. For example, [Reseller] explained to the CMA that 'online sales margins are different because there is no

are often able to offer lower prices than prices available through ‘offline channels’.

4.24 [Reseller] and [Reseller] described the challenges of competing against resellers with lower overheads as follows:

4.24.1 [Reseller]: *‘Online resellers that predominantly sell online do not bear additional costs incurred by traditional catering equipment dealers such as the overheads associated with bricks and mortar shops and sales rooms and the costs of publishing catalogues.’*<sup>57</sup>

4.24.2 [Reseller]: *‘Sellers who only have an on-line marketplace, generally will sell at low margins to win business, and can do this as they have little or no overhead.’*<sup>58</sup>

4.25 This is true even for any traditional full-service catering equipment resellers offering online sales alongside other distribution methods, as they may also enjoy a lower cost base than rivals based on the location of their business. For example, while physical premises may be located in a lower cost area, the reseller is able to reach customers outside their geographic catchment area by selling online.<sup>59</sup> This means that even where the customer has used an offline channel to identify the product it wishes to purchase, there is significant scope to purchase it at a more competitive price online.<sup>60</sup> A press article published in *Catering Insight*, a business intelligence website for the catering equipment industry, describes the changes in the consumer way of purchasing catering equipment as follows: *‘of course the same issue that faces high street retailers is now a reality for CEDA [Catering Equipment Distributors’ Association]*

---

*additional overhead, you are just shifting a box. If a customer wants to buy a cooker, they can do this online and it will arrive in a box. However, if a customer is buying a cooker as part of a scheme it might take three months from start to finish, requiring a lot of resource and you cannot sell it at the same price.’* (See paragraph 16, page 5 of note of telephone call between the CMA and [Reseller] on 6 May 2015 (URN F160006)). See also Question 17, Part B of [Reseller]’s response to section 26 notice dated 8 September 2015 (URN F160021.1): *‘Sellers who only have an on-line marketplace, generally will sell at low margins to win business, and can do this as they have little or no overhead.’*

<sup>57</sup> Question 18 of [Reseller]’s response to section 26 notice dated 4 September 2015 (URN F900038.1).

<sup>58</sup> Question 18, Part B of [Reseller]’s response to section 26 notice dated 8 September 2015 (URN F160021.1).

<sup>59</sup> For instance, [Reseller] told the CMA *‘the main advantage of selling online is that you have a wider customer, our customer base is worldwide’* (Question 18 of [Reseller]’s response to section 26 notice dated 4 September 2015) (F370009.1); See also the quote from [Reseller] above at paragraph 4.10.

<sup>60</sup> See also comment from [Sales employee] (Foster) to [Director] (Foster) dated 16 June 2011: *‘I know we have a strong story against online trading but this (like everything in life) could be the way consumers are purchasing our type of equipment by using an online price to reduce their cost with their local suppliers. I know I would!!! Not an easy one to control though.’* (Emphasis added.) (URN FD0573).

*members and others; customers plunder your expertise, ask you to quote and then buy it cheaper online.*<sup>61</sup>

- 4.26 As set out above,<sup>62</sup> evidence obtained during the CMA's investigation demonstrates that prices for commercial refrigeration products sold via offline channels are constrained by lower prices available online.<sup>63</sup>
- 4.27 In particular, the evidence demonstrates that the MAP Policy was introduced in response to low prices by online resellers putting pressure on the prices and margins of Foster's traditional resellers. The introductory paragraphs of the MAP Policy state: *'We also see the added pressure applied to you by low-cost internet retailers.'*<sup>64</sup>
- 4.28 Furthermore, the CMA has reasonable grounds to suspect that other suppliers of commercial refrigeration products have, over recent years, attempted to prevent or reduce price competition from resellers that sell online through arrangements similar in nature to the Infringements. This is based on evidence obtained by the CMA during the course of its investigation and comments in the trade press. Examples from resellers are:
- 4.28.1 An email from [Reseller] to [Sales employee] of Foster on 11 July 2013, which refers to other manufacturers implementing a MAP Policy: *'Other manufactures [sic] such as [Supplier], [Supplier] etc. have enforced rules for online pricing for dealers across the UK.'*<sup>65</sup>
- 4.28.2 An internal [Reseller] email from 20 September 2013, which refers to the MAP policies of [Supplier] and [Supplier].<sup>66</sup>

---

<sup>61</sup> [X] (F0051). See also *Catering Insight* article, 'Pricing it right', dated February 2014 quoting a reseller: *'[Employee] said the industry needed to accept that it is now living in the internet era and that it's normal for people to shop around for the best prices.'* (see email from [Employee] (Foster) to [Employee] dated 3 February 2014 attaching the *Catering Insight* article (URN FD0045).

<sup>62</sup> See for instance paragraphs 4.21 and 4.22.

<sup>63</sup> See also email titled 'FW' from [Sales employee] (Foster) to [Director] (Foster) dated 16 June 2011, which stated: *'Internet prices are something which could be having an effect on our dealer numbers as these guys could be making our product an unsustainable sell due to single figure margins.'* (URN FD0573). Similarly, an email titled 'Dealer feedback' from [Sales employee] (Foster) to [Director] (Foster) dated 29 June 2011 noted that *'There are a lot of Online dealers making very little margin on our product and has forced some dealers to spec other products to try and increase their margins see attached spread sheet for info'* (URN FD0575).

<sup>64</sup> Email from [Sales employee] (Foster) to [Sales employee], [Sales employee], [Sales employee], [Employee], [Director], [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Employee], and [Sales employee] (Foster) dated 16 January 2012 (URN FD0001).

<sup>65</sup> Email from [Employee] ([Reseller]) to [Sales employee] (Foster), dated 11 July 2013 (URN FD0186).

<sup>66</sup> Email from [Employee] ([Reseller]) to [Employee] ([Reseller]) and [Employee] ([Reseller]), dated 20 September 2013 (URN F110105).

- 4.28.3 An email from [Reseller] to Foster dated 29 October 2013, which noted: *'The MAP's [sic] policy is pretty typical now within this industry, and to those suppliers who have sympathetically managed the process, they, and their dealers reap the rewards.'*<sup>67</sup>
- 4.28.4 An email from [Reseller] to Foster dated 13 May 2013, which noted: *'We have now been asked by a number of suppliers to advertise at certain minimum levels with the threat of cutting our discount or even closing our accounts down completely unless we comply.'*<sup>68</sup>
- 4.29 An example from the trade press comes from a [X] article [X]. The article reported that [Supplier] believed that *'Manufacturers such as [Supplier], Foster, [Supplier] and [Supplier] are all understood to have taken steps to put clear internet or minimum advertised pricing guidelines in place over the last 18 months.'*<sup>69</sup>

#### *Conclusion on sales channels and the importance of the internet*

- 4.30 In summary, the ability to advertise and sell products at discounted prices on the internet can intensify price competition, both between online resellers and between online and offline resellers. Increased price competition increases resellers' incentives to act efficiently and pass on cost savings to customers in the form of lower resale prices. In turn, this enables customers to obtain better value for money.
- 4.31 Therefore, preventing or restricting resellers from determining their own online resale prices, by preventing resellers from advertising prices online below a fixed level, would:
- 4.31.1 reduce price competition from sales of commercial refrigeration products made online; and
  - 4.31.2 reduce downward pressure on the price of commercial refrigeration products and thereby increasing the price end-users are likely to pay.

---

<sup>67</sup> Email from [Employee] ([Reseller]) to [Sales employee] (Foster) dated 29 October 2013 (URN FD0221).

<sup>68</sup> Email from [Employee] ([Reseller]) to [Sales employee] (Foster) dated 13 May 2013 (URN FD0173).

<sup>69</sup> Andrew Seymour, 'Classeq gets firm on advertised web prices', *Catering Insight*, 10 January 2013 (F0049).



## **5. RELEVANT FACTS**

### **A. Introduction**

5.1 This Chapter presents the evidence relied upon by the CMA in reaching its finding that Foster has infringed the Chapter I prohibition and/or Article 101 TFEU. The Chapter is structured as follows:

5.1.1 Summary of the relevant facts (**Section B**)

5.1.2 Implementation of the MAP Policy (**Section C**)

5.1.3 The rationale for the MAP policy (**Section D**)

5.1.4 Resellers' compliance with the MAP Policy (**Section E**)

5.1.5 Enforcement action by Foster (**Section F**)

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

5.2.1 the MAP Policy, as updated from time to time;

5.2.2 the Enforcement Procedure for the MAP Policy;

5.2.3 spreadsheets logging calls with resellers to discuss the MAP Policy; and

5.2.4 internal email correspondence between members of Foster's sales team in relation to the introduction, operation or enforcement of the MAP Policy.

5.3 The CMA has also relied on contemporaneous documentary evidence of communications between Foster and its resellers in relation to the introduction, operation and enforcement of the MAP Policy, to demonstrate the understanding and conduct of resellers in response to the MAP Policy.

5.4 Where relevant, the CMA has also relied on:

5.4.1 information obtained from Foster or its resellers from responses to formal requests for information sent under section 26 of the Act; and

5.4.2 transcripts of interviews with employees of Foster and [Reseller], who were involved in the Infringements during the Relevant Period.

5.5 Table 1 below sets out the names and positions of key Foster employees referred to in the remainder of this Chapter, to facilitate an understanding of the evidence.

**TABLE 5.1: Key Foster employees<sup>70</sup>**

<b>Senior Managers</b>	<b>Position</b>
[Director]	Managing Director
[Director]	Finance Director
[Director]	UK Sales Director
[Sales employee]	Business Manager – Regional
<b>Sales Managers</b>	<b>Position</b>
[Sales employee]	Sales Manager South
[Sales employee]	Sales Manager North
[Sales employee]	Project Sales
[Sales employee]	Regional Business Manager
[Sales employee]	Regional Business Manager
[Sales employee]	Regional Business Manager
[Sales employee]	Regional Business Manager
[Sales employee]	Regional Business Manager
[Sales employee]	Regional Business Manager
[Sales employee]	Regional Business Manager
<b>Other</b>	<b>Position</b>
[Sales employee]	Regional Manager South, then Export Sales Manager
[Sales employee]	[✂] Sales, then Sales Manager QSR
[Employee]	Marketing Assistant, then Regional Business Development Manager
[Employee]	Product and Digital Manager
[Employee]	Regional Sales Office Supervisor

<sup>70</sup> See questions 39 (URN FD0672) and 41 (URN FD0674) of Foster's response to section 26 notice dated 22 May 2015.

Former employees	Position
[Employee]	Regional Business Manager until 2014
[Employee]	Customer Action Team Member until 2014
[Employee]	Marketing Manager until 2014

## **B. Summary of the relevant facts**

- 5.6 On 6 January 2012, Foster issued a ‘discounting policy’ to its entire network of resellers (the MAP Policy). The MAP Policy prohibited resellers from advertising any Foster products below a MAP both online and offline. The MAP was to be calculated by reference to Foster’s regional nett price, plus a [✂] mark-up.
- 5.7 The MAP Policy was introduced to improve the margins available to resellers from selling Foster products, and to reduce competitive pressure on Foster’s traditional dealers from lower prices available online.
- 5.8 Following the introduction of the MAP Policy, Foster regularly monitored resellers’ websites to check that resellers were not advertising Foster’s products for sale below the MAP. Foster also requested its resellers to report instances where Foster products were advertised for sale below the MAP.
- 5.9 Further, where Foster identified instances where resellers’ online prices for Foster products were below the MAP, Foster took enforcement action to compel resellers to change their online prices so that they were no lower than the MAP. In particular, from time to time, Foster:
- 5.9.1 requested resellers to change their online prices so that they were no lower than the MAP;
  - 5.9.2 threatened to reduce resellers’ wholesale terms of supply if prices were not amended so that they were no lower than the MAP;
  - 5.9.3 temporarily or permanently ceased supply of Foster’s products, or threatened to do so; and
  - 5.9.4 permanently closed a reseller’s account.
- 5.10 In the light of the totality of the evidence set out in this Chapter, the CMA finds that Foster’s prohibition on advertising prices below the MAP in practice

restricted the ability of resellers to set online prices below a fixed level and, as such, amounted to RPM. This is specifically demonstrated in relation to three resellers, where the evidence demonstrates that they adhered to the MAP Policy.

### **C. Implementation of the MAP Policy**

5.11 This Section sets out the content of the MAP Policy first issued to Foster's network of resellers in January 2012, and highlights changes to the MAP Policy when it was reissued in 2013 and 2014. The section concludes with the evidence relating to the withdrawal of the MAP Policy in December 2014.

5.12 The MAP Policy prohibited resellers from advertising Foster products below a specified minimum price. Each of the three versions of the MAP Policy:

5.12.1 applied to all Foster products;

5.12.2 applied to both online and offline sales channels;

5.12.3 indicated that Foster would monitor internet and other sources on a regular basis to ensure the MAP Policy was adhered to by all resellers;

5.12.4 did not allow dealers to advertise 'strap lines' such as 'Ring now for better prices' or any other phrase which indicated that the advertised prices were not the best prices they had to offer; and

5.12.5 contained disciplinary mechanisms consisting of:

- a [~~5%~~] deduction to the reseller's wholesale discount if the reseller advertised any Foster product below the MAP; and
- cessation of supply if the reseller persisted in advertising any Foster product below the MAP.

5.13 Changes to the MAP Policy as reissued in 2013 and 2014, were:

5.13.1 clarification of the exact MAP to be applied to each product;

5.13.2 the inclusion of an invitation to resellers to support Foster in 'policing' the MAP Policy; and

5.13.3 strengthening the sanctions against resellers that advertised Foster products below the MAP.

5.14 The MAP Policy remained operational until its withdrawal on 31 December 2014.

**TABLE 5.2: Chronology of key dates**

Date	Milestone
2011 – 6 January 2012	Foster drafts the MAP Policy and discusses it with resellers.
6 January 2012	Foster MAP Policy commences. <sup>71</sup> Internal Foster email to confirm the minimum prices <sup>72</sup> and that the MAP Policy is to be issued to all resellers. <sup>73</sup>
Throughout January 2012	Foster sends its MAP Policy to resellers by email. The starting date for the Policy is recorded as 6 January 2012. <sup>74</sup>
1–3 October 2013	Foster sends its first update to the MAP Policy by mail and email to all resellers. <sup>75</sup>
18 October 2013	Foster's first update to the MAP Policy becomes effective. <sup>76</sup>

<sup>71</sup> 'Foster Refrigerator – Product discounting and published prices' (URN FD0001A).

<sup>72</sup> Email from [Sales employee] to [Sales employee], [Sales employee], [Sales employee], [Employee], [Director], [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Employee], [Sales employee] (Foster) dated 6 January 2012 (URN FD0002).

<sup>73</sup> Email from [Sales employee] to [Sales employee], [Employee], [Employee], [Employee], [Employee], [Employee], [Employee], [Employee], [Employee], [Employee], [Employee], [Employee], [Employee], [Sales employee], [Employee] (Foster) dated 9 January 2012 (URN FD0002).

<sup>74</sup> Letter from Steptoe & Johnson (representing ITW) to the CMA dated 7 October 2014 (URN FC0014.3) and Annexure 2 (URN FC0014.2). Examples: URN FD0005.

<sup>75</sup> See URN FD0073, URN FD0031 and question 4 of Foster's response to section 26 notice dated 22 May 2015 (URN FD0637).

<sup>76</sup> See policy as attached to email from [Sales employee] (Foster) dated 1 October 2013 (URN FD0031).

23 January 2014	Foster sends its second update to the MAP Policy. <sup>77</sup>
1 February 2014	Second update to the Foster MAP Policy becomes effective. <sup>78</sup>
15 December 2014	'Foster General Notes' were provided to resellers in hard copy together with Foster's new price list. <sup>79</sup>
7 January 2015	Foster informed the CMA that it withdrew its MAP Policy in December 2014. <sup>80</sup>
2 April 2015	Foster issued a 'Dealer Update' to [X] resellers, which stated that Foster withdrew its MAP Policy with effect from 31 December 2014. <sup>81</sup>

### ***January 2012: The launch of the MAP Policy***

5.15 On 6 January 2012,<sup>82</sup> Foster issued a 'discounting policy'<sup>83</sup> to its network of active resellers (the MAP Policy). The MAP Policy stated as follows:

*Discounting policy (To commence 6<sup>th</sup> January 2012)*

- 1) *Your existing Trade Dealer discount will be maintained as long as you do not advertise any of the Foster product range*

<sup>77</sup> Email from [Employee] (Foster) to [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Employee], [Sales employee], [Sales employee], [Sales employee], [Employee], [Sales employee], [Employee] (Foster) dated 23 January 2014 (URN FD0044).

<sup>78</sup> *Ibid.*

<sup>79</sup> See email from [Lawyer] (Steptoe & Johnson (representing ITW)) to the CMA, dated 7 January 2015 (URN FC0023) and 'Foster General Notes' (URN FD0587).

<sup>80</sup> *Ibid.*

<sup>81</sup> Email from [Lawyer] (Steptoe & Johnson (representing ITW)) to the CMA dated 15 April 2015 (URN FC0049).

<sup>82</sup> Foster has confirmed that the MAP Policy was launched in January 2012 (Part B2, paragraph 2 of the letter from Steptoe & Johnson (representing ITW) in response to section 26 notice dated 28 August 2014 (URN FC0008.1)). Approximately [X] Foster resellers (including the three Resellers, [Reseller 1], [Reseller 2], and [Reseller 3]) were sent the MAP Policy and the 2013 and 2014 updated iterations of the MAP Policy (see paragraph 2b of the letter from Steptoe & Johnson (representing ITW) to the CMA dated 7 October 2014 (URN FC0014.3)). Furthermore, see note of telephone call between [Director] (Foster), [Director] (Foster), Steptoe & Johnson (representing ITW) and the CMA on 1 October 2014 confirming that the MAP Policy was sent to all Foster's resellers (URN FC0012). See also Foster, letter to the CMA dated 7 October 2014, Annexure 2 (URN FC0014.2).

<sup>83</sup> Along with the MAP Policy, Foster also provided other guidance to resellers, namely online marketing and branding guidelines, domain name guidance, content guidance and header/logo guidance. As the other guidance

*at prices below the current Regional Nett price list plus [X] mark up (excluding VAT and installation). Please call 0843 216 8844 for a copy of the current Green Regional Nett price list.*

- 2) If you do publish or advertise any of the Foster product range at prices below the current Regional Nett price list plus [X] mark-up then we shall deduct [X] of your dealer discount.*
- 3) Any Dealer that continues to advertise below the current Green Regional Nett price list plus [X] mark-up may lose their Foster dealership together with permission to use Foster branding.*
- 4) Foster will monitor the internet and other sources on a regular basis to ensure the new policy is fairly adhered to by all dealers.*
- 5) Foster Refrigerator reserves the right to have full authorisation on Foster Logos, product photographs and any other brand material.*
- 6) Prices displayed on websites must state that they are for delivery in the U.K. mainland only. All dealers must respect the principal [sic] of this policy and should not advertise strap lines stating “Ring now for better prices”, “Additional Discounts Available” or any other phrase which indicates that the advertised prices do not represent their best offer.*
- 7) The Authorised Foster Dealer ‘online pack’ is available below to enable you to maximise your online sales presence. You are required to follow the guidelines supplied within the ‘online pack’ including but not limited to logo usage, content and domain names. For further advice please contact the Marketing Department on 01553 698275 or email [marketing@foster-uk.com](mailto:marketing@foster-uk.com).*

---

documents do not relate to the MAP Policy, this material has not been reproduced in this Decision. See email from [Sales employee] (Foster) to [Sales employee], [Sales employee], [Sales employee], [Employee], [Director], [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Employee], and [Sales employee] (Foster) dated 6 January 2012 (URN FD0001).

## *The 2013 update*

- 5.16 The MAP Policy was amended in October 2013 and re-issued to Foster resellers by email and post.<sup>84</sup>
- 5.17 The 2013 update to the MAP Policy, took effect from 18 October 2013 and stated:

*Further to the successful introduction of our product discounting and published price policy in January 2012 we are delighted with the ongoing support and fantastic response received from our authorised dealer network. This adheres to our core policy of supporting our dealer network as well as continuing to deliver industry leading products and solutions.*

[...]

*Unfortunately there have been instances where the previous policy has been misinterpreted; we are therefore taking this opportunity to avoid any further confusion by providing you with a transparent price point for each standard product which demonstrates the minimum advertised price which must be in place by the below commencement date.*

**Discounting Policy (To commence 18<sup>th</sup> October 2013)**

- 1) *Your existing Trade Dealer discount will be maintained as long as you do not advertise any of the Foster product range at prices below the enclosed minimum advertised price (MAP) document (excluding VAT and installation)*
- 2) *If after the commencement date you publish or advertise any of the Foster product range at prices below the enclosed MAP document then we shall deduct [X] of your dealer discount immediately.*
- 3) *Any non-standard product should be publicised using the following formula ((current list price – [X]) + [X]) then rounded to the nearest pound (e.g. .49 and below rounds down .50 and above rounds up).*

<sup>84</sup> Part B2 of the letter from Steptoe & Johnson (representing ITW) in response to section 26 notice dated 28 August 2014 (URN FC0008.1) and Question 4 of Foster's response to section 26 notice dated 22 May 2015 (URN FD0637). See further email from [Sales employee] (Foster) to [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Employee], [Sales employee], [Employee], [Sales employee], [Sales employee], [Employee], [Employee], [Director], [Sales employee] (Foster) dated 1 October 2013 (URN FD0031).



- 4) *Any dealer that continues to advertise below the enclosed MAP document may lose their Foster dealership together with their permission to use Foster branding.*
- 5) *Foster will monitor the internet and other sources on a regular basis to ensure the new policy is being fairly adhered to by all dealers. We invite our dealer network to support us with policing this policy.*
- 6) *Foster Refrigerator reserves the right to have full authorisation on Foster Logos, product photographs and any other brand material.*
- 7) *Prices displayed on websites must state that they are for delivery in the U.K. mainland only (excluding Northern Ireland). All dealers must respect the principal [sic] of this policy and should not advertise strap lines stating "Ring now for better prices", "Additional Discounts Available" or any other phrase which indicates that the advertised prices do not represent their best offer.*

*The enclosed MAP removes any ambiguity regarding the price we expect our core products to be advertised at in any publication. We believe this improved policy outlines in a clear manner our continued commitment to our authorised dealer network.*<sup>85</sup> [Emphasis in original.]

5.18 Although the substance of the 2013 version of the MAP Policy is similar to the original 2012 version, there are some notable differences. For example, the 2013 version:

5.18.1 At point 3: required dealers to comply with a fixed MAP, which was set out alongside the nett price in the Green price list, to 'remove any ambiguity'<sup>86</sup> regarding the price Foster expected its products to be advertised at in any publication. The original version of the MAP Policy required dealers not to advertise prices below the nett price plus [£]. In the email communicating the MAP Policy, [Sales

---

<sup>85</sup> See copy of the 2013 update of the MAP Policy as attached to email from [Sales employee] (Foster) to [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Employee], [Sales employee], [Employee], [Sales employee], [Sales employee], [Employee], [Employee], [Director], [Sales employee] (Foster) dated 1 October 2013 (URN FD0031).

<sup>86</sup> See paragraph 5.17 above.

employee] of Foster explained that this change was made to avoid any confusion about the exact MAP to apply.<sup>87</sup>

5.18.2 At point 2: noted that resellers advertising Foster products below the MAP would lose [X] of their wholesale discount ‘immediately’.

5.18.3 At point 5: invited resellers to support Foster with ‘policing’ the MAP Policy.<sup>88</sup>

### ***The 2014 update***

5.19 On 23 January 2014,<sup>89</sup> Foster updated the MAP Policy again to include its new brands and to apply a price increase across the majority of its products. The 2014 update was effective from 1 February 2014 and stated:

#### ***Foster Refrigerator – Product discounting and published prices***

*Foster is focused on providing great quality products and total satisfaction to our customers and we are delighted with the on-going support and fantastic response received from our dealer network.*

*As you already know we implemented an average price increase of [X] across the majority of our product range effective 31<sup>st</sup> December 2013, in response to external market factors including rising material and utility costs, and inflation [...].*

*Unfortunately there have been instances where previous Minimum Advertised Price Policy has been misinterpreted; to avoid any further confusion, you will find the MAP that must be in place next to each product in your green nett price book within the column marked ‘MAP’. This policy is here to help all our dealers in the marketplace, by improving the margins available from selling the Foster range. [...]*

---

<sup>87</sup> Email from [info@foster-uk.com](mailto:info@foster-uk.com) to [Sales employee] (Foster) and unknown recipients dated 3 October 2013 (URN FD0033). See further email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 2 October 2013 (URN FD0032).

<sup>88</sup> See also email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 7 October 2013 (URN FD0078).

<sup>89</sup> Email from [Employee] (Foster) to [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Employee], [Sales employee], [Employee], [Director] and [Employee] (Foster) dated 23 January 2014 (URN FD0253). This is an example of the draft circulated internally at Foster. See also email from [info@foster-uk.com](mailto:info@foster-uk.com) (Foster) to [Employee] ([Reseller]) dated 23 January 2014 (URN FD0233). This is an example of the MAP Policy as circulated to all Foster resellers.

### ***Discounting policy effective by 1<sup>st</sup> February 2014***

- 1) *Your existing Trade Dealer discount will be maintained as long as you do not advertise any of the Foster product range at prices below the minimum advertised price (MAP) (excluding VAT and installation).*
  - 2) *MAP for each product is highlighted in your green nett price book. The MAP has been calculated for you using the following formula:  
Regional nett price + [✂]*
  - 3) *If after the commencement date you publish or advertise any of the Foster product range at prices below the MAP prices then we shall deduct [✂] of your dealer discount immediately.*
  - 4) *Any Dealer that continues to advertise below the MAP prices will lose their Foster dealership together with the permission to use Foster branding*
  - 5) *Foster will monitor the internet and other sources on a regular basis to ensure the new policy is being fairly adhered to by all dealers. We invite our dealer network to support us with policing this policy*
  - 6) *Foster Refrigerator reserves the right to have full authorisation on Foster Logos, product photographs and any other brand material*
  - 7) *Prices displayed on websites must state that they are for delivery into the UK mainland only (excluding Northern Ireland). All dealers must respect the principal [sic] of this policy and should not advertise strap lines stating “Ring now for better prices”, “Additional Discounts Available” or any other phrase which indicates that the advertised prices do not represent their best offer.<sup>90</sup>*
- 5.20 The 2014 update of the MAP Policy replicated the 2013 update of the MAP Policy, with the exception of two adjustments:
- 5.20.1 In the introductory text and at point 2: Foster set out the exact location of the MAP for each product within the ‘green nett price list’, emphasising that the MAP was ‘highlighted’ and within a designated MAP ‘column’.

---

<sup>90</sup> See example of the 2014 update of the MAP Policy: email from [Employee] (Foster) to [Employee] ([Reseller]) dated 6 February 2014 (URN FD0253).

- 5.20.2 At point 4: the revised version of the MAP Policy stated that a dealer ‘will lose’ its Foster dealership and use of the Foster branding if it sells below the MAP price. In contrast, the 2013 update to the MAP Policy stated that the dealer ‘may lose’ its dealership and use of the Foster brand.

### ***The withdrawal of the MAP Policy***

- 5.21 Foster submitted in November 2015 that it concluded the MAP Policy following the launch of the CMA’s investigation:

- 5.21.1 instructions were provided to Foster employees that the MAP Policy must cease, with immediate effect;<sup>91</sup> and
- 5.21.2 during September, October and November 2014, Foster sales personnel spoke with resellers to inform them of the withdrawal of the MAP Policy. Priority was initially given to resellers with the most custom with Foster [§].<sup>92</sup>

- 5.22 However, there is contemporaneous evidence on the CMA’s file to indicate that the MAP Policy continued beyond the launch of the CMA’s investigation. For example:

- 5.22.1 On 3 October 2014, [Employee] of [Reseller] emailed [Sales employee] of Foster, alerting him to a number of offers by [Reseller] on Foster products.<sup>93</sup> [Sales employee] replied, copying in [Sales employee] of Foster, to confirm that [Reseller] had advertised certain Foster products below the MAP within what [Reseller] had regarded as an internal flyer to a client mailing list. [Sales employee] of Foster then stated:

*Historically like yourselves, [Reseller] have been a good supporter of our policy. Their online pricing has not been altered and continues to remain compliant with our pricing policy. **We have made it clear that we feel this is an infringement of the MAP Policy and cannot be tolerated for any future offers.** This would be the case for anyone*

---

<sup>91</sup> Witness statement of [Director] dated 17 November 2015 (URN FC0121.3).

<sup>92</sup> *Ibid.*

<sup>93</sup> Email from [Employee] ([Reseller]) to [Sales employee] and [Sales employee] (Foster) dated 3 October 2014 (URN F110196).

*else that sent out similar flyers/pricing. We are in no way supporting these prices by offering any additional resource/discounts during the period these flyers are valid. As always we appreciate your continued support with our policy.*<sup>94</sup> [Emphasis added.]

5.22.2 In a notebook entry by [Employee] of [Reseller], he records ‘*Trading Meeting October 2014*’ along with ‘*[Employee] [of Reseller] + [Sales employee] [of Foster] **Foster £859.00 MAP.***’<sup>95</sup> (Emphasis added.)

5.23 Further, on 7 January 2015, Foster informed the CMA that it had withdrawn its MAP Policy in December 2014, and that it was no longer being enforced.<sup>96</sup>

5.24 Foster explained that on 15 December 2014, the ‘Foster General Notes’ were provided in hard copy to all resellers, together with Foster’s new price list. The ‘Foster General Notes’ (which consisted of one page) included the following statement:

*By using the prices within this publication you are accepting Foster Refrigerator’s standard terms and conditions, a copy of which can be viewed at [www.fosterrefrigerator.co.uk/terms](http://www.fosterrefrigerator.co.uk/terms). MRAP is defined as being the Manufacturer’s Recommended Advertised Price.*<sup>97</sup>

5.25 The ‘Reseller Specific Terms’, which were available to resellers on the Foster website (but not provided as part of the 15 December 2014 communication to resellers) stated at clause 5.2 that resellers would ‘*be provided with recommended advertised prices but would be free to adopt different advertised*

---

<sup>94</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 6 October 2014 (URN F110090). See also (i) email from [Employee] ([Reseller]) to [Sales employee] (Foster) dated 11 September 2014 (URN F110195) and email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 15 September 2014 (F110089); (ii) email from [Employee] ([Reseller]) to [Sales employee] and [Sales employee] dated 27 August 2014 (URN F50012.46) and email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 21 October 2014 (URN F50012.46); (iii) Email from [Employee] ([Reseller]) to [Director] (Foster) dated 6 November 2014 (URN F90014.57)

<sup>95</sup> Extract from notebook by [Employee] ([Reseller]) dated October 2014 (URN F20009.25). This evidence was provided to the CMA by [Reseller], specifically in response to the CMA’s formal request for any documents that record requests or instructions communicated by Foster to [Reseller] (Part C – ‘Specified documents to be produced’, of section 26 notice to [Reseller] dated 3 November 2014 (URN F20001.1)). As set out in Part C of the section 26 notice, the scope of the CMA’s formal request extended to notebooks. See also [Reseller]’s response to section 26 notice dated 3 November 2014, containing an index of documents provided in response to Part C of the CMA’s section 26 notice (URN F20009.1A).

<sup>96</sup> Email from [Lawyer] (Steptoe & Johnson (representing ITW)) to the CMA, dated 7 January 2015 (URN FC0023).

<sup>97</sup> *Ibid* and ‘Foster General Notes’ (URN FD0587).

*prices, whether online or through any other medium, should they wish to do so'.<sup>98</sup>*

- 5.26 The CMA asked Foster to confirm what (if any) steps had been taken to draw resellers' attention to the amendment of 'MAP' to 'MRAP' in Foster's price list and the change to the Reseller Specific Terms.<sup>99</sup> In an email dated 15 April 2015, Foster provided the CMA with its 'dealer update', which was sent to approximately [X] resellers on 2 April 2015. The dealer update stated that Foster's MAP Policy had been withdrawn with effect from 31 December 2014:

*Terms & Conditions*

*With effect from 31<sup>st</sup> December 2014, Foster's minimum advertised price policy was withdrawn and replaced with a recommended advertised price policy. This policy is referred to in the Foster General Notes that accompanied the 2015 nett price book also issued in December 2014 and is also referred to in the Reseller Specific Terms, available on Foster's website at [www.fosterrefrigerator.co.uk/terms](http://www.fosterrefrigerator.co.uk/terms).<sup>100</sup>*

- 5.27 In the light of the evidence set out above, the CMA takes 31 December 2014, the date that Foster told its resellers the MAP Policy had concluded, to be the date that the MAP Policy came to an end.

**D. Rationale for the MAP Policy**

- 5.28 This Section sets out the rationale for the MAP Policy. The evidence set out in this Section demonstrates that the MAP Policy was principally introduced to improve the margins available to resellers from selling Foster products, and to reduce the competitive pressure on Foster's traditional resellers from significantly lower prices available online.
- 5.29 This rationale is expressly stated in Foster's communications of the MAP Policy, as updated from time to time. This is further supported by contemporaneous evidence of complaints by Foster's resellers in relation to

---

<sup>98</sup> *Ibid* and 'Foster Reseller Specific Terms', clause 5.2 (URN FC0023.1).

<sup>99</sup> Question 9 of section 26 notice dated 5 March 2015 (URN FC0042.1).

<sup>100</sup> Email from [Lawyer] (Steptoe & Johnson (representing ITW)), to the CMA dated 15 April 2015, enclosing 'Dealer Update' newsletter dated 2 April 2015 (URN FC0049).

low prices of Foster products available online, before the introduction of the MAP Policy.

- 5.30 Whilst the MAP Policy may have had a subsidiary aim of protecting Foster's brand and reputation, the CMA finds that the evidence does not support the submission that this was the primary aim of introducing the MAP Policy.

### **Communications from Foster**

- 5.31 Contemporaneous communications from Foster to its resellers, and related internal Foster correspondence, expressly state that the MAP Policy was introduced to improve the margins available to resellers from selling Foster products, and to reduce the competitive pressure on Foster's traditional (ie offline) resellers from significantly lower prices available online.
- 5.32 As set out above, Foster first communicated the MAP Policy to its network of resellers on 6 January 2012. The explanatory letter from Foster accompanying the MAP Policy stated:

*We recognise that the market in which we – and you – operate, is intensely competitive, especially in such difficult economic times. **We also see the added pressure applied to you by low-cost internet retailers and have listened to your concerns.***

*We remain firmly committed to a partnership approach with our dealers and believe in the heightened customer experience and support you deliver. Our official dealer network is very important to us and we have a long history of supporting and nurturing our dealers, to share in our success. With this in mind, we have developed a new policy to support you, as much as possible, in fair pricing of our products.*

***This new policy will help all of our dealers in the marketplace, by improving the margins available from selling the Foster range of products.** We firmly believe that the demand for our award-winning, market-leading refrigeration products will remain strong and that customers will continue to recognise the benefits of our quality,*

*innovation and unparalleled environmental commitment.*<sup>101</sup>

[Emphasis added.]

- 5.33 Similarly, when Foster updated the MAP Policy in 2013, it stated to one of its traditional resellers:

*This policy is designed to set an advertised selling price for those distributors who sell online. I know this does not apply to your company **but we want to let our key distributors know what we are doing to try to protect margin and stop internet price wars.** This affects all our distributors as their customers check price online. We have set this at [%] on standard net terms and although this is not a huge mark-up it allows us to be competitive while allowing our customers to upsell their services (not just a kerbside delivery). [Attached: 'MAP Policy.pdf']*

*I know you do not actively sell online but **the policy is there to protect margin for our loyal distributors.***<sup>102</sup> [Emphasis added.]

- 5.34 Further, an internal Foster email dated 11 November 2013 explained the rationale for introducing the MAP Policy as follows:

*With the **continued growth of on-line selling and many e-commerce based catering equipment platforms available distributors became concerned of the diminishing margins within the industry.** Taking that on board we introduced our minimum price policy for all advertised products, **be it off or on-line, ensuring at least a [%] markup on our dealers buying prices are displayed...** There is still a large customer base that places an emphasis on engaging consultative buying - in fact 95% of equipment sales are still made off-line.*<sup>103</sup> [Emphasis added.]

- 5.35 In addition, internal Foster communications also referred to the MAP Policy as an effective means to increase resellers' margins. For example, on 10 January

---

<sup>101</sup> Email from [Sales employee] (Foster) to [Sales employee], [Sales employee], [Sales employee], [Employee], [Director], [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Employee], and [Sales employee] (Foster) dated 16 January 2012 (URN FD0001).

<sup>102</sup> See email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 8 October 2013 (URN FD0083). See further email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 8 October 2013 (URN FD0088).

<sup>103</sup> Email from [Sales employee] (Foster) to [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Employee], [Sales employee], [Employee] and [Sales employee] (Foster) dated 11 November 2013 entitled '[%] Update' (URN FD0128).



2014, [Employee] of Foster emailed [Sales employee] of Foster in relation to using the MAP Policy as a public-relations tool to promote the Foster brand to resellers:

*That could be good toolkit [The MAP Policy] to help the guys [Foster's sale staff] promoting Foster to the dealers and give a bigger impact on **how the MAP is beneficial for them and how much money minimum they are able to make with us** – for example £154 on a EP700H compared to £... against XXX & is not a guarantee as Foster is the only one to have implement a MAP Policy.<sup>104</sup> [Emphasis added.]*

- 5.36 Finally, Foster expressly re-confirmed the rationale for the MAP Policy to all resellers in the introductory paragraphs of the 2014 update to the MAP Policy:

*This policy is here to help all our dealers in the marketplace, **by improving the margins available from selling the Foster range.***<sup>105</sup>

### **Complaints from resellers**

- 5.37 Contemporaneous evidence relating to the pre-MAP period further demonstrates that the MAP Policy was introduced in response to growing concerns from resellers that discounts available online were creating increased pressure on the margins of Foster's resellers. For example:

- 5.37.1 On 20 June 2011 [Sales employee] of Foster noted to [Sales employee] of Foster that:

*Feedback from [X]<sup>106</sup> is that these internet dealers are really starting to grate. This issue is not going away and whilst we have some good comebacks, many fear this is just lip service. I quote [Employee] at [Reseller] "If Internet dealers really only make up a max of 3% of your overall business then surely you can afford to nip them in the bud to protect your loyal dealers who make up the 97%?" [...] I*

---

<sup>104</sup> Email from [Sales employee] (Foster) to [Employee] and [Employee] (Foster) dated 10 January 2014 (URN FD0039).

<sup>105</sup> See paragraph 5.19 above.

<sup>106</sup> Foster explained that [Sales employee] (Foster)'s reference to 'feedback from [X]' refers to anecdotal feedback received during telephone calls and/or meetings. See question 29 of Foster's response to the CMA's section 26 notice dated 22 May 2015 (URN FD0662).

*know there isn't an easy solution but I do feel we need to do something more – even if it is just to make an example of one of two so we have a story to take back to our [✂]?<sup>107</sup>*

5.37.2 On 29 June 2011, [Sales employee] of Foster told [Director] of Foster that *'[t]here are a lot of Online [sic] dealers making very little margin on our product and [this] has forced some dealers to spec other products to try and increase their margins.'*<sup>108</sup>

5.37.3 On 27 October 2011, [Employee] of [Reseller] sent an email to [Sales employee] and [Director] of Foster which noted:

*I have yet again today had to suffer a good long standing customer question why I am overcharging her. [...] I'm not happy with the current margins I'm selling at [...]. I'm not threatening to pull the plug on Foster I am however needing to consider my options and I can no longer put in the time, effort and budget on your brand, I will continue to sell the product but cannot afford the time or money to actively push and prioritise the brand and instead will have to look at alternatives that can give me the margins I feel are acceptable and workable'<sup>109</sup>*

5.37.4 In addition, conversations recorded between Foster's RBMs and 18 resellers show that Foster received a number of complaints about the low prices and associated low level of services being offered for Foster products by certain online discounters.<sup>110</sup>

---

<sup>107</sup> Email from [Sales employee] (Foster) to [Sales employee], [Sales employee] and [Director] (Foster) dated 20 June 2011 (URN FD0574).

<sup>108</sup> Email from [Sales employee] (Foster) to [Director] (Foster) dated 29 June 2011 (URN FD0575).

<sup>109</sup> Email from [Employee] ([Reseller]) to [Sales employee] (Foster) dated 27 October 2011 (URN FD0576). See further email from [Employee] ([Reseller]) to [Director] (Foster) dated 25 May 2010 (URN FD0572) and email from [Employee] ([Reseller]) to [Sales employee] (Foster) dated 15 June 2011 (URN FD0573).

<sup>110</sup> Question 1.2 of Foster's response to section 26 notice dated 5 March 2015 (URN FC0046.2 and FD0578).

### ***Foster's explanation of the rationale for the MAP Policy***

5.38 During the course of the CMA's investigation, Foster submitted that the MAP Policy was introduced in 2012 to respond to reseller complaints, which highlighted:

*[E]xtensive dealer dissatisfaction with the deceptive practices of certain dealers, poor or non-existent service and unprofessional behaviour that was harmful to the other brands. Foster's introduction of MAP was therefore effected in order to:*

- *protect its brand and reputation; and*
- *ensure that its dealers had a continuing incentive to invest in the brand and in pre and post-sale service.*<sup>111</sup>

5.39 In support of its submission, Foster provided an email exchange between Foster employees [Director] and [Sales employee] of 27 November 2013.<sup>112</sup> The email exchange justified closing an online reseller's account on the grounds that the reseller's conduct amounted to '*misleading the general public*'.<sup>113</sup>

5.40 Whilst this email exchange indicates that Foster had a range of concerns with this particular reseller, the CMA does not consider that the evidence in the CMA's file supports Foster's position that the primary rationale behind the MAP Policy was to protect its brand and reputation. In particular, the CMA notes that:

5.40.1 poor practices and/or unprofessional behaviour of certain online resellers were not identified by Foster when communicating the rationale for the MAP Policy to the reseller network;<sup>114</sup>

---

<sup>111</sup> See Schedule 1, question 1.2, of Foster's response to section 26 notice dated 5 March 2015 (URN FC0046.2). Foster further explained that the MAP Policy was one of the elements of broader guidance designed to regulate the way in which Foster products were advertised (Part B2 of the letter from Steptoe & Johnson (representing ITW) to the CMA dated 18 September 2014 in response to section 26 notice dated 28 August 2014 (URN FC0008.1))

<sup>112</sup> Email from [Sales employee] (Foster) to [Sales employee], [Sales employee], [Sales employee], [Employee] (Foster) dated 27 November 2013 (URN FD0579).

<sup>113</sup> Email from [Director] (ITW) to [Sales employee] (Foster) dated 27 November 2013 (URN FD0579).

<sup>114</sup> See paragraphs 5.32–5.36 above.

- 5.40.2 such concerns did not feature in internal Foster correspondence prior to the introduction of the MAP Policy, which focused on concerns about online discounters;<sup>115</sup> and
- 5.40.3 the proposal to present the MAP Policy through a public relations campaign,<sup>116</sup> was intended to draw attention to the policy's effectiveness in maintaining reseller margins and not as a means to tackle unprofessional conduct.

### ***Conclusion on the rationale for the MAP Policy***

- 5.41 In the light of the above, the CMA finds that the MAP Policy was introduced to improve the margins available to resellers from selling Foster products, and to reduce the competitive pressure on Foster's traditional dealers from significantly lower prices available online.
- 5.42 This rationale is expressly stated in Foster's communications of the MAP Policy, as updated from time to time. This is further supported by contemporaneous evidence of complaints by Foster's resellers in relation to low prices of Foster products available online, before the introduction of the MAP Policy.
- 5.43 Whilst the CMA acknowledges that the MAP Policy may have had a subsidiary aim of protecting Foster's brand and reputation, the CMA finds that the evidence on its file does not support the submission that this was the primary aim of introducing the MAP Policy.

### **E. Resellers' compliance with the MAP Policy**

- 5.44 This Section sets out the evidence that demonstrates that Foster's prohibition on advertising prices below the MAP effectively restricted the ability of its resellers to set their online prices below a fixed level.<sup>117</sup>
- 5.45 This is specifically demonstrated in relation to the following three resellers:
- 5.45.1 [Reseller 1];

---

<sup>115</sup> See paragraphs 5.37.1 and 5.37.2.

<sup>116</sup> See paragraph 5.35 above.

<sup>117</sup> Whilst the MAP Policy technically applied to printed material as well as online prices (catalogues, flyers, etc) the delay associated with amending prices and the challenges for Foster to monitor prices on printed material meant that, in practice, compliance with the MAP policy was difficult to achieve in the offline environment. As a result the focus of the Decision is on online compliance with the MAP Policy.

- 5.45.2 [Reseller 2]; and
- 5.45.3 [Reseller 3] (each a Reseller).
- 5.46 The evidence presented demonstrates that Foster sent the MAP Policy to all of its active resellers. Further, Foster considered its resellers had complied with the MAP Policy. As such, the CMA has reasonable grounds for suspecting that other resellers of Foster products agreed to the MAP Policy. For reasons of administrative efficiency, the CMA has chosen to prioritise demonstrating the existence of an agreement only with the three Resellers set out above.
- 5.47 For each Reseller, this Section will set out evidence which demonstrates that the Reseller adhered to the MAP Policy in any of the following ways:
- 5.47.1 the Reseller committed to change an online price so that it was no lower than the MAP;
- 5.47.2 the Reseller took steps internally to change an online price when requested to do so by Foster, so that it was no lower than the MAP;
- 5.47.3 the Reseller confirmed to Foster that it had changed an online price, so that it was no lower than the MAP, when requested to do so by Foster; and/or
- 5.47.4 the Reseller stated that it adhered to the MAP Policy, in writing to Foster and/or to the CMA during the course of its investigation.
- 5.48 In addition, the evidence will also show that each of the Resellers engaged in conduct which supports the CMA's finding that the Reseller adhered to the MAP Policy.

***General compliance with the MAP Policy***

- 5.49 Foster confirmed that the MAP Policy, and each of its iterations, was issued to its entire network of active resellers, consisting of approximately [X] resellers.<sup>118</sup> The evidence demonstrates that, in general, Foster's resellers complied with the terms of the MAP Policy, in particular by setting their online prices no lower than the MAP specified by Foster (as amended from time to time). This is shown by:

---

<sup>118</sup> See paragraph 5.15 and footnote 82 above.

- 5.49.1 comments made by Foster in the MAP Policy itself, as communicated to resellers;
- 5.49.2 contemporaneous documentary evidence of Foster's internal discussions around the success of the MAP Policy;
- 5.49.3 contemporaneous communications between Foster and its resellers; and
- 5.49.4 corroborative evidence obtained from interviews with key Foster employees during the course of the CMA's investigation.

#### *The MAP Policy*

- 5.50 The successful implementation of the MAP Policy is evidenced by Foster's comments within the 2013 and 2014 versions of the MAP Policy, as communicated to resellers.
- 5.51 The covering message from [Sales employee] of Foster that accompanied the 2013 update to the MAP Policy, stated that:

*Further to the successful introduction of our product discounting and published price policy in January 2012 we are **delighted with the on-going support and fantastic response received from our authorised dealer network***. [Emphasis added.]<sup>119</sup>

- 5.52 This statement was repeated in the introduction to the 2014 update to the MAP Policy.<sup>120</sup>

#### *Foster's internal discussions*

- 5.53 Contemporaneous internal Foster documents further support that Foster considered its MAP Policy to have been positively received by its resellers. For example, on 2 February 2014, [Sales employee] of Foster indicated the perceived value of the MAP Policy in an email to marketing staff and RBMs:

---

<sup>119</sup> 'Foster Refrigerator – Product discounting and published prices' (URN FD0031).

<sup>120</sup> See paragraph 5.20 above.

*We have spent a hell of a lot of time on our MAP Policy and I feel it's now the envy of the industry [...] This area is as important to dealers as discounts and warranties.*<sup>121</sup>

- 5.54 In a further internal email on 27 February 2014, [Sales employee] of Foster stated his view that the MAP Policy warranted a marketing campaign, and highlighted the frequency with which Foster and resellers were engaged on the topic of the MAP Policy:

*[Employee]/[Employee] how are we getting on with our MAP PR campaign? It really is **the first topic with every dealer we visit** and as we have such a great story to tell we should be shouting from the highest mountain!!*<sup>122</sup> [Emphasis added.]

- 5.55 On 28 February 2014, [Sales employee] (Foster) responded to [Sales employee] of Foster to note:

***General feedback from my Project dealers on our MAP is that it is exactly the type of clear policy that is required in the industry.** They generally approve of the margins we have based our policy on and like the formal way we have now shown an MAP price in the price list and backed it up with conditions clearly explaining the penalties etc.*<sup>123</sup> [Emphasis added.]

#### *Communications between Foster and its resellers*

- 5.56 The evidence that resellers were complying with the MAP Policy is also supported by contemporaneous communications between Foster and its resellers. For example:<sup>124</sup>

- 5.56.1 On 17 February 2014, [Sales employee] of Foster emailed [Employee] of [Reseller] and noted: *'To be fair we have had a great*

---

<sup>121</sup> Email from [Sales employee] (Foster) to [Employee], [Employee], [Employee], [Employee] (Foster) dated 2 February 2014 (URN FD0047).

<sup>122</sup> Email from [Sales employee] (Foster) to [Employee] and [Employee] (Foster) dated 27 February 2014 (URN FD0048).

<sup>123</sup> Email from [Sales employee] (Foster) to [Sales employee] (Foster) dated 28 February 2014 (URN FD0051).

<sup>124</sup> For further similar examples see: (i) email from [Employee] ([Reseller]) to [Sales employee] (Foster) and [Employee] ([Reseller]), cc [Sales employee] (Foster) dated 10 June 2014 (URN F20009.20); (ii) email from [Employee] ([Reseller]) to [Sales employee] (Foster) dated 18 October 2013, (URN FD0211) (iii) email sent by [Employee] ([Reseller]) to undisclosed recipients dated 9 January 2014 (URN FD0240); (iv) email from [Employee] ([Reseller]) to [Sales employee] (Foster) dated 19 February 2014 (URN FD0269); and (v) paragraph 5.81 below. See also [Reseller]'s response to section 26 notice dated 8 September 2015 (URN F480004.1),

*response from those under MAP with many apologies and immediate responses.*<sup>125</sup>

- 5.56.2 On 1 March 2014, [Sales employee] of Foster emailed [Reseller] in relation to 'out of date' web prices and stated '*[y]ou guys are the only ones around the country now under MAP prices.*'<sup>126</sup>
- 5.56.3 On 9 April 2014, [Employee] of [Reseller] sent an internal email that summarised a conversation with [Director] of Foster: '*He [Director] claims that we are now the only dealer who is not adhering to their advertised pricing policy and that Foster are under pressure from other internet dealers who have complained about our web prices.*'<sup>127</sup>

#### *Statements made in interview*

- 5.57 During his interview with the CMA, [Sales employee] of Foster confirmed that there was a '*positive response*' from resellers to the MAP Policy, and that the introductory statement to the 2013 and 2014 versions of the MAP Policy was a fair reflection of how he viewed the resellers' response to the MAP Policy at the time.<sup>128</sup> [Sales employee] of Foster further confirmed that the resellers, with only a few exceptions, complied with the MAP Policy:

*But generally otherwise, from the number of emails and stuff, I think, [...] generally they were adhering to it and [...] they liked it. They, they were in favour of it. So they probably... you know, they liked it [...] and they adhered to it.*<sup>129</sup>

- 5.58 When asked about the potential sanctions included in the MAP Policy, [Sales employee] explained that:

---

which noted that '*We welcomed the MAP pricing because it prevented the "bedroom businesses" from advertising ridiculously low prices i.e. 2% margins.*'

<sup>125</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller]) and [Sales employee] (Foster), dated 17 February 2014 (URN F50012.43).

<sup>126</sup> Email from [Sales employee] (Foster) to [Reseller] dated 1 March 2014 (URN FD0495).

<sup>127</sup> Email from [Employee] ([Reseller]) to [Employee] ([Reseller]) dated 9 April 2014 (URN F90014.32).

<sup>128</sup> Transcript of interview with [Sales employee] (Foster) dated 29 July 2015, page 121, lines 22–25; and page 122, lines 1–2 (URN FD0685).

<sup>129</sup> *Ibid*, page 123, lines 17–20.



*[The terms of the MAP Policy] had its desired effect because 90-95 per cent of the dealers [...] that's all they needed and that was job done.*<sup>130</sup>

- 5.59 [Sales employee] of Foster also confirmed that Foster's resellers were positive about the MAP Policy, even if some resellers were less amenable than others:

*I would say that... largely, the -- the dealer network were very positive in the -- in the MAP policy itself. We, obviously, had certain internet dealers who were more difficult and it was very, very difficult for us to enforce that policy as well from there.*<sup>131</sup>

- 5.60 The CMA further notes that, with the exception of only one reseller,<sup>132</sup> the evidence obtained during the course of the CMA's investigation does not indicate that any reseller refused generally to adhere to the MAP Policy. As will be shown below, when Foster identified instances where resellers' online prices were below the MAP, the reseller concerned would agree to amend its prices so that they were no lower than the MAP, particularly once reassured that Foster would take similar action in relation to other resellers. There are also numerous examples of resellers directly contributing to the success of the MAP Policy by informing Foster where other resellers' online prices did not comply with the MAP Policy.

### ***Compliance by the Resellers***

- 5.61 For each Reseller, this Section will set out evidence which demonstrates that:

5.61.1 Foster sent the MAP Policy to the Reseller; and

5.61.2 the Reseller adhered to the MAP Policy in any of the following ways:

- the Reseller committed to change an online price, when requested to do so by Foster, so that it was no lower than the MAP;

---

<sup>130</sup> *Ibid*, page 51, lines 16–20.

<sup>131</sup> Transcript of interview with [Sales employee] (Foster) dated 28 July 2015, page 38, lines 23–25, and page 39, lines 1–3 (URN FD0684).

<sup>132</sup> See email from [Employee] ([Reseller]) to [Sales employee] (Foster), dated 18 October 2013: 'if this is a real sticking point we can always stop opening those 4 items and replace them with a [Supplier] alternative' (URN FD0211).

- the Reseller took steps internally to change an online price, when requested to do so by Foster, so that it was no lower than the MAP;
- the Reseller confirmed to Foster that it had changed an online price so that it was no lower than the MAP, when requested to do so by Foster; and/or
- the Reseller stated that it adhered to the MAP Policy, in writing to Foster and/or to the CMA during the course of its investigation.

5.62 Where appropriate, this Section will also set out examples of conduct, which support the CMA's finding that the Reseller adhered to the MAP Policy:

- 5.62.1 The Reseller informed Foster about other resellers who had advertised an online price below the MAP.
- 5.62.2 The Reseller asked Foster to take action against other resellers who had advertised an online price below the MAP.
- 5.62.3 The Reseller threatened to reduce its own prices or de-list Foster products, if Foster did not take action against other resellers who had advertised an online price below the MAP.
- 5.62.4 Foster stated to the Reseller that the Reseller's online advertised prices were not below the MAP.
- 5.62.5 The Reseller made a statement that indicated that it was in favour of the MAP.

5.63 The CMA acknowledges that the evidence shows that, on occasion, the relevant Reseller set its online prices for one or more of Foster's products below the MAP. However, the evidence further demonstrates that, on these occasions:

- 5.63.1 Foster's system of monitoring resellers' websites allowed Foster (or another reseller) to identify the instance of non-compliance;
- 5.63.2 Foster contacted the Reseller to alert them to the products that were priced below the MAP; and

5.63.3 the Reseller amended its online prices in response to instructions from Foster, so that they were no lower than the MAP.

(a) [Reseller 1]

*Instructions from Foster*

5.64 [Reseller 1] received copies of each of the iterations of the Foster MAP Policy.<sup>133</sup>

5.65 The earliest copy of the Foster MAP Policy that [Reseller 1] was able to retrieve from its files was dated 6 January 2012 and attached to an email received from Foster on 21 September 2012.<sup>134</sup> However, contemporaneous documents from January and February 2012 confirm that [Reseller 1] was aware of the MAP Policy on 31 January 2012 at the latest.<sup>135</sup> In addition, [Employee], [Reseller 1] confirmed during a witness interview with the CMA that to his recollection, the MAP Policy ‘*came out as an email. It also came out as a letter. Around that same time, [...] the end of 2011, beginning of 2012.*’<sup>136</sup>

5.66 [Reseller 1] received the 2013 update to the MAP Policy on 2 October 2013.<sup>137</sup> [Reseller 1] received the 2014 update to the MAP Policy on 12 February 2014.<sup>138</sup>

*Compliance with the MAP Policy by [Reseller 1]*

5.67 There are some instances when [Reseller 1] did not comply with the MAP Policy for some of Foster’s products. The evidence shows that when requested

---

<sup>133</sup> Question 3.2 of [Reseller 1]’s response to section 26 notice dated 25 March 2015 (URN F110033).

<sup>134</sup> Email from [Employee] (Foster) to [Employee] and [Employee] ([Reseller 1]) dated 21 September 2012. (URN F110054). See also question 3.4 of [Reseller 1]’s response to section 26 notice dated 25 March 2015 (URN F110033).

<sup>135</sup> For example, in an email exchange on 31 January 2012, Foster identified the prices of products [Reseller 1] had not yet adjusted to comply with the MAP and [Reseller 1] agreed that it ‘*will amend selling price*’. Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 31 January 2012. (URN FD0016).

<sup>136</sup> Transcript of interview with [Employee] ([Reseller 1]) dated 5 October 2015, page 89 (URN F110282).

<sup>137</sup> Question 3.2 of [Reseller 1]’s response to section 26 notice dated 25 March 2015 (URN F110033). See also email from [Sales employee] (Foster) to [Employee] ([Reseller 1]) dated 2 October 2013. (URN F110021.4). The evidence is also supported by the evidence received by Foster that it contacted key resellers, including [Reseller 1], to confirm that they had received and understood the updated MAP Policy (see call log completed by [Sales employee] (Foster) attached in response to Question 3 of the section 26 notice dated 22 May 2015 sent to Foster, in which [Sales employee] (Foster) notes that she contacted [Employee] ([Reseller 1]) on 2 October 2013 (URN FD0636.8)).

<sup>138</sup> Question 3.2 of [Reseller 1]’s response to section 26 notice dated 25 March 2015 (URN F110033). See also email from [Sales employee] (Foster) to [Employee] and [Employee] ([Reseller 1]) dated 12 February 2014 (URN F110064).

to do so by Foster, [Reseller 1] would amend its price so that prices were no lower than the MAP.

- 5.68 This is supported by evidence obtained from [Reseller 1] during the course of the CMA's investigation, and corroborated by contemporaneous documentary evidence from 2012 to 2014.

*Witness evidence obtained from [Reseller 1]*

- 5.69 During interview with the CMA, [Employee] of [Reseller 1] stated:

*[T]here were times when they [Foster] got on to us and said, 'Look, your prices are wrong. You've got this amount of time to change them or we're gonna do this or we're gonna do that.' Um, and it was difficult in 2012 [§] it took us 'til the end of 2012 before we had replacements for it. So sometimes, um – and again, I can't remember the detail or the timing – there were times when we had to make changes to our pricing because of the threats we were getting and the account was gonna be...gonna be stopped.<sup>139</sup>*

- 5.70 [Employee] further stated during his witness interview with the CMA, that Foster 'expected total compliance'<sup>140</sup> with the MAP Policy and that unlike other suppliers with whom [Reseller 1] had supply arrangements, Foster was prepared to threaten restricting or closing [Reseller 1]'s account if it did not comply.<sup>141</sup> [Employee] explained that [Reseller 1] [§] that did not have the time to deliberate over whether to comply with Foster's MAP Policy, and that [Reseller 1] was particularly influenced by the necessity to maintain supply from Foster:

*[I]f Foster have sent this [an email requesting [Reseller 1] change a price] through, they're not gonna [sic] ship anything to us from next Tuesday unless we change these three prices, what shall we do....Just change them. You know...in most situations there's minimal consideration, discussion, whatever. We we [sic] just do it and get on with the business, and you know, at the back of it is always those, you know, that guy opening the sandwich bar next*

---

<sup>139</sup> Transcript of interview with [Employee] ([Reseller 1]) dated 5 October 2015, page 29, lines 16–25 (F110282).

<sup>140</sup> *Ibid*, page 41.

<sup>141</sup> *Ibid*, page 51, lines 21–27; page 53, lines 22–27; and pages 145–147.

*week who won't get his refrigerator through the door...They [Reseller 1's customers] drive the business.*<sup>142</sup>

- 5.71 [Employee] of [Reseller 1] also confirmed to the CMA that once [Reseller 1] had adjusted prices to comply with the MAP Policy, that those prices would stay at that level until some event prompted [Reseller 1] to amend the price again.<sup>143</sup>

*Contemporaneous documentary evidence*

2012

- 5.72 The evidence demonstrates that, at the end of January 2012, [Reseller 1] was contacted by Foster for advertising a small number of Foster products below the MAP:

*[T]here are just a few items which haven't been adjusted for the new minimum advertised pricing policy, please could you arrange for these items to be uplifted?*<sup>144</sup> [Emphasis added.]

- 5.73 In reply, [Employee] of [Reseller 1] confirmed that he 'will amend selling price'.<sup>145</sup> A further email from [Employee] of Foster on 3 February 2012 again requested [Reseller 1] to update their prices.<sup>146</sup> On 6 February 2012, [Employee] of [Reseller 1] replied to [✂]. However, he confirmed that 'I have asked the other cost prices to be amended.'<sup>147</sup>
- 5.74 On 17 February 2012, [Employee] of Foster reminded [Employee] of [Reseller 1] that some of the items had still not been updated.<sup>148</sup> [Employee] asked: 'Can you please advise which PREM cabinets you are referring too?'<sup>149</sup> On 21 February 2012, [Sales employee] of Foster provided [Reseller 1] with a spreadsheet with the price changes required on 12 products.<sup>150</sup>

---

<sup>142</sup> *Ibid*, pages 157–158.

<sup>143</sup> *Ibid*, page 134.

<sup>144</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 1]) dated 30 January 2012 (URN FD0016).

<sup>145</sup> Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 31 January 2012 (URN FD0016).

<sup>146</sup> Email from [Employee] (Foster) to [Employee] ([Reseller 1]) dated 3 February 2012 (URN FD0016).

<sup>147</sup> Email from [Employee] ([Reseller 1]) to [Employee] (Foster) dated 6 February 2012 (URN FD0016).

<sup>148</sup> Email from [Employee] (Foster) to [Employee] ([Reseller 1]) dated 17 February 2012 (URN FD0016).

<sup>149</sup> Email from [Employee] ([Reseller 1]) to [Employee] (Foster) dated 17 February 2012 (URN FD0016).

<sup>150</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 1]) dated 21 February 2012 (URN FD0016) and spreadsheet attached to email from [Sales employee] (Foster) to [Employee] ([Reseller 1]) dated 21 February 2012 (URN FD0016.1).

- 5.75 In a further email exchange on 3 April 2012, [Employee] of [Reseller 1] reminded [Employee] of Foster [REDACTED].<sup>151</sup> With respect to the other five products [Reseller 1] were advertising below the MAP, [Employee] of [Reseller 1] confirmed that *‘Changes to the web advertised pricing of the other products will show from tomorrow.’*<sup>152</sup> [Employee] of Foster emailed [Employee] of [Reseller 1] once more on 11 April 2012 concerning four remaining items priced under MAP and requested that these were amended.<sup>153</sup>
- 5.76 In August 2012, [Reseller 1] advised Foster that it would be [REDACTED] reviewing the products it offered online. For each of the Foster products supplied, [Reseller 1] requested 2013 cost prices, list prices and product lead times.<sup>154</sup> Foster replied to [Employee] and [Employee] at [Reseller 1] on 21 September 2012, thanking them for their *‘patience with the pricing’* and attaching spreadsheets with the MAPs.<sup>155</sup>

### 2013

- 5.77 The evidence demonstrates that [Reseller 1] complied with the MAP Policy during 2013. This was achieved by agreeing to amend prices when requested by Foster, and by ensuring that [Reseller 1] had the correct MAP information in the right format to enable it to comply in a timely manner. Set out below are some examples of [Reseller 1]’s compliance during 2013.
- 5.78 An email from [Director] of Foster to [Reseller 1] in May 2013 confirms that [Reseller 1] was complying with the MAP Policy. There is also a suggestion that the MAP [REDACTED]:

*I have checked and **all the prices are in line with our minimum advertised price** [REDACTED] you also have the assurance that no dealer will be advertising them at a better price in any media.*<sup>156</sup> [Emphasis added.]

---

<sup>151</sup> Email from [Employee] ([Reseller 1]) to [Employee] (Foster) dated 3 April 2012 (URN FD0156).

<sup>152</sup> *Ibid.*

<sup>153</sup> Email from [Employee] (Foster) to [Employee] ([Reseller 1]) dated 11 April 2012 (URN FD0156).

<sup>154</sup> Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 22 August 2012 (URN F110054).

<sup>155</sup> Email from [Employee] (Foster) on behalf of [Sales employee] (Foster) to [Employee] and [Employee] ([Reseller 1]) dated 21 September 2012 (URN F110054). See also attachment titled ‘2013 Foster Refrigerator (U K) Ltd prices’ (URN F110054.1) and attachment titled ‘2012 Minimum Advertised Price’ (URN F110034).

<sup>156</sup> Email from [Director] (Foster) to [Employee] ([Reseller 1]) dated 14 May 2013 (URN FD0175).

- 5.79 On 24 June 2013, [Employee] of [Reseller 1] emailed [Sales employee] of Foster regarding information he had received that [Reseller 1] was advertising below the MAP, and to complain about the lack of guidance from Foster.<sup>157</sup> [Sales employee] replied: *'please accept my apologies for any confusion [...] As requested I have enclosed the MAP policy together with an excel spreadsheet detailing model reference, [Reseller 1]'s Net price, MAP, List price – I hope in this format it makes it easier for you to use your end?'*
- 5.80 [Sales employee] of Foster also noted the consequences if [Reseller 1] did not comply with the MAP Policy: *'We would really appreciate your assistance with arranging for the [✂] to amend the following prices as quickly as they can, as we don't want to leave ourselves open to other distributors using this as an excuse to drop their online process and consequently damage the policy, creating issues for all of us.'*<sup>158</sup>
- 5.81 On 26 June 2013, [Reseller 1] submitted its *'competitor analysis'* to Foster to demonstrate [Reseller 1] had reacted to lower pricing in the market. [Reseller 1] acknowledged in this email, that in *'most instances'* [Reseller 1]'s competitors were advertising at the MAP.<sup>159</sup>
- 5.82 [Sales employee] replied to confirm that she had *'explained that [Foster] are under considerable pressure from other distributors due to the fact that [Reseller 1] are currently advertising some products below the MAP. We are being chased daily for [Reseller 1] to increase their prices to MAP, unfortunately if one distributor doesn't comply then this encourages others to drop their pricing.'* She concluded the email by requesting that the [✂] increased prices and noted that [Reseller 1] was technically in breach of the MAP Policy.<sup>160</sup> [Employee] of [Reseller 1] took action on 1 July 2013 by emailing his colleagues with the following instruction:

*These are the Maps' [sic] for the Foster products that we list. They will not allow any selling prices which are less than this, eg if the MAP is £4,277.00 then 4276.99 is not acceptable. They insist on this as previously [Reseller] have used this to slowing [sic] erode down*

---

<sup>157</sup> Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 24 June 2013 (URN FD0183).

<sup>158</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 1]) dated 24 June 2013 (URN FD0183).

<sup>159</sup> Email from [Employee] ([Reseller 1]) to [Employee] (Foster) dated 26 June 2013 (URN F110021.5).

<sup>160</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 1]) dated 26 June 2013 (URN F110021.5). Specifically, [Sales employee] refers to the fact that [Reseller 1] is outside of the *'7 days grace period as per the online policy'*.

*the MAP by pennies then pounds, which defeats the purpose. Can we have **all sell prices adjusted by the end of this week please**.*<sup>161</sup>  
[Emphasis added.]

- 5.83 The evidence shows that [Reseller 1]’s employees complied with [Employee]’s instruction, as a few days later, [Employee] of [Reseller 1] replied to note: *‘following confirmation from [Employee] [...] I have set all the [X] WEB prices below to the MAP, and this will show correctly on the web from tomorrow.*’<sup>162</sup>
- 5.84 On 12 July 2013, [Employee] of [Reseller 1] emailed [Employee] of [Reseller 1] to request: *‘could we change the price on the website for the product shown on the attached sheet please. Could this be done today [X].*’<sup>163</sup> [Employee] responded that day noting: *‘Web prices are now amended.*’<sup>164</sup> [Employee] of [Reseller 1] then emailed [Employee] to explain that as the change would have resulted in the web price being 40 pence lower than [Reseller 1]’s [X] price, that he had *‘set the WEB price back to £4,227’.* [Employee] replied within the hour to insist: *‘Please set the sell price to 4227.40, **we have to be on or above the MAP.***’<sup>165</sup> (Emphasis added)
- 5.85 On 8 October 2013, [Employee] of [Reseller 1] emailed [Employee] of [Reseller 1] to request particular MAP information *‘ASAP’.*<sup>166</sup> [Employee] forwarded a list of products to Foster stating: *‘I need the MAP’s for these products by 2:00pm today please, if there are no minimum advertised could you let me know.*’<sup>167</sup> [Employee] of Foster replied with the MAP prices,<sup>168</sup> which [Employee] forwarded to [Employee].<sup>169</sup>
- 5.86 On 18 October 2013, [Sales employee] of Foster emailed [Employee] of [Reseller 1] to advise that seven products did not comply with the new MAP

---

<sup>161</sup> Email from [Employee] ([Reseller 1]) to [Employee] and [Employee] ([Reseller 1]) dated 1 July 2013 (URN F110096).

<sup>162</sup> Email from [Employee] ([Reseller 1]) to [Employee] and [Employee] ([Reseller 1]) dated 5 July 2013 (URN F110099).

<sup>163</sup> Email from [Employee] ([Reseller 1]) to [Employee] ([Reseller 1]) dated 12 July 2013 (URN F110101).

<sup>164</sup> Email from [Employee] ([Reseller 1]) to [Employee] (copied to [Employee] ([Reseller 1])) dated 12 July 2013 (URN F110101). The CMA discussed this email exchange with [Employee] ([Reseller 1]) during the witness interview. [Employee] ([Reseller 1]) stated that *‘if I’ve sent an email like that it will have been because of pressure applied to me by Foster...in the case of their products.’* Transcript of interview with [Employee] ([Reseller 1]) dated 5 October 2015 (page 78) (URN F110282).

<sup>165</sup> Email from [Employee] ([Reseller 1]) to [Employee] and [Employee] ([Reseller 1]) dated 12 July 2013 (URN F110101).

<sup>166</sup> Email from [Employee] ([Reseller 1]) to [Employee] ([Reseller 1]) dated 8 October 2013 (F110103).

<sup>167</sup> Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 16 October 2013 (URN F110062).

<sup>168</sup> Email from [Employee] (Foster) to [Employee] ([Reseller 1]) dated 16 October 2013 (URN F110108).

<sup>169</sup> Email from [Employee] ([Reseller 1]) to [Employee] ([Reseller 1]) dated 16 October 2013 (URN F110108).



Policy. He noted: *'I am sure this has been overlooked in your efforts to get all pricing in line with our new policy. Please could you ask the relevant department to correct today.'*<sup>170</sup> (Emphasis added). [Employee] of [Reseller 1] confirmed to [Employee] of [Reseller 1] that he had updated the website, but queried the accuracy of the MAP for one item. [Employee] of [Reseller 1] instructed him to *'just change it to the latest [sic] advised MAP'*.<sup>171</sup>

- 5.87 On 23 October 2013, [Employee] of [Reseller 1] instructed [Employee] of [Reseller 1] not to reduce [Reseller 1]'s price for Foster products below the MAP in reaction to a competitor's pricing ([Reseller]): *'no changes to our sell price to go below MAP please.'* Forwarding an email exchange with Foster to [Employee], [Employee] pointed out that Foster *'have stopped supplies to [Reseller] until they are selling at MAP'*.<sup>172</sup>
- 5.88 On 31 October 2013, Foster emailed [Employee] of [Reseller 1] to advise that *'[f]ollowing your conversation with [Sales employee], please see below products along with your [✂] and the prices that should be shown online [lists four products, the [Reseller 1] Code and the MAP].'*<sup>173</sup> [Employee] forwarded this to [Reseller 1] colleagues, highlighting that [Reseller 1] was *'short on the following [lists 3 products]'*.<sup>174</sup> [Employee] of [Reseller 1] replied shortly afterwards to confirm *'MAP prices are now amended.'*<sup>175</sup>

## 2014

- 5.89 The evidence demonstrates that [Reseller 1] continued to comply with the MAP Policy throughout 2014.
- 5.90 In February 2014, Foster contacted [Reseller 1] about not bringing prices swiftly into line with Foster's revised MAPs, noting: *'your web pricing is still at the 2013 MAP prices.'*<sup>176</sup>

---

<sup>170</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 1]) dated 18 October 2013 (URN F110110).

<sup>171</sup> Email from [Employee] ([Reseller 1]) to [Employee] ([Reseller 1]) dated 18 October 2013 (URN F110113).

<sup>172</sup> Email from [Employee] ([Reseller 1]) to [Employee] ([Reseller 1]) dated 23 October 2013 (URN F110115).

<sup>173</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 1]) dated 31 October 2013 (URN F110119.1).

<sup>174</sup> Email from [Employee] ([Reseller 1]) to [Employee], [Employee] and [Employee] ([Reseller 1]) dated 31 October 2013 (URN F110120).

<sup>175</sup> Email from [Employee] ([Reseller 1]) to [Employee], [Employee], [Employee] and [Employee] ([Reseller 1]) dated 31 October 2013 (URN F110120).

<sup>176</sup> Email from [Sales employee] (Foster) to [Employee] and [Employee] ([Reseller 1]) dated 12 February 2014, further email from [Sales employee] (Foster) on 20 February 2014 and on 21 February 2014 (URN FD0477).

5.91 In response, on 24 February 2014 [Employee] of [Reseller 1] explained to Foster:

[✂]<sup>177</sup>

5.92 The next day, [Sales employee] of Foster asked [Employee] of [Reseller 1] for his 'help' to resolve [Reseller 1]'s MAP pricing issue as soon as possible. He noted that:

*I appreciate that the lack of [Reseller 1] codes on the initial info I sent you caused problems last week. However, we now have several dealers on stop who have not complied, and have closed the account of 1 continuous offender. The new issue this week is that we have had 6 dealers (who were MAP compliant last week) that have dropped their online costs back in line with your web prices – my concern is this number will continue to expand until the [Reseller 1] site is updated.*<sup>178</sup>

5.93 Following several further exchanges, including a suggestion from [Employee] of [Reseller 1] that Foster communicate MAPs using a [Reseller 1] template in future, [Employee] confirmed that *'Sell prices are being corrected now and will show on the web site later today.'*<sup>179</sup>

5.94 On 7 April 2014, [Employee] of [Reseller 1] emailed internal colleagues to advise of the details for additional Foster products from the Foster Xtra range that [Reseller 1] were soon to advertise online: *'[C]ould you set up the products listed on the attached sheet please [...] could you set up the sell prices please, I have given you the MAP here.'*<sup>180</sup>

5.95 In an email dated 1 May 2014, [Employee] of [Reseller 1] noted to [Employee] of [Reseller 1] that Foster had alerted them to three prices on [Reseller 1]'s website that were below the MAP.<sup>181</sup> He said: *'it's their fault as they left them*

---

<sup>177</sup> Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) and [Employee] ([Reseller 1]) dated 24 February 2014 (URN F110158).

<sup>178</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 1]) dated 25 February 2014 (URN F110159).

<sup>179</sup> Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 28 February 2014 (URN FD0286).

<sup>180</sup> Email from [Employee] ([Reseller 1]) to [Employee], [Employee] and [Employee] ([Reseller 1]) dated 7 April 2014 (URN F110132).

<sup>181</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 1]) dated 15 April 2014 (URN F110161 and F110161.1).

*off the 2014 MAP's [sic] list, but we need to amend them by the end of tomorrow.*<sup>182</sup>

- 5.96 On 9 May 2014, [Employee] asked a [Reseller 1] colleague to amend [Reseller 1]'s online prices for three Foster products: *'Foster have advised these MAP's for Chest Freezers, could these be set up so they appear on the website [✂] please.'*<sup>183</sup> Shortly thereafter, [Employee] of [Reseller 1] confirmed that the prices were *'now amended'*.<sup>184</sup>
- 5.97 On 27 June 2014, [Sales employee] of Foster emailed [Employee] of [Reseller 1] to advise that [Reseller 1]'s prices were under the MAP for a number of Foster products. He stated that *'info received states that the 6 products in question had their pricing dropped on 22/6/14? Whether this is the case [...] I am faced with the fact that [Reseller 1] currently have these 6 products advertised below MAP when all your online pricing was previously MAP compliant.'* (Emphasis added). He warned that [Reseller 1]'s account would be *'put on stop'* if amendments to advertised prices were not made.<sup>185</sup> On 30 June 2014, [Employee] of [Reseller 1] confirmed to [Employee] of [Reseller 1] that the prices had been changed online.<sup>186</sup> [Employee] of [Reseller 1] stated that he would inform Foster.<sup>187</sup>

#### *Monitoring and reporting other resellers*

- 5.98 [Reseller 1] notified Foster of non-compliance with the MAP Policy by other resellers.<sup>188</sup> This is evidenced by the following email on 27 June 2014 from [Sales employee] of Foster to [Employee] of [Reseller 1]: *'We have discussed many times how seriously Foster Refrigerator takes this policy and you have been helpful on numerous occasions in pointing out those that are non-compliant.'*<sup>189</sup> This was further confirmed by [Employee] of [Reseller 1] during interview.<sup>190</sup>
- 5.99 Indeed, there is considerable contemporaneous documentary evidence of [Reseller 1] reporting other resellers advertising Foster products at prices

<sup>182</sup> Email from [Employee] ([Reseller 1]) to [Employee] ([Reseller 1]) dated 1 May 2014 (F110135).

<sup>183</sup> Email from [Employee] ([Reseller 1]) to [Employee] ([Reseller 1]) dated 9 May 2014 (URN F110139).

<sup>184</sup> Email from [Employee] ([Reseller 1]) to [Employee] ([Reseller 1]) dated 9 May 2015 (URN F110142).

<sup>185</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 1]) dated 27 June 2014 (URN F110021.1).

<sup>186</sup> Email from [Employee] ([Reseller 1]) to [Employee] ([Reseller 1]) 30 June 2014 (URN F110145).

<sup>187</sup> Email from [Employee] ([Reseller 1]) to [Employee] ([Reseller 1]) 30 June 2014 (URN F110145).

<sup>188</sup> Part A of [Reseller 1]'s response to section 26 notice dated 25 March 2015, question 3.17 (URN F110033).

<sup>189</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 1]) dated 27 June 2014 (URN FD0370).

<sup>190</sup> Transcript of interview with [Employee] ([Reseller 1]) dated 5 October 2015, page 144. (F110282).

lower than the MAP. Evidence on the CMA file shows that [Reseller 1] reported non-compliance on at least 25 occasions.<sup>191</sup>

5.100 On occasion, [Reseller 1] threatened to drop its advertised price in response to the low prices advertised by the resellers it had reported to Foster. The evidence also shows that, on occasion, Foster would confirm to [Reseller 1] the action it had taken to follow up with those resellers [Reseller 1] had identified as advertising below the MAP. On one occasion, Foster warned [Reseller 1] that if it reacted to competition in the market by advertising below the MAP, this would put [Reseller 1] in breach of the MAP Policy.

5.101 Examples of [Reseller 1]'s reporting activities are as follows:

5.101.1 On 12 August 2013, [Employee] of [Reseller 1] reported that [Reseller] was offering a product below the advised MAP.<sup>192</sup>

5.101.2 On 23 October 2013, [Employee] of [Reseller 1] sent an email to [Sales employee] of Foster entitled 'Foster MAP Violation'. He complained that [Reseller] was advertising below the MAP and that

---

<sup>191</sup> See the following 25 documents: Email from [Employee] ([Reseller 1]) to [Employee] (Foster) dated 26 June 2013 (URN F110021.5), Email from [Employee] ([Reseller 1]) to [Sales employee] and [Sales employee] (Foster) dated 12 August 2013 (URN F110165), Email from [Sales employee] (Foster) to [Employee] ([Reseller 1]) dated 2 October 2013 (URN F110166) (note that in this email, [Sales employee] (Foster) refers to [Employee] ([Reseller 1])'s 'message' about non-compliance), Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 23 October 2013 (URN F110086), Email from [Employee] ([Reseller 1]) to [Employee] and [Employee] (Foster) dated 12 December 2013 (URN F110169), Email from [Employee] ([Reseller 1]) to [Sales employee] and [Sales employee] (Foster) dated 7 April 2014 (URN F110170), Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 8 April 2014 (URN F110172), Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 16 April 2014 (URN F110173), Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 16 April 2014 (URN F110174), Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 1 May 2014 (URN F110176), Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 12 May 2014 (URN F110178), Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 20 May 2014 (URN F110179), Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 20 May 2014 (URN F110180), Email from [Employee] ([Reseller 1]) to [Sales employee] and [Sales employee] (Foster) dated 23 May 2014 (URN F110182), Email from [Employee] ([Reseller 1]) to [Sales employee] and [Sales employee] (Foster) dated 23 May 2014 (URN F110183), Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 10 June 2014 (URN FD0522), Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 23 June 2014 (URN F110184), Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 11 July 2014 (URN F110187), Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 16 July 2014 (URN F110188), Email from [Employee] ([Reseller 1]) to [Sales employee] and [Sales employee] (Foster) dated 31 July 2014 (URN F110189), Email from [Employee] ([Reseller 1]) to [Sales employee] and [Sales employee] (Foster) dated 5 August 2014 (URN F110190), Email from [Employee] ([Reseller 1]) to [Sales employee] and [Sales employee] (Foster) dated 6 August 2014 (URN F110191), Email from [Employee] ([Reseller 1]) to [Sales employee] and [Sales employee] (Foster) dated 15 August 2014 (URN F110193), Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 11 September 2014 (URN F110195), Email from [Employee] ([Reseller 1]) to [Sales employee] and [Sales employee] (Foster) dated 3 October 2014 (URN F110196).

<sup>192</sup> Email from [Employee] to [Sales employee] and [Sales employee] ([Reseller 1]) dated 12 August 2013 (URN F110165).

[Reseller 1] would wait until Friday 26 October *'before lowering our sell price to match [sic] this [...] Await your reply.'*<sup>193</sup> Within the hour, [Sales employee] of Foster confirmed that *'all products have been removed until they can be placed on at the minimum advertised price.'*<sup>194</sup> [Employee] of [Reseller 1] then instructed his colleague [Employee] not to price below the MAP.<sup>195</sup>

5.101.3 On 12 December 2013, [Employee] of [Reseller 1] contacted [Employee] of Foster to report a product which was being advertised below Foster's cost price. A potential customer had drawn this to the attention of the [Reseller 1] sales team. [Employee] of [Reseller 1] asked [Employee] to *'look into this as a matter of urgency'*.<sup>196</sup>

5.101.4 On 7 April 2014, [Employee] of [Reseller 1] reported [Reseller] for selling two items below the MAP: *'[S]elling prices for some of your products have become very competitive in the marketplace. Could you check our cost prices for these products please, we will of course be matching these in the market and are concerned at losing further margin.'* He gave Foster a deadline of 4pm to reply.<sup>197</sup> [Sales employee] of Foster responded confirming that he expected [Reseller]'s website to be compliant within 36 hours. He asked [Reseller 1] not to reduce its prices to match [Reseller]'s prices, and noted that such action by [Reseller 1] would trigger the MAP Policy sanctions.<sup>198</sup>

5.101.5 On 20 May 2014, [Employee] of [Reseller 1] reported three more products advertised below MAP and asked [Sales employee] of Foster to *'confirm whether our cost prices are correct, we seem to be slipping behind the competition.'*<sup>199</sup> [Sales employee] of Foster

---

<sup>193</sup> Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 23 October 2013 (URN F110086).

<sup>194</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 1]) dated 23 October 2013 (URN F110086).

<sup>195</sup> Email from [Employee] ([Reseller 1]) to [Employee] ([Reseller 1]) dated 23 October 2013 (URN F110115). See paragraph 5.87 above.

<sup>196</sup> Email from [Employee] ([Reseller 1]) to [Employee] and [Employee] (Foster) dated 12 December 2013 (URN F110169).

<sup>197</sup> Email from [Employee] ([Reseller 1]) to [Sales employee] and [Sales employee] (Foster) dated 7 April 2014 (URN F110170).

<sup>198</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 1]) and [Sales employee] (Foster) dated 7 April 2014 (URN F110171).

<sup>199</sup> Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 20 May 2014 (URN F110179).

responded and thanked [Employee] for *'keeping us [Foster] updated with offenders. It helps a lot.'*<sup>200</sup>

- 5.101.6 On 10 June 2014, [Employee] of [Reseller 1] emailed [Sales employee] of Foster to report the *'MAP violations that we have encountered today'*.<sup>201</sup>
- 5.101.7 On 23 June 2014, [Employee] of [Reseller 1] reported [Reseller] for offering a price to a [Reseller 1] customer that would leave [Reseller 1] with a negative margin. [Employee] requested a reply by 8am the next day.<sup>202</sup>
- 5.101.8 On 15 August 2014, in an email entitled *'[Reseller 1] market survey'* [Employee] of [Reseller 1] provided [Sales employee] and [Sales employee] of Foster with a list of five Foster products beneath the MAP. He stated: *'await your comments on these market offers.'*<sup>203</sup> [Sales employee] thanked [Employee] of [Reseller 1] for the information and updated him on his contact with the non-compliant resellers.<sup>204</sup>
- 5.101.9 On 11 September 2014, [Employee] of [Reseller 1] reported four products offered beneath the MAP.<sup>205</sup> In reply, on 15 September 2014, [Sales employee] of Foster confirmed that [Reseller] had updated its prices, that [Reseller] were advertising at the MAP, and that [Reseller] had priced an obsolete product and were otherwise at the MAP.<sup>206</sup>
- 5.101.10 On 3 October 2014, [Employee] of [Reseller 1] emailed [Sales employee] of Foster alerting him to a number of offers by [Reseller] on Foster products. He asked: *'I've just seen the [Reseller] [✂], have I missed an e-mail from you with price reduction offers or a Foster backed promotion? Pages attached for your information.'*

---

<sup>200</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 1]) dated 20 May 2014 (URN F110181).

<sup>201</sup> Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 10 June 2014 (URN FD0522).

<sup>202</sup> Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 23 June 2014 (URN F110184).

<sup>203</sup> Email from [Employee] ([Reseller 1]) to [Sales employee] and [Sales employee] (Foster) dated 15 August 2014 (URN F110193).

<sup>204</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 1]) and [Sales employee] (Foster) dated 18 August 2014 (URN F110088).

<sup>205</sup> Email from [Employee] ([Reseller 1]) to [Sales employee] (Foster) dated 11 September 2014 (URN F110195).

<sup>206</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 1]) dated 15 September 2014 (F110089).

*Await your comments.*<sup>207</sup> On 6 October 2014, [Sales employee] of Foster replied setting out his investigations in relation to [Reseller] and confirmed that *'[h]istorically like yourselves, [Reseller] have been a good supporter of our policy. Their online pricing has not been altered and continues to remain compliant with our pricing policy [...]. As always we appreciate your continued support with our policy.'*<sup>208</sup>

#### *Conclusion on [Reseller 1]'s compliance with the MAP Policy*

- 5.102 The evidence set out above demonstrates that [Reseller 1] received the MAP Policy in January 2012. Further, for each of 2012, 2013 and 2014, there is evidence to demonstrate that [Reseller 1] amended its advertised prices in order to comply with the MAP Policy when requested to do so by Foster. Internal exchanges between [Reseller 1] colleagues further demonstrate the action taken by [Reseller 1] to set its prices no lower than the MAP in response to Foster's instructions. On at least two occasions, Foster acknowledged in correspondence with [Reseller 1] that [Reseller 1] had been complying with the MAP and that, in Foster's view, [Reseller 1] had been supportive of the MAP Policy.
- 5.103 In addition, the evidence shows that [Reseller 1] played a role in ensuring compliance with the MAP Policy in at least 2013 and 2014 by reporting other resellers who were not complying and by pressuring Foster to take action. On at least two occasions, Foster acknowledged the assistance given by [Reseller 1] in this regard.

#### *(b) [Reseller 2]*

#### *Discussions with Foster prior to the introduction of the MAP Policy*

- 5.104 In June 2011, [Reseller 2] provided Foster with information on the low prices being advertised online by certain Foster resellers.<sup>209</sup> Specifically, [Reseller 2]

---

<sup>207</sup> Email from [Employee] ([Reseller 1]) to [Sales employee] and [Sales employee] (Foster) dated 3 October 2014 (URN F110196).

<sup>208</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 1]) dated 6 October 2014 (URN F110090).

<sup>209</sup> Email from [Employee] ([Reseller 2]) to [Sales employee] (Foster) dated 15 June 2011 (URN FD0573).

identified Foster resellers advertising at prices that, if matched by [Reseller 2], would result in very low margins.

#### *Instructions from Foster*

- 5.105 [Reseller 2] confirmed to the CMA that it received instructions from Foster not to advertise Foster products below a recommended price.<sup>210</sup> Contemporaneous documents show that [Reseller 2] received the MAP Policy in January 2012<sup>211</sup> and that it received the 2014 update to the policy.<sup>212</sup> [Reseller 2] also provided a letter from Foster dated 15 July 2013 requesting that [Reseller 2] apply the MAP Policy.<sup>213</sup> With respect to the 2013 update to the MAP Policy, the evidence shows that [Sales employee] contacted [Employee] on 7 October 2013 to discuss the update.<sup>214</sup>

#### *Compliance with the MAP Policy by [Reseller 2]*

- 5.106 In informal discussions with the CMA, [Reseller 2] said that it had initially sought to oppose the MAP Policy.<sup>215</sup> It did not provide any evidence to the CMA to support this. When asked by the CMA what action (if any) it took in response to the requests/instructions received from Foster set out in the MAP Policy, [Reseller 2] told the CMA that it had told Foster that it would change prices to comply with the MAP Policy and that it had done so in practice.<sup>216</sup>
- 5.107 Contemporaneous evidence also demonstrates that [Reseller 2] agreed to change its prices, when requested to do so by Foster, and that it told Foster that it had complied with the MAP Policy.
- 5.108 Specifically, on 12 July 2013, [Employee] of [Reseller 2] emailed Foster to complain of non-compliance by other resellers, in contrast to his own efforts to comply:

---

<sup>210</sup> See Question 2 of [Reseller 2]'s response to section 26 notice dated 3 November 2014 (URN F50012.1). See also email from [Sales employee] (Foster) to [Employee] ([Reseller 2]) dated 16 January 2012 (URN FD0001).

<sup>211</sup> 'Foster Refrigerator – Product discounting and published prices' dated 6th January 2012 (URN F50012.5). See also email from [Sales employee] (Foster) to [Employee] ([Reseller 2]) dated 16 January 2012 (URN FD0001).

<sup>212</sup> 'Foster Refrigerator – Product discounting and published prices effective by 1st February 2014' (URN F50012.37).

<sup>213</sup> Letter from [Sales employee] (Foster) to [Employee] ([Reseller 2]) dated 15 July 2013 (URN F50012.18).

<sup>214</sup> See Question 3 of Foster's response to section 26 notice dated 22 May 2015 (URN FD0636.4) ([Sales employee]'s call log, in which he records that on 7 October 2013 he contacted [Employee] of [Reseller 2].

<sup>215</sup> Notes of telephone calls between [Employee] ([Reseller 2]) and the CMA dated 25 August 2015 and 2 September 2015 (URNs F50018 and F50019).

<sup>216</sup> See Question 3.13 and 3.14 of [Reseller 2]'s response to section 26 notice dated 3 November 2014 (URN F50012.1).



*If there are letters being sent out to us and [Reseller], you better get around another 50 or so sent out to all those others that are also taking the biscuit. **All the time I spent putting our prices back up to your MAP has clearly gone done [sic] the swanny [sic], as no one has taken notice. I waited and waited for action to be taken towards others and nothing has changed.** I wasn't prepared to watch sales decrease our end and action had to be taken from my point of view. [...] **Maybe it's all the others turn to put things right this time before we do.***<sup>217</sup> [Emphasis added.]

- 5.109 Foster took swift action against [Reseller 2] for lowering prices to respond to competition. On 15 July 2013, Foster issued [Reseller 2] with an official warning letter. The letter required [Reseller 2] to comply with the MAP Policy and warned that [Reseller 2]'s discount and Foster dealership could be revoked if [Reseller 2] continued to fail to meet the pricing requirements of the MAP Policy.<sup>218</sup> It further stated that *'It is not a defence to say that other dealers are not adhering to the policy.'* In an email to Foster, [Reseller 2] stated *'we have done what you asked.'*<sup>219</sup>
- 5.110 Prior to this warning letter, the evidence demonstrates that when Foster requested that [Reseller 2] change a price, it would agree to do so.
- 5.111 On 26 February 2013, [Employee] of Foster emailed [Employee] of [Reseller 2] to request a change to [Reseller 2]'s price: *'Please can you take a look at the below, the EP700H is below minimum advertised price policy (£1098.00) [...] Please have this amended to the minimum of £1148.85.'*<sup>220</sup> [Employee] of [Reseller 2] responded on the same day and confirmed that he would *'change this now'*. He further sought confirmation that [Reseller 2]'s competitors were also aware of the MAP Policy.<sup>221</sup> [Employee] of Foster reassured him of Foster's actions: *'This policy has been in place for over a year – all our dealers would have been made aware. We do check the websites to make sure*

<sup>217</sup> Email from [Employee] ([Reseller 2]) to [Sales employee], [Sales employee] and [Employee] (Foster) dated 12 July 2013 (URN F50012.16).

<sup>218</sup> Letter from [Sales employee] (Foster) to [Employee] ([Reseller 2]) dated 15 July 2013 (URN F50012.18).

<sup>219</sup> Email from [Employee] ([Reseller 2]) to [Sales employee] (Foster) dated 7 August 2013 (URN F50012.19).

<sup>220</sup> Email from [Employee] (Foster) to [Employee] ([Reseller]) dated 26 February 2013 (URN F50012.6).

<sup>221</sup> Email from [Employee] ([Reseller 2]) to [Employee] (Foster) dated 26 February 2013 (URN F50012.6). See also URN FD0149 and URN FD0184.

*companies are adhering to the policy, but if you come across any that are not – please drop me an email.*<sup>222</sup>

- 5.112 On 30 April 2013, [Employee] of Foster alerted [Reseller 2] that it was advertising two Foster products under the MAP.<sup>223</sup>
- 5.113 This was followed, in May 2013, by an exchange between [Employee] of [Reseller 2] and [Employee] of Foster concerning a spreadsheet compiled by [Reseller 2]. Having confirmed that she had contacted certain resellers, [Employee] of Foster asked [Employee] of [Reseller 2] to *‘Please advise when you can amend the ones on your website that are slightly under.*<sup>224</sup> In a subsequent email, she named a number of resellers that had already amended their prices and stated *‘by Thursday all should be done.*<sup>225</sup> (Emphasis added.) In response, [Employee] of [Reseller 2] confirmed that he *‘will be changing the prices soon’* (Emphasis added.)<sup>226</sup> A few hours later, [Employee] of Foster thanked [Employee] of [Reseller 2] for updating [Reseller 2]’s prices.<sup>227</sup>
- 5.114 On 25 June 2013, [Employee] of Foster asked [Employee] of [Reseller 2] to amend an online price.<sup>228</sup> In response, [Employee] asked *‘how come the price has changed?’*<sup>229</sup>

#### *Monitoring and reporting other resellers*

- 5.115 From May 2013 onwards, [Reseller 2] provided Foster with regular spreadsheets setting out the online prices being advertised by other resellers for Foster products. [Reseller 2] provided this information to Foster in May, June, July, August and October 2013, and in January, February and August 2014. The evidence for this is set out below.
- 5.116 On many of these occasions, [Reseller 2] encouraged Foster to take action against non-compliant resellers. Prior to receiving the warning letter from Foster in July 2013, [Reseller 2] had also threatened Foster that it would match

---

<sup>222</sup> Email from [Employee] (Foster) to [Employee] ([Reseller 2]) dated 26 February 2013 (URN F50012.6). See also URN FD0149 and URN FD0184.

<sup>223</sup> Email from [Employee] (Foster) to [Employee] ([Reseller 2]) dated 30 April 2013 (URN F50012.7).

<sup>224</sup> Email from [Employee] (Foster) to [Employee] ([Reseller 2]) dated 21 May 2013 (URN F50012.11).

<sup>225</sup> *Ibid.*

<sup>226</sup> Email from [Employee] ([Reseller 2]) to [Employee] dated 23 May 2013 (URN F50012.11).

<sup>227</sup> Emails from [Employee] (Foster) to [Employee] dated 23 May 2013 (URN F50012.10).

<sup>228</sup> Email from [Employee] (Foster) to [Employee] ([Reseller 2]) dated 25 June 2013 (URN F50012.14).

<sup>229</sup> *Ibid.*

the prices of its competitors if no action was taken. The evidence demonstrates that Foster acted on the information from [Reseller 2] by contacting the non-compliant resellers, and that it encouraged [Reseller 2] to continue to provide Foster with such information. For example:

- 5.116.1 On 17 May 2013, in an email entitled 'Online Policy', [Employee] of Foster asked [Employee] of [Reseller 2] to send her a copy of his *'spreadsheet regarding online dealers'*.<sup>230</sup> [Employee] of [Reseller 2] sent [Employee] of Foster the spreadsheet that day,<sup>231</sup> which indicated that price checks were conducted on 29 April 2013. The spreadsheet included the resellers' online prices along with the expected margin for [Reseller 2] if it were to match the best available price.<sup>232</sup>
- 5.116.2 On 21 May 2013, [Employee] of Foster again emailed [Employee] of [Reseller 2] in relation to the online dealer spreadsheet to thank him for the information.<sup>233</sup> [Employee] replied and identified the resellers he was most concerned with. He stated: *'I will keep an eye on these, and if we see them starting to drop their prices I will be happy enough to do the same.'*<sup>234</sup> [Employee] of Foster replied to inform [Employee] of the resellers that had already amended their prices, along with the timeframe in which she expected full compliance from the remainder.<sup>235</sup>
- 5.116.3 On 13 June 2013, [Employee] of [Reseller 2] reported [Reseller] for non-compliance: *'Looks to me like [Reseller] aren't playing ball with the guidelines. You best look at their prices as it's going to affect us again.'*<sup>236</sup> [Employee] of [Reseller 2] contacted Foster again on 17 June 2013, to highlight that [Reseller]'s prices had not changed. [Sales employee] of Foster replied:

*We appreciate you bringing these issues to our attention and ask that you bear with us until the early part of next week. I also appreciate that price parity is vitally important in*

---

<sup>230</sup> Email from [Employee] (Foster) to [Employee] ([Reseller 2]) dated 17 May 2013 (URN F50012.8).

<sup>231</sup> Email from [Employee] ([Reseller 2]) to [Employee] (Foster) dated 17 May 2013 (URN F50012.8).

<sup>232</sup> Email from [Employee] ([Reseller 2]) to [Employee] (Foster) dated 17 May 2013 (URN F50012.9).

<sup>233</sup> Email from [Employee] (Foster) to [Employee] ([Reseller 2]) dated 21 May 2013 (URN F50012.11).

<sup>234</sup> Email from [Employee] ([Reseller 2]) to [Employee] (Foster) dated 21 May 2013 (URN F50012.11).

<sup>235</sup> Emails from [Employee] (Foster) to [Employee] dated 21 and 23 May 2013 (URN F50012.11).

<sup>236</sup> Email from [Employee] ([Reseller 2]) to [Employee] (Foster) dated 13 June 2013 (URN F50012.12).

*the online market and would ask if you could refrain from price matching until we have spoken to [Reseller] in order that we avert another price war where the only winner is the end user.*<sup>237</sup>

[Employee] of [Reseller 2] sent [Sales employee] of Foster a further email on 28 June 2013: *'[Reseller] are still the same prices and it's getting ridiculous now. I have noticed [Reseller] being below too.'*<sup>238</sup>

5.116.4 On 12 July 2013, [Employee] of [Reseller 2] provided Foster with a further version of the reporting spreadsheet: *'the latest spreadsheet I have endlessly and tirelessly put together (again!).'*<sup>239</sup>

5.116.5 On 7 August 2013, [Employee] of [Reseller 2] emailed [Sales employee] of Foster to request confirmation that *'action has been taken to those that are still undercutting the pricing guidelines. If we have done what you asked and others still haven't after letters were sent out, then how can this be still going on?'*<sup>240</sup>

5.116.6 On 15 August 2013, [Employee] of [Reseller 2] sent [Sales employee] of Foster an email entitled '[Reseller]' with the message *'Maybe [sic] worth looking at their prices.'*<sup>241</sup>

5.116.7 On 7 October 2013, [Sales employee] of Foster called [Employee] of [Reseller 2] to discuss the 2013 update of the MAP Policy. During this call he invited [Employee] to continue reporting violations of the MAP Policy to Foster.<sup>242</sup>

5.116.8 On 21 October 2013, [Employee] of [Reseller 2] forwarded to [Sales employee] of Foster links to resellers' websites.<sup>243</sup> In response to an email containing a list of websites, [Sales employee] of Foster stated *'I have passed all the links you sent to me on to [Sales*

---

<sup>237</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 2]) dated 17 June 2013 (URN F50012.13).

<sup>238</sup> Email from [Employee] ([Reseller 2]) to [Sales employee] (Foster) dated 28 June 2013 (URN F50012.15).

<sup>239</sup> Email from [Employee] ([Reseller 2]) to [Sales employee], [Sales employee] and [Employee] (Foster) dated 12 July 2013 (URN F50012.16).

<sup>240</sup> Email from [Employee] ([Reseller 2]) to [Sales employee] (Foster) dated 7 August 2013 (URN F50012.19).

<sup>241</sup> Email from [Employee] ([Reseller 2]) to [Sales employee] (Foster) dated 15 August 2013 (URN F50012.21).

<sup>242</sup> Transcript of call between [Employee] ([Reseller 2]) and [Sales employee] (Foster) dated 7 October 2013 (URN F50027.4).

<sup>243</sup> Emails from [Employee] ([Reseller 2]) to [Sales employee] (Foster) dated 21 October 2013, (URN F50012.23, URN F50012.24, URN F50012.25, URN F50012.26, URN F50012.27, URN F50012.28, URN F50012.29 of [Reseller 2]'s response to section 26 notice dated 3 November 2014

*employee] [Foster] who is conducting the checks at our head office. Again we appreciate the feedback from [Reseller 2] on this and yourself in particular.*<sup>244</sup> [Employee] of [Reseller 2] then asked [Sales employee] of Foster: *'Are they going to be dealt with like the letter suggests?'*<sup>245</sup> [Sales employee] of Foster responded: *'That is what I believe we're doing [Employee].'*<sup>246</sup> The next day, [Employee] of [Reseller 2] provided [Sales employee] and [Sales employee] of Foster with additional reseller web links.<sup>247</sup>

- 5.116.9 On 28 October 2013, [Employee] of [Reseller 2] forwarded his *'latest price checking spread sheet'*:

*As you can see there are at least 26 dealers selling your products underneath the new MAP guidelines 10 days after this was introduced. [...] I would expect this to be enforced to all that are breaking this guideline.*<sup>248</sup>

[Sales employee] responded:

*Many thanks for this info. [...] We are implementing this policy and every one of the dealers on the list will have been contacted or will be contacted today. We have implemented this policy with those who have offended and are really pleased with the results so far. To have 26 to contact today is good and some of these have one or 2 products which look like they might be mistakes or oversights.*<sup>249</sup>

- 5.116.10 On 1 November 2013, [Sales employee] of Foster thanked [Employee] of [Reseller 2] for information which *'really helps [Foster] to clamp down [on resellers]'*:

*We have at least a dozen customers with reduced discount which effectively puts them on stop. We have also written to 2 dealers giving them a set time or they will lose their*

---

<sup>244</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 2]) dated 21 October 2013 (URN F50012.30).

<sup>245</sup> Email from [Employee] ([Reseller 2]) to [Sales employee] (Foster) dated 21 October 2013 (URN F50012.30).

<sup>246</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 2]) dated 21 October 2014 (URN F50012.30).

<sup>247</sup> Emails from [Employee] ([Reseller 2]) to [Sales employee] (Foster) and [Sales employee] (Foster) dated 22 October 2013 (URN F50012.31, URN F50012.32, URN F50012.33, and URN F50012.34).

<sup>248</sup> Email from [Employee] ([Reseller 2]) to [Sales employee] (Foster) dated 28 October 2013 (URN F50012.35).

<sup>249</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 2]) dated 29 October 2013 (URN F50012.35).

*dealerships. Around 10 people this week have increased their prices in line with MAP. [...] We welcome your weekly reports and will be vigilantly policing this going forward.*<sup>250</sup>

5.116.11 On 23 January 2014, [Employee] of [Reseller 2] emailed [Sales employee] of Foster with the subject title 'Latest Price Checking Sheet'. The email attached a further spreadsheet detailing prices advertised by Foster resellers.<sup>251</sup>

5.116.12 On 11 February 2014, [Employee] of [Reseller 2] asked Foster to 'deal with' one reseller advertising below the MAP. It added 'we haven't sold one of your products this month and it's obviously showing why.'<sup>252</sup> [Sales employee] of Foster responded:

*I will sort out [Reseller] tomorrow. [...] All the guys are phoning the list over the next 2 days and will have this sorted by the end of the week with any non-conformers being on stop and in the process. Thanks again for your help. I will offer additional discount for the next couple of orders.*<sup>253</sup>

5.116.13 A few days later, on 17 February 2014, [Employee] of [Reseller 2] sent another spreadsheet and asked Foster to take action against the offenders: 'Think it's time some discounts are cut & accounts cut off.'<sup>254</sup> In a further email of the same day, [Sales employee] of Foster added:

*To be fair we have had a great response from those under MAP with many apologies and immediate responses. Think that some people don't really monitor their website and use it as a sales tool the way you guys do.*<sup>255</sup>

---

<sup>250</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 2]) dated 1 November 2013 (URN F50012.36).

<sup>251</sup> Email from [Employee] ([Reseller 2]) to [Sales employee] (Foster) dated 23 January 2013 (URN F50012.38 and F50012.39).

<sup>252</sup> Email from [Employee] ([Reseller 2]) to [Sales employee] and [Sales employee] (Foster) dated 11 February 2014 (URN F50012.40).

<sup>253</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 2]) dated 11 February 2014 (URN F50012.40).

<sup>254</sup> Email from [Employee] ([Reseller 2]) to [Sales employee] and [Sales employee] (Foster) dated 17 February 2014 (URN F50012.41 and URN F50012.42).

<sup>255</sup> Email from [Employee] ([Reseller 2]) to [Sales employee] and [Sales employee] (Foster) dated 17 February 2014 (URN F50012.43).

5.116.14 On 27 August 2014, [Employee] of [Reseller 2] sent [Sales employee] and [Sales employee] of Foster a link to a reseller's website, noting it was possible to obtain a discount off the MAP price.<sup>256</sup> On 17 and 24 September 2014, [Employee] of [Reseller 2] emailed again about the website and asked what action had been taken.<sup>257</sup> On 24 September, [Sales employee] replied stating that Foster could not find the discounts on the reseller's website, and asked [Employee] to assist.<sup>258</sup> On 21 October 2014, [Sales employee] of Foster emailed [Employee] of [Reseller 2] to confirm that he had discussed the matter with [Sales employee] of Foster and that the reseller is '*on stop and are unable to buy our products due to MAP violation*'.<sup>259</sup>

*Conclusion on [Reseller 2]'s compliance with the MAP Policy*

5.117 The evidence set out above demonstrates that [Reseller 2] received the MAP Policy in January 2012. Further, [Reseller 2] complied with the MAP Policy by amending its advertised prices when requested to do so by Foster so they were no lower than the MAP. This is supported by contemporaneous evidence from 2013. In addition, from May 2013, [Reseller 2] monitored other resellers' compliance with the MAP Policy and reported examples of non-compliance to Foster.

(c) *[Reseller 3]*

*Discussions with Foster prior to the introduction of the MAP Policy*

5.118 Foster stated to the CMA that it provided advance notice of its MAP Policy to [X] resellers, one of which was [Reseller 3].<sup>260</sup>

5.119 This is supported by contemporaneous internal [Reseller 3] documents. For example, on 17 November 2011, [Employee] of [Reseller 3] sent an email to internal colleagues to report his conversations with Foster in relation to the pressure being placed on the market price of Foster products by online sales:

---

<sup>256</sup> Email from [Employee] ([Reseller 2]) to [Sales employee] and [Sales employee] (Foster) dated 27 August 2014 (URN F50012.46).

<sup>257</sup> Email from [Employee] ([Reseller 2]) to [Sales employee] and [Sales employee] (Foster) dated 17 September 2014 and 24 September 2014 (URN F50012.46).

<sup>258</sup> Email from [Sales employee] (Foster) to [Sales employee] (Foster) and [Employee] ([Reseller 2]) dated 24 September 2014 (URN F50012.46).

<sup>259</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 2]) dated 21 October 2014 (URN F50012.46).

<sup>260</sup> Question 31 of Foster's response to section 26 notice dated 22 May 2015 (URN FD0664).

*As I am sure you are all aware there are dealers/distributors/internet traders who are putting pressure on the market price of Fosters [sic] products. We have been taking this up with Fosters [sic] for a period of time and they are soon to write to all of their dealers stating that they will be applying a minimum advertised selling price with penalties for companies breaking the policy. Hopefully this will show to you and your teams that Fosters [sic] are aware of the issue and are taking active steps to resolve and drive value back into the market.*<sup>261</sup>

- 5.120 [Reseller 3] then received a draft of the MAP Policy and was promised the final version once available.<sup>262</sup> [Reseller 3] subsequently stated that it was pressured by competitors' low prices: *'As discussed with [Director] in our recent meeting, we are often under price pressure from lower cost competitors and we need to find away [sic] to compete [...] I believe Fosters are putting together a document and then going to see [Employee]. [X]'*<sup>263</sup>

#### *Instructions from Foster*

- 5.121 [Reseller 3] received the draft MAP Policy in November 2011.<sup>264</sup> The contemporaneous documentary evidence shows that Foster issued the final version of the January 2012 MAP Policy to [Reseller 3] at that time.<sup>265</sup> Foster also issued the 2013 and 2014 updates to the MAP Policy to [Reseller 3].<sup>266</sup>
- 5.122 [Reseller 3] explained to the CMA that it understood the MAP Policy was an instruction from Foster requiring [Reseller 3] not to advertise Foster products

<sup>261</sup> Email from [Employee] ([Reseller 3]) to [Employee], [Employee], [Employee], [Employee] and [Employee] ([Reseller 3]) dated 17 November 2011 (URN F90014.4).

<sup>262</sup> Email from [Director] (Foster) to [Employee] ([Reseller 3]) dated 22 November 2011 (URN F90014.6 and URN F90014.7). See also Part 1, question 1(i) of [Reseller 3]'s response to section 26 notice dated 3 November 2014, where [Reseller 3] states that Foster provided it with a draft dealer policy (URN F90014.1). The CMA notes that the draft dealer policy Foster provided to [Reseller 3] is substantively the same as the final version of the MAP Policy issued to Foster resellers in January 2012.

<sup>263</sup> Email from [Employee] ([Reseller 3]) to [Employee] (Foster) dated 28 November 2011 (URN F90014.8).

<sup>264</sup> Part A, question 3.2 of [Reseller 3]'s response to section 26 notice dated 3 November 2014 (URN F90014.1). See also Part 1, question 1(i) of [Reseller 3]'s response to section 26 notice dated 3 November 2014, where [Reseller 3] states that Foster provided it with a draft dealer policy (URN F90014.1). See also, email from [Director] (Foster) to [Employee] ([Reseller 3]) dated 22 November 2011 (URN F90014.6 and URN F90014.7). See paragraph 5.119 above.

<sup>265</sup> See footnote 82.

<sup>266</sup> Part A, question 3.2 of [Reseller 3]'s response to section 26 notice dated 3 November 2014 (URN F90014.1).



below a minimum advertised price, either online or through other sales channels.<sup>267</sup>

- 5.123 Furthermore, the contemporaneous documentary evidence confirms that Foster issued instructions to [Reseller 3] to comply with the minimum advertised price on a number of other occasions.<sup>268</sup> This is discussed below.

*Compliance with the MAP Policy by [Reseller 3]*

- 5.124 The evidence demonstrates that on those occasions when [Reseller 3] did not comply with the MAP Policy and this was identified by Foster, [Reseller 3] would adjust its prices so that these were no lower than the MAP as requested by Foster. The evidence of this is set out below.

- 5.125 The CMA asked [Reseller 3] whether prior to, or at the time of receiving the instructions from Foster, it advertised Foster products online below the MAP.<sup>269</sup> [Reseller 3] stated that up until 2014 (with the exception of one instance in March 2013), it did not advertise Foster's products below the MAP. [Reseller 3] told the CMA that it *'generally advertised its products higher than the Foster MAP'*.<sup>270</sup>

- 5.126 On 12 March 2013, [Director] of Foster contacted [Employee] of [Reseller 3] to request that [Reseller 3] amend the price of a product advertised below the MAP: *'Would you please check the following link, this BCT21 is advertised below the minimum advertised price, any chance you can change please. The price should be no less than £ [sic] £3410.'*<sup>271</sup> [Employee] forwarded this request to his colleague [Employee] for instruction.<sup>272</sup> [Reseller 3] stated to the CMA that it is likely that the price was subsequently changed: *'the absence of follow up communications from Foster suggests that [Reseller 3] amended its advertised price to bring it in line with the required MAP.'*<sup>273</sup>

---

<sup>267</sup> *Ibid*, Part A, questions 1 and 2.

<sup>268</sup> *Ibid*, Part A, question 1. [Reseller 3] told the CMA that it also received instructions from Foster on March 2013, March 2014, April 2014 and May 2014, concerning the price at which [Reseller 3] had advertised Foster products.

<sup>269</sup> Question 3.8, section 26 notice dated 3 November 2014 (URN F90001.1).

<sup>270</sup> Part A, question 3.8 of [Reseller 3]'s response to section 26 notice dated 3 November 2014 (URN F90014.1).

<sup>271</sup> Email from [Director] (Foster) to [Employee] ([Reseller 3]) dated 12 March 2013 (URN F90014.16).

<sup>272</sup> Email from [Employee] ([Reseller 3]) to [Employee] ([Reseller 3]) dated 12 March 2013 (URN F90014.16).

<sup>273</sup> Part A, question 3.14 of [Reseller 3]'s response to section 26 notice dated 3 November 2014 (URN F90014.1).

- 5.127 [Reseller 3] told the CMA that in or after January 2014, it used the 2014 MAPs to set the prices displayed in its catalogue and on its website.<sup>274</sup> On 8 January 2014, [Reseller 3] requested the latest Foster MAPs for its 2014 catalogue: *'do you have you [sic] min advertised pricing for 2014 sorted out yet? If so can you send me it on a spreadsheet.'*<sup>275</sup>
- 5.128 [Reseller 3] told the CMA that it advertised a number of products below the MAPs during Q1 2014, as per its revised, independent pricing strategy.<sup>276</sup>
- 5.129 However, [Reseller 3] also told the CMA that in March and April 2014, and again in May and June 2014, it agreed to amend its advertised prices in response to instructions from Foster to comply with the MAP Policy.<sup>277</sup>
- 5.130 Documentary evidence confirms that, during 2014, [Reseller 3] did on several occasions advertise prices below the MAP. When requested by Foster, [Reseller 3] agreed to change its advertised prices to comply with the MAP Policy. For example:
- 5.130.1 On 21 March 2014, [Employee] of Foster contacted [Employee] of [Reseller 3] to request that products advertised on [Reseller 3]'s website below the MAP were *'adjusted with immediate effect'*.<sup>278</sup> [Employee] responded that [Reseller 3]'s web pricing would *'go live'* in April 2014.<sup>279</sup> A prompt reply from [Director] of Foster emphasised to [Employee] the need for [Reseller 3] to comply with the MAP Policy: *'I am sure you appreciate once we make an exception we may as well scrap the policy which is designed to protect dealer margins, we really need your co-operation with this.'*<sup>280</sup>
- 5.130.2 On 25 March 2014, [Sales employee] of Foster shared his analysis of [Reseller 3]'s advertised prices with [Director] of Foster. He noted

---

<sup>274</sup> *Ibid.*

<sup>275</sup> Email from [Employee] ([Reseller 3]) to [Employee] (Foster) dated 8 January 2014 (URN F90014.19). See also Foster's response to section 26 notice dated 28 August 2014 (URN FD0447).

<sup>276</sup> Part A, question 3.8 of [Reseller 3]'s response to section 26 notice dated 3 November 2014 (URN F90014.1).

<sup>277</sup> *Ibid.*, Part A, question 3.13.

<sup>278</sup> Email from [Employee] (Foster) (cc [Director] and other Foster colleagues) to [Employee] ([Reseller 3]) dated 21 March 2014 (URN FD0304).

<sup>279</sup> Email from [Employee] ([Reseller 3]) to [Director] (Foster) dated 21 March 2014 (URN FD0303).

<sup>280</sup> Email from [Employee] ([Reseller 3]) to [Director] dated 21 March 2014 (URN FD0302, FD0303 and FD0305).

that [Reseller 3] would need to remove certain products from its website to be compliant with the MAP Policy.<sup>281</sup>

- 5.130.3 On 7 April 2014, [Director] of Foster emailed [Employee] of [Reseller 3] to request that [Reseller 3] amend the advertised prices of ten products that were below Foster's MAPs.<sup>282</sup> [Director] of Foster escalated his request to [Employee] of [Reseller 3] and warned that *'this [non-compliance with the MAP policy] will effect [sic] supply to [Reseller 3].'*<sup>283</sup> [Employee] responded that *'it is almost certain that our web pricing has been determined [✂].'* He added *'I strongly recommend that before you take any action you discuss your proposal with a [✂] of our business!'*<sup>284</sup>
- 5.130.4 On 9 April 2014, [Employee] of [Reseller 3] forwarded the above email to [Employee] of [Reseller 3], and summarised his conversation with [Director] of Foster as follows: *'He [Director] claims that we are now the only dealer who is not adhering to their advertised pricing policy and that Foster are under pressure from other internet dealers who have complained about our web prices.'*<sup>285</sup>
- 5.130.5 Also on 9 April 2014, [Employee] of [Reseller 3] confirmed that he had settled the issue with Foster: ***'I have just spoken to [Director] [of Foster], I have promised him I will go back to him in the next 48 hours to resolve. No o/standing orders will be delayed.'***<sup>286</sup> On the same day, [Employee] instructed [Reseller 3]'s web provider to amend the advertised price of seven Foster products ***'as a matter of urgency'***.<sup>287</sup>
- 5.130.6 On 11 April 2014, [Director] of Foster informed [Employee] of [Reseller 3] that he had checked the [Reseller 3] website, and additional changes were still required: ***'8 out of 10 have been changed, we still need the following 2 items updated'***

---

<sup>281</sup> Email from [Sales employee] (Foster) to [Director] (Foster) dated 25 March 2014 (URN FD0507).

<sup>282</sup> Email from [Director] (Foster) to [Employee] ([Reseller 3]) dated 7 April 2014 (URN F90014.23).

<sup>283</sup> Email from [Director] (Foster) to [Employee] ([Reseller 3]) dated 8 April 2014 (URN F90014.30).

<sup>284</sup> Email from [Employee] ([Reseller 3]) to [Director] (Foster) dated 8 April 2014 (URN F90014.28).

<sup>285</sup> Email from [Employee] to [Employee] ([Reseller 3]) dated 9 April 2014 (URN F90014.32).

<sup>286</sup> Email from [Employee] ([Reseller 3]) to [Employee] ([Reseller 3]) dated 9 April 2014 (URN F90014.33).

<sup>287</sup> Email from [Employee] ([Reseller 3]) to [Employee] ([Reseller 3]) dated 9 April 2014 (URN F90014.48).

**please.**<sup>288</sup> A subsequent email from [Reseller 3]’s web providers confirmed that ***‘These have been amended.’***<sup>289</sup>

5.130.7 On 23 May 2014, [Sales employee] of Foster asked [Employee] of [Reseller 3] to change the online price of two Foster products.<sup>290</sup> On 4 June 2014, [Director] of Foster emailed [Employee] of [Reseller 3] noting that one of the two products had not yet been amended and asked *‘please confirm that it will be changed today.’*<sup>291</sup> [Employee] replied: *‘This price has been updated.’*<sup>292</sup>

#### *Monitoring and reporting other resellers*

5.131 The CMA asked [Reseller 3] whether it had notified Foster of non-compliance by other resellers with the MAP Policy.<sup>293</sup> [Reseller 3] said that *‘on 28 November 2012 [it] provided [Foster] with a price analysis to illustrate the low margin [Reseller 3] would make on certain Foster products if it matched the price advertised on the [Reseller] website.’*<sup>294</sup>

5.132 The contemporaneous evidence confirms that on 28 November 2012, [Employee] of [Reseller 3] sent [Director] of Foster a spreadsheet which showed that [Reseller] was advertising a Foster product below the MAP.<sup>295</sup> In an internal email exchange, [Employee] noted to colleagues that *‘as you can see [X] apart from one line which is way below Fosters guideline selling prices, I have taken this up with [Director] [of Foster] [...] who will ensure their [Reseller]’s pricing is updated.’*<sup>296</sup> Indeed, on 29 November 2012 [Director] of Foster thanked [Employee] of [Reseller 3] for *‘the heads up’* on [Reseller]’s pricing and confirmed that he had asked [Reseller] to amend its price.<sup>297</sup>

---

<sup>288</sup> Email from [Director] (Foster) to [Employee] ([Reseller 3]) dated 11 April 2014 (URN F90014.51).

<sup>289</sup> Email from [Employee] ([Reseller 3]) to [Employee] ([Reseller 3]) dated 16 April 2014 (URN F90014.51).

<sup>290</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller 3]) dated 23 May 2014 (URN F90014.52).

<sup>291</sup> Email from [Director] (Foster) to [Employee] ([Reseller 3]) dated 4 June 2014 (URN F90014.54).

<sup>292</sup> Email from [Employee] ([Reseller 3]) to [Director] (Foster) dated 4 June 2014 (URN F90014.55). See also acknowledgement email from [Director] (Foster) to [Employee] ([Reseller 3]) dated 4 June 2014 (F90014.56).

<sup>293</sup> Section 26 notice dated 3 November 2014 (URN F90001.1)

<sup>294</sup> Part A, question 3.17 of [Reseller 3]’s response to section 26 notice dated 3 November 2014 (URN F90014.1).

<sup>295</sup> Email from [Employee] ([Reseller 3]) to [Director] (Foster) dated 28 November 2012 (URN F90014.10 and F90014.11). The email was entitled [X].

<sup>296</sup> Email from [Employee] ([Reseller 3]) to [Employee], [Employee] and [Employee] ([Reseller 3]) dated 28 November 2012 (F90014.12).

<sup>297</sup> Email from [Director] (Foster) to [Employee] ([Reseller 3]) dated 29 November 2012 (URN F90014.14).

*Conclusion on [Reseller 3]'s compliance with the MAP Policy*

- 5.133 The evidence set out above demonstrates that [Reseller 3] received the MAP Policy in January 2012. Further, [Reseller 3] complied with the MAP Policy by amending its advertised prices when requested to do so by Foster so they were no lower than the MAP. This is supported by contemporaneous evidence from 2014. In addition, in 2012, [Reseller 3] monitored another reseller's compliance with the MAP Policy and reported an instance of non-compliance to Foster.

***Conclusion on the Resellers' compliance with the MAP Policy***

- 5.134 The evidence set out above demonstrates that each Reseller complied with the MAP Policy in any of the following ways:
- 5.134.1 The Reseller committed to change an online price when requested to do so by Foster, so that it was no lower than the MAP.
  - 5.134.2 The Reseller took steps internally to change an online price when requested to do so by Foster, so that it was no lower than the MAP.
  - 5.134.3 The Reseller confirmed to Foster that it had changed an online price, so that it was no lower than the MAP, when requested to do so by Foster.
  - 5.134.4 The Reseller stated that it adhered to the MAP Policy, in writing to Foster and/or to the CMA during the course of its investigation.
- 5.135 In addition, the evidence also shows that each of the Resellers engaged in conduct which supports the CMA's finding that the Reseller adhered to the MAP Policy.

**F. Monitoring and enforcement of resellers' compliance with the MAP Policy**

- 5.136 As demonstrated by the evidence in Section E above, Foster's network of resellers positively supported the MAP Policy and, at least, the Resellers adhered to the MAP Policy.
- 5.137 There is evidence to show that some resellers advertised Foster products below the MAP, on occasion, whether deliberately or unintentionally.<sup>298</sup> The

---

<sup>298</sup> See for example, the evidence in Section E, relating to [Reseller 1], [Reseller 2] and [Reseller 3].

evidence demonstrates that compliance with the MAP Policy was monitored by Foster, with the support of its resellers, to identify instances where resellers' prices were below the MAP. Where Foster identified resellers pricing below MAP, the evidence shows that Foster enforced the policy, through the use of sanctions and warnings of sanctions.

5.138 The evidence presented in this Section demonstrates that Foster's warnings of sanctions were credible, as Foster did withhold or cease supply, both temporarily and permanently, to resellers that did not comply with the MAP Policy. As such, the monitoring and sanctions effectively incentivised Foster's resellers, including the Resellers, to comply with the MAP Policy.

5.139 In particular, the evidence demonstrates the following:

- 5.139.1 Foster and certain of its resellers monitored resellers' websites to identify instances where prices were below the MAP.
- 5.139.2 Where Foster identified prices below the MAP, it used one or more of the following enforcement mechanisms to compel resellers to change their online prices so that they were no lower than the MAP. In particular, from time to time, Foster:
- requested resellers to change their online prices, so that they were no lower than the MAP;
  - threatened to reduce resellers' wholesale terms of supply if prices were not amended so that they were no lower than the MAP;
  - temporarily or permanently ceased supply of Foster's products, or threatened to do so; and
  - permanently closed a reseller's account.

#### *Monitoring and reporting of non-compliance*

##### *Foster's Enforcement Procedure*

5.140 The evidence demonstrates that Foster monitored resellers' websites to identify instances where prices for Foster products were below the MAP.

5.141 In January 2012, Foster produced a document for internal use, entitled 'the Enforcement Procedure'.<sup>299</sup> The Enforcement Procedure involved a team of Foster employees, known as the Customer Action Team (the CAT team),<sup>300</sup> working with the RBMs to check online prices of Foster products and ensure reseller compliance with the MAP Policy. The Enforcement Procedure also established how and when to impose the sanctions set out in the MAP Policy:

- 1) *January 20<sup>th</sup> – CAT team to check web for minimum advertised pricing by dealers. Continue to check every Friday.*
- 2) *With any dealer websites showing lower prices, CAT team to take screen print of the offending page and email to RBM [Regional Business Manager]*
- 3) *RBM to ring and visit (if required) any dealer not at the correct minimum advertised price to inform them verbally that they have 7 days to adhere to the policy.*
- 4) *CAT to check after 3 days to see if the dealer has changed their prices to the correct level.*
- 5) *If the dealer has not changed their prices after 3 days from the telephone call an official letter is to be sent out to the Dealer via email and hard copy (see enclosed letter)*
- 6) *After 7 days from the letter being sent out, RBM to ring dealer again to give 24 hour's [sic] notice prior to enforcing policy.*
- 7) *24 hours – Dealer to be informed that they have lost [✂] of their dealer discount on all future orders via email and hard copy.*
- 8) *7 days after the above letter has been sent out (if the dealer is still not adhering to the policy) RBM to inform the dealer that their account will be closed, official letter to be sent.*

---

<sup>299</sup> 'Foster Refrigerator – product discounting and published prices policy. Enforcement procedure – internal use only', attachment to email from [Lawyer] (Steptoe & Johnson (representing ITW)) to the CMA dated 20 May 2015 (URN FC0056.1).

<sup>300</sup> The CAT Team is a team of administrators at Foster. See transcript of interview with [Sales employee] (Foster) dated 28 July 2015, page 23, lines 17– 20 (URN FD0684).

- 9) *Internally - dealer account to be closed and removed from CRM system.*<sup>301</sup>

5.142 [Sales employee] explained to the CMA in interview that the purpose of the Enforcement Procedure was to give *'a bit of a structure'* to the MAP Policy,<sup>302</sup> but that as the CAT team was too busy to monitor websites weekly<sup>303</sup> it *'was pushed [...] back on the guys [RBMs] to really try and look after their own distributors'*.<sup>304</sup> This is supported by contemporaneous documents. For example, on 19 February 2014, [Sales employee] of Foster told [Sales employee] of Foster that *'it is the responsibility of the RBM's to get their own customers to adhere to the policy.'*<sup>305</sup>

5.143 Foster told the CMA that the Enforcement Procedure was *'never fully implemented'*,<sup>306</sup> but it provided a copy of the procedure to [X] certain resellers.<sup>307</sup> For example:

5.143.1 On 21 January 2012, [Sales employee] of Foster told [Reseller] that *'we [...] will be starting on enforcement procedure next week (please see enclosed). This will hopefully get everyone at the desired pricing levels.'*<sup>308</sup> (Emphasis added. )

5.143.2 On 13 May 2013, [Sales employee] told [Reseller] that: *'we do have an enforcement policy that we have to follow (enclosed) [...] we are on the case and will keep you informed. [Employee] – Can you*

---

<sup>301</sup> 'Foster Refrigerator – product discounting and published prices policy. Enforcement procedure – internal use only', attachment to email from [Lawyer] (Steptoe & Johnson (representing ITW)) to the CMA dated 20 May 2015 (URN FC0056.1).

<sup>302</sup> Transcript of interview with [Sales employee] (Foster) dated 29 July 2015, page 80, lines 12–18, page 82, line 25 and page 83, line 1 (URN FD0685).

<sup>303</sup> *Ibid*, page 87, lines 6–10: 'And it was a general, a general task of the CAT team to sort of monitor, but we really only ever did it when somebody sent something through, and then we looked and started sending these [X] emails out [...] we run a really tight ship at Foster and I think [X] [ie the CAT team] are probably the busiest people in our company, really.'

<sup>304</sup> *Ibid*, page 76, lines 20–22. Contemporaneous documents show that RBMs were asked to monitor websites. For instance, see email from [Sales employee] (Foster) to [Sales employee], [Sales employee], [Sales employee] (Foster) dated 18 February 2014 (URN FD0460): 'Can you all also take the time to skim through the websites that are listed to check all prices.'

<sup>305</sup> Email from [Sales employee] (Foster) to [Sales employee] (Foster) dated 19 February 2014 (URN FD0470).

<sup>306</sup> See letter from [Lawyer] (Steptoe & Johnson (representing ITW)) to the CMA dated 23 October 2015 (URN FC0109.2).

<sup>307</sup> See email from [Lawyer] (Steptoe & Johnson (representing ITW)) to the CMA dated 20 May 2015 (URN FC0056). Foster told the CMA that the procedure was provided on 13 May 2013 to [Reseller], on 10 September 2013 to [Reseller], and on 19 January 2013 to [Reseller].

<sup>308</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 21 January 2012 (URN FD0003).



*let me know tomorrow the actions we have taken.'* (Emphasis added.)<sup>309</sup>

5.144 However, whilst Foster itself may not have checked websites as systematically as intended by the Enforcement Procedure, Foster incentivised resellers to comply by warning them it was '*regularly*' monitoring compliance. For example:

5.144.1 On 30 January 2012, [Sales employee] of Foster told a reseller: '*The [X] in the office are monitoring the various online sites regularly to make sure this policy is being adhered to.*'<sup>310</sup>

5.144.2 On 26 February 2013, [Employee] of Foster told [Reseller]: '***We do check the websites to make sure companies are adhering to the policy.***'<sup>311</sup>

#### *Reseller reporting*

5.145 Foster was assisted by its reseller network in detecting non-compliance with the MAP Policy.

5.146 [Sales employee] of Foster stated in his interview with the CMA that a [X] was '*the policing route*' for the MAP Policy.<sup>312</sup> Foster formalised this practice in the 2013 and 2014 updates to the MAP Policy, by 'inviting' resellers to [X].<sup>313</sup>

5.147 [Sales employee] of Foster also stated that reporting was extensive: '*They all tended to report [...] on each other a little bit. So, [Reseller] were reporting on [Reseller], [Reseller] were reporting on [Reseller], [Reseller] were sending us [...] that list saying, "What about these guys?" So, we were all saying, you know, "Just let it go round and round and round", because that was our policy.*'<sup>314</sup>

5.148 Contemporaneous documents further show that Foster appreciated its resellers providing information on non-compliance with the MAP Policy. For

---

<sup>309</sup> Email from [Sales employee] to [Employee] ([Reseller]) dated 13 May 2013 (URN FD0173).

<sup>310</sup> Email from [Sales employee] (Foster) to [Reseller] dated 30 January 2012 (URN FD0414).

<sup>311</sup> Email from [Employee] (Foster) to [Employee] ([Reseller]) dated 26 February 2013 (URN FD0170). See also: Email from [Employee] (Foster) to [Employee] ([Reseller]) dated 26 November 2012 (URN FD0163). Email from [Employee] (Foster) to [Employee] ([Reseller]) dated 21 May 2013, (URN FD0426). Email from [Employee] (Foster) to [Reseller] dated 21 May 2013, (URN FD0422).

<sup>312</sup> Transcript of interview with [Sales employee] (Foster) dated 29 July 2015, page 78, lines 7–9 (URN FD0685).

<sup>313</sup> See paragraphs 5.17, 5.19.

<sup>314</sup> Transcript of interview with [Sales employee] (Foster) dated 29 July 2015, page 125, lines 24–25; and page 126, lines 1–3 (URN FD0685).

instance, in reply to information from [Reseller] on 1 November 2013, [Sales employee] of Foster stated: *'[this information] really helps [Foster] to clamp down [on resellers] [...] We welcome your weekly reports and will be vigilantly policing this going forward.'*<sup>315</sup>

5.149 Further, contemporaneous documents demonstrate that resellers did report non-compliance in practice. [Reseller 1], [Reseller 2] and [Reseller 3] all reported non-compliance to Foster, to varying degrees.<sup>316</sup> Other resellers also reported non-compliance.<sup>317</sup> For example, [Reseller] told Foster that it would monitor compliance with the MAP Policy and did so in practice:

5.149.1 On 9 January 2014, [Reseller] explained that: *'For manufacturers who have a MAP policy in place we will check a selection of products on a weekly basis against the "usual suspects" to see where they sit pricing wise. If any product is found to not adhere to the policy we will report this to the relevant supplier.'*<sup>318</sup>

5.149.2 On 8 May 2014, [Reseller] reported [Reseller] and [Reseller] for non-compliance, and stated that as a result, it had adjusted its prices.<sup>319</sup>

5.149.3 On 26 June 2014, [Reseller] reported [Reseller] for advertising one product below the MAP.<sup>320</sup> On 30 June 2014, [Employee] of [Reseller] stated that: *'I've Checked [Reseller]'s prices, and they have increased the Foster products to fall in line with MAP policy. Ours are also now at MAP prices.'*<sup>321</sup>

---

<sup>315</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 1 November 2013 (URN FD0237). See also email from [Sales employee] (Foster) to [Employee] ([Reseller]), dated 17 June 2013 (URN F50012.13), and email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 11 February 2014 (URN F50012.40), and email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 27 June 2014 (URN FD0370).

<sup>316</sup> See Section E, 'Resellers' compliance with the MAP Policy'.

<sup>317</sup> See the following additional examples of reseller reporting: Email from [Employee] ([Reseller]) to [Sales employee] (Foster), dated 20 January 2012 (URN FD0003). Email from [Employee] ([Reseller]) to [Sales employee] (Foster), dated 11 July 2013 (URN FD0186). Email from [Employee] ([Reseller]) to [Employee] (Foster) dated 15 October 2013 (URN FD0203). Email from [Employee] ([Reseller]) to [Sales employee] (Foster) dated 24 January 2014 (URN F20009.15). Email from [Employee] ([Reseller]) to [Employee] and [Sales employee] (Foster) dated 13 March 2014 (URN FD0300). Email from [Employee] ([Reseller]) to [Employee] (Foster) dated 21 May 2014 (URN FD0346).

<sup>318</sup> Email sent by [Employee] ([Reseller]) to undisclosed recipients dated 9 January 2014 (URN FD0240).

<sup>319</sup> Email from [Employee] ([Reseller]) to [Sales employee] (Foster) dated 8 May 2014 (URN FD0334).

<sup>320</sup> Email from [Employee] ([Reseller]) to [Sales employee] (Foster) dated 26 June 2014 (URN F40013.7).

<sup>321</sup> Email from [Employee] ([Reseller]) to [Sales employee] (Foster) dated 30 June 2014 (URN FD0524).

*Records of non-compliance and discussions with resellers*

- 5.150 The evidence demonstrates that Foster maintained records of reseller compliance with the MAP Policy from as early as January 2012<sup>322</sup> on the MAP call log.<sup>323</sup> Foster would use the call log as evidence in the event that Foster decided to suspend a reseller's account for non-compliance with the MAP Policy:

*The minimum price document has been sent out today so should be with dealers by Friday (when an email will be going out also)...Also attached is the minimum advertised price policy call log, each RBM tab is along the bottom. Please can you complete and send back along with name of contact you spoke to and date spoken to. **If we have to suspend any accounts, this will for [sic] a vital part in listing the opportunities the dealer has had to adhere to our policy.***<sup>324</sup> [Emphasis added.]

- 5.151 The call logs show that the RBMs contacted resellers during October 2013, around the time that resellers would have received the 2013 update to the MAP Policy, to check whether they intended to comply with the MAP Policy.<sup>325</sup>
- 5.152 In an email dated 18 February 2014 to the Regional Sales Team, [Sales employee] of Foster listed resellers advertising below MAP and tasked individuals with 'chasing' resellers:

*Here are the action points still required on the MAP Process [...]  
I need the below actioned immediately and any updates sent to me.  
I have also sent a copy of [Reseller]'s [sic] latest spreadsheet. I am*

---

<sup>322</sup> See email from [Sales employee] (Foster) to [Employee] ([Reseller]) cc [Employee] (Foster) dated 21 January 2012 (URN FD0003).

<sup>323</sup> Question 2 of Foster's response to section 26 notice dated 22 May 2015 (URN FD0635). Foster provided the CMA with MAP call logs for [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Sales employee], [Sales employee] and [Sales employee]. Question 3 (attachment) of Foster's response to section 26 notice dated 22 May 2015 (URN FD0636.1 to FD0636.8). Foster advised the CMA that [Sales employee] and [Employee] did not complete the call logs. Foster further advised that it was unable to retrieve calls logs for 2012 from its IT system (Question 2 of Foster's response to section 26 notice dated 22 May 2015 (URN FD0635)).

<sup>324</sup> Email from [Sales employee] (Foster) to all Foster sales managers and sales' representatives dated 1 October 2013 (URN FD0031).

<sup>325</sup> See URN FD0635. For instance, in [Sales employee] (Foster)'s call log, she recorded 'read and understood' against the reseller [Reseller] (URN FD0636.6). [Sales employee] (Foster)'s call log recorded 'new website imminent [sic] with new price' against [Reseller] and 'pricing well above MAP' against [Reseller] (Question 2 of Foster's response to section 26 notice dated 22 May 2015 (URN FD0636.3)).

*sure they will begin to apply some serious pressure soon if we do not sort out the offenders this week.*

*[list of 15 resellers and the Foster employee allocated to contact eg [Reseller] – [Sales employee] to chase and update 18.02.14’]<sup>326</sup>*

### *Enforcement of the MAP Policy*

5.153 The evidence demonstrates that, where Foster identified prices below the MAP, it used one or more of the following enforcement mechanisms to compel resellers to change their online prices so that they were no lower than the MAP. In particular, from time to time, Foster:

- 5.153.1 Requested resellers to change their online prices so that they were no lower than the MAP.
- 5.153.2 Threatened to reduce resellers’ wholesale terms of supply if prices were not amended so that they were no lower than the MAP.
- 5.153.3 Temporarily or permanently ceased supply of Foster’s products, or threatened to do so.
- 5.153.4 Permanently closed a reseller’s account.

5.154 The evidence in relation to each mechanism is set out below.

### *Requests to comply with the MAP Policy*

5.155 The three Resellers were contacted by Foster if their online prices were set below Foster’s MAP.<sup>327</sup> The evidence shows that Foster also contacted other resellers about non-compliance to request that prices be amended to the agreed level, sometimes within a specified timeframe. For example:<sup>328</sup>

- 5.155.1 On 31 January 2012, [Employee] of Foster emailed [Reseller] and noted: *‘I have checked the prices this morning and some have been*

---

<sup>326</sup> Email from [Sales employee] (Foster) to Foster Regional Sales Team dated, 18 February 2014 (URN FD0457).

<sup>327</sup> See Section E, ‘Resellers’ compliance with the MAP Policy’.

<sup>328</sup> See also: Email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 31 August 2012 (URN FD0129). Email from [Employee] (Foster) to [Employee] ([Reseller]) dated 11 September 2012 (URN FD0161). Email from [Employee] (Foster) to [Employee] ([Reseller]) dated 6 June 2013 (URN FD0181). Email from [Sales employee] (Foster) to [Employee] ([Reseller]), cc [Employee] ([Reseller]) and [Sales employee] (Foster), dated 29 October 2013 (URN FD0219). Email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 31 January 2014 (URN F20009.16). Email from [Sales employee] (Foster) to [Reseller] dated 13 February 2014 (URN FD0452).

*amended – thank you. However there is a few that have not been amended or have but are still slightly under the minimum. **Please can you amend the rest asap**, as per the attached.*<sup>329</sup> (Emphasis added)

- 5.155.2 On 4 April 2012, [Employee] of Foster contacted [Reseller]: *'We have noticed that the new products are being advertised at less than regional net plus [%], please see below minimum prices...Please **let me know when you will be updating these?***<sup>330</sup> (Emphasis added.)
- 5.155.3 On 26 November 2012, [Employee] of Foster contacted [Reseller]: *'Please can you amend the above products to the minimum advertised price as per above.*<sup>331</sup>
- 5.155.4 On 21 May 2013, [Employee] of Foster requested that [Reseller] amend pricing in *'the next couple of days'*.<sup>332</sup>
- 5.155.5 On 17 October 2013, [Sales employee] of Foster emailed [Reseller] concerning 5 products under MAP and stated: *'we will be enforcing this tomorrow'*.<sup>333</sup>
- 5.155.6 On 13 February 2014, [Sales employee] of Foster told [Reseller] that: *'If you could **change them [prices] by tomorrow at the latest** it would be much appreciated.*<sup>334</sup> (Emphasis added.)
- 5.155.7 On 8 May 2014, [Employee] of Foster emailed [Reseller] and stated: *'if these [3 products under MAP] can be changed in the morning that will be great.*<sup>335</sup>

---

<sup>329</sup> Email from [Employee] (Foster), cc [Sales employee] (Foster) to [Employee] ([Reseller]) dated 31 January 2012 (URN FD0140).

<sup>330</sup> Email from [Employee] (Foster) to [Employee] ([Reseller]) dated 4 April 2012 (URN FD0153).

<sup>331</sup> Email from [Employee] (Foster) to [Employee] ([Reseller]) dated 26 November 2012 (URN FD0163).

<sup>332</sup> Email from [Employee] (Foster) to [Employee] ([Reseller]) dated 21 May 2013 (URN FD0426).

<sup>333</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 17 October 2013 (URN FD0211).

<sup>334</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 13 February 2014 (URN FD0254).

<sup>335</sup> Email from [Employee] (Foster) to [Reseller] dated 8 May 2014 (URN FD0335). We note that this email from Foster to [Reseller], must have been prompted by an email from another reseller ([Reseller]) earlier in the morning, to [Sales employee] (Foster). In that email, [Reseller] states: *'We have found the following suppliers and product breaking the Map policy. In line with our MAP policy previously communicated to you, we have had to change our prices in response to this. If you can let us know once these prices have been corrected back to MAP we will happily change ours back [names [Reseller] and lists the three products found in the later email to*

5.155.8 On 10 June 2014, [Sales employee] of Foster contacted [Reseller] and noted: *'See email trial [sic] below for products below MAP [...] Please **can you change straight away**. Can you also ensure that your website does not drop any prices under the MAP policy, it seems to have happened 2 or 3 times now and causes us a lot of hassle from other dealers.'*<sup>336</sup> (Emphasis added.)

5.156 The evidence demonstrates that once non-compliance had been identified, Foster would continue to monitor that reseller's website until it was satisfied that prices had been raised to the agreed level. For instance, [Reseller] told Foster that changes to advertised prices would be visible on the [Reseller] website [X]. [Sales employee] of Foster replied: *'I will arrange for the office to check on Monday.'*<sup>337</sup>

#### *Threats and warnings to reduce resellers' discounts*

5.157 The MAP Policy and the Enforcement Procedure established that Foster would deduct [X] from a resellers' discount if it advertised below the MAP. Foster told the CMA that it never applied this sanction.<sup>338</sup> Nonetheless, the evidence demonstrates that Foster threatened to reduce discounts to resellers that were not complying with the MAP Policy. For example:

5.157.1 During October 2013, [Sales employee] and [Sales employee] of Foster emailed a number of resellers advertising below the MAP to advise that Foster was unable to accept any orders at *'standard terms'* from any company not adhering to the MAP Policy until prices were amended.<sup>339</sup> For example, the email to [Reseller] read as follows:

---

[Reseller]].' See email from [Employee] ([Reseller]) to [Sales employee] (Foster) dated 8 May 2014 (URN FD0336).

<sup>336</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller]), cc [Sales employee] (Foster) dated 10 June 2014 (URN FD0518).

<sup>337</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 7 July 2013 (URN FD0185). See also email exchange between Foster and [Reseller], where on 11 April 2014, [Director] (Foster) told [Employee] ([Reseller]) that *'I have just checked and 8 out of 10 have been changed, we still need the following 2 items updated please.'* Email from [Director] (Foster) to [Employee] ([Reseller]) dated 11 April 2014 (URN F90014.51). See also email from [Sales employee] (Foster) to [Reseller] dated 21 October 2013 (URN FD0211).

<sup>338</sup> Transcript of interview with [Sales employee] (Foster) dated 29 July 2015, page 50, lines 16–18 (URN FD0685).

<sup>339</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 18 October 2013 (URN FD0209). Email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 18 October 2013 (URN FD0431). Email from [Sales employee] (Foster) to [Reseller] dated 21 October 2013 (URN FD0434). Email from [Sales employee] (Foster) to [Reseller] dated 21 October 2013 (URN FD0435). Email from [Sales employee] (Foster) to [Reseller] dated 21 October 2013 (URN FD0437). Email from [Sales employee] (Foster) to [Reseller] dated 18 October

*[W]hilst researching online pricing I can see a number of products which are listed below the minimum advertised price [...] Unfortunately **by not adhering to the policy and attached minimum advertised pricing we shall no longer be able to process any order received at standard discount terms [...]** Once products listed on the website adhere to the policy we will of course re-instate your full regional dealer discount.*<sup>340</sup> (Emphasis added).

5.157.2 On 29 October 2013, [Sales employee] warned [Reseller]:

*[S]ome of the prices you are showing on your web shop are below the MAP, so we really need you to arrange for these to be changed by return. **The last thing I want is for accounts to remove your discount** so could you please let me know that you have received this email and will be changing any prices below MAP.*<sup>341</sup> [Emphasis added.]

5.157.3 Within an internal email exchange on 7 April 2014, [Sales employee] of Foster raised a concern that [Reseller] was not complying and that Foster had taken ‘action’ against other resellers for similar conduct:

*I need to stress that these prices must be changed by close of play on Tuesday **or we will be forced to take the action we have taken with other non-conforming distributors** [sic]. As we have such a strong partnership with [Reseller] this is most definitely a last resort [...] we have had complaints from several dealers who will change their prices to match [Reseller] if this does not happen.*<sup>342</sup> [Emphasis added.]

5.157.4 In an email to [Employee] of [Reseller] on the same date, [Director] of Foster warns of the consequences of failing to comply with the MAP Policy:

---

2013 (URN FD0432). Email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 30 October 2013 (URN FD0440). Email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 30 October 2013 (URN FD0224).

<sup>340</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 18 October 2013 (URN FD0431).

<sup>341</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 29 October 2013 (URN FD0223).

<sup>342</sup> Email from [Sales employee] (Foster) to [Director] (Foster) dated 7 April 2014 (URN FD0509).

***[W]e have already closed two dealer accounts and have reverted several dealers to purchase pricing based on [✂] above any current agreement they had with Foster, this causes a major amount of disruption to ourselves, the dealer involved, and their customers, as we would simply not process orders unless they are at the revised [✂] mark up.<sup>343</sup> [Emphasis added.]***

- 5.158 As envisaged in the Enforcement Procedure, Foster did issue formal warnings to resellers for advertising below the MAP. The template letter, signed by [Sales employee] of Foster, read as follows:

*Your prices will be checked on [+7 days from date of letter] to see if they meet the requirements of the policy letter [the MAP Policy]. If you fail to meet the pricing requirements of [sic] policy letter, Foster reserves the right to reduce your dealer discount by [✂], in line with point 3 of the policy letter, immediately. If [name of reseller] continue to fail to meet the pricing requirements of the policy letter, Foster reserves the right to take away your 'Foster Dealership' together with permission to use Foster branding.<sup>344</sup>*

- 5.159 The CMA has evidence that such letters were sent to:

5.159.1 [Reseller],<sup>345</sup>

5.159.2 [Reseller],<sup>346</sup>

---

<sup>343</sup> Email from [Director] (Foster) to [Employee] ([Reseller]) dated 7 April 2014 (URN FD0311).

<sup>344</sup> Template letter for online enforcement procedure received 20 May 2015 following section 26 notice dated 5 March 2015 (URN FC0058.1). The template letter was revised in May 2014 (email from [Employee] (Foster) to [Employee] (Foster) dated 28 May 2014 (URN FD0059)) and circulated for internal review (email from [Employee] (Foster) to [Sales employee], [Sales employee] and [Sales employee] (Foster) dated 28 May 2014 (URN FD0060)). On 11 June 2014, [Employee] requested advice from [Director] of Foster: 'We are looking at sending emails to customers that do not respect the MAP policy [...] Could you please let us know if this is something we are allowed to do or would it create problems for us?' The attached draft letter stated: 'The Foster product prices that you advertise on your website do not support the MAP Policy. Therefore we request that you rectify the Foster advertise [sic] prices as per our policy with [sic] the next 48 hours or your account will be on stop until future notice. A non respect [sic] of the MAP Policy could result in losing your dealer terms.' (email from [Employee] (Foster) to [Director] (Foster) dated 11 June 2014 (URN FD0520)).

<sup>345</sup> Email from [Employee] (Foster) to [Employee] ([Reseller]) dated 10 February 2012 (URN FD0013).

<sup>346</sup> Letters from [Sales employee] (Foster) to [Employee] ([Reseller]) and [Employee] ([Reseller]) dated 1 February 2012 and 3 February 2012 (URN FD0417).



5.159.3 [Reseller];<sup>347</sup> and

5.159.4 [Reseller].<sup>348</sup>

*Refusal to supply Foster products*

5.160 The MAP Policy and the Enforcement Procedure established that if a reseller continued to advertise below the MAP, Foster would close the reseller's account. The evidence demonstrates that Foster threatened to, and did in practice, refuse to supply Foster products to resellers not complying with the MAP Policy. For example:

5.160.1 On 19 July 2013, [Sales employee] of Foster told [Reseller]: *'We continue to take this policy extremely seriously and action has been taken to bring pricing into line. Those who are currently falling outside of the acceptable price point **have been policed** in line with the procedure.'*<sup>349</sup>

5.160.2 On 18 October 2013, [Sales employee] emailed two resellers to advise that they had missed the deadline for compliance with the updated MAP Policy. In the email to [Employee] of [Reseller], [Sales employee] of Foster requested that [Employee] *'ask the relevant department to correct today.'*<sup>350</sup> In the email to [Reseller], [Sales employee] warned that Foster would *'be enforcing this as of Monday and be unable to take any orders from any company not adhering to the policy.'*<sup>351</sup>

5.160.3 On 30 October 2013, [Sales employee] of Foster emailed [Employee] of [Reseller] and stated: *'you currently are advertising products below the minimum price and **therefore we will not be able to accept any orders from you until this is corrected.***<sup>352</sup> (Emphasis added.)

---

<sup>347</sup> Letters from [Sales employee] (Foster) to [Employee] ([Reseller]) and [Employee] ([Reseller]) dated 1 February 2012 and 3 February 2012 (URN FD0417).

<sup>348</sup> Letter from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 15 July 2013 (URN F50012.18).

<sup>349</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 19 July 2013 (URN FD0186).

<sup>350</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 18 October 2013 (URN FD0210).

<sup>351</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 18 October 2013 (URN FD0208).

<sup>352</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 30 October 2013 (URN FD0442).

- 5.160.4 On 30 October 2013, [Employee] of Foster told [Reseller] that it was *‘advertising 4 products at below our MAP [...] **ACCOUNTS NOT ADHERING TO OUR MAP POLICY WILL BE PLACED ON STOP.***<sup>353</sup> (Emphasis in original.)
- 5.160.5 On 21 February 2014, [Sales employee] of Foster emailed [Reseller] to advise that its advertised prices did not comply with the MAP Policy and warned that *‘We [Foster] are taking a tough stance on this matter and have **already put a number of dealers on stop** for failing to adhere to MAP guidelines.’*<sup>354</sup> (Emphasis added.)
- 5.160.6 On 27 June 2014, [Sales employee] of Foster told [Employee] of [Reseller] that [Reseller]’s account with Foster was at risk: *‘I need you to have these 6 models advertised at MAP by 1700hrs on Tuesday 1<sup>st</sup> July [...] or I am left with no option but to have **your account put on stop** from Wednesday 2<sup>nd</sup> July until all Foster models are once again advertised at MAP or above.’*<sup>355</sup> (Emphasis added.) In a follow-up email, [Sales employee] of Foster clarified that *‘As part of our MAP policy [sic] I have to give you **48hrs notice so my deadline for price compliance remains 1700hrs on Tuesday 1<sup>st</sup> July.***<sup>356</sup> (Emphasis added.)
- 5.160.7 On 1 March 2014, [Sales employee] of Foster emailed [Reseller] to advise that their account was ‘on stop’: *‘the web prices are still not up to date, **you guys are the only ones around the country now under MAP prices. We have had to put you on stop until these are sorted.***<sup>357</sup> (Emphasis added.)
- 5.161 The evidence shows that Foster refused to supply resellers (by placing them ‘on stop’) until prices were amended to comply with the MAP Policy, at which point Foster would reinstate supply. In an email to his colleague [Employee] dated 20 February 2014, [Sales employee] of Foster set out the process to follow: *‘place the following companies on stop as they continue to be under MAP despite numerous efforts to contact them. I want no orders to be processed, quotes sent out or any outstanding orders sent out. I also want no*

---

<sup>353</sup> Email from [Employee] (Foster) to [Employee] ([Reseller]) dated 30 October 2013 (URN FD0230).

<sup>354</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 21 February 2014 (URN FD0280).

<sup>355</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 27 June 2014 (URN FD0370).

<sup>356</sup> Email from [Sales employee] (Foster) to [Employee] ([Reseller]) dated 27 June 2014 (URN FD0370).

<sup>357</sup> Email from [Sales employee] (Foster) to [Reseller] dated 1 March 2014 (URN FD0495).

*spare parts to be sent out [...] This will remain until they adhere to our policy.*<sup>358</sup>

- 5.162 On 25 February 2014, [Employee] of Foster told [Sales employee] of Foster that supply to four resellers had been reinstated, whereas supply to three others had not and was ‘*on hold*’.<sup>359</sup>

***Permanently closing resellers’ accounts***

- 5.163 Foster told the CMA that it only closed four resellers’ accounts over the entire period that the MAP Policy operated.<sup>360</sup> The resellers were:

5.163.1 [Reseller];

5.163.2 [Reseller];

5.163.3 [Reseller]; and

5.163.4 [Reseller].

- 5.164 This is supported by contemporaneous documents. For example, on 4 March 2014, [Sales employee] of Foster wrote to [Reseller]: ‘*you no longer have a Foster Refrigerator account with immediate effect.*’<sup>361</sup> On 13 March 2014, [Sales employee] of Foster informed his colleagues that [Reseller] and [Reseller] had been placed ‘*on stop*’ because they were advertising prices below the MAP.<sup>362</sup>

***Conclusion on monitoring and enforcement***

- 5.165 The evidence set out above demonstrates that:

5.165.1 Foster and certain of its resellers monitored resellers’ websites to identify instances where prices for Foster products were below the MAP.

5.165.2 Where Foster identified prices below the MAP, it used one or more of the following enforcement mechanisms to compel resellers to

---

<sup>358</sup> Email from [Sales employee] (Foster) to [Employee] (Foster) dated 20 February 2014 (URN FD0479).

<sup>359</sup> Email from [Employee] (Foster) to [Employee], [Employee], [Employee], and [Employee] (Foster) dated 25 February 2014 (URN FD0281).

<sup>360</sup> See page 4 of URN FC0046.2 and FD0589.

<sup>361</sup> Email from [Sales employee] (Foster) to [Reseller] dated 4 March 2014 (URN FD0290).

<sup>362</sup> Email from [Sales employee] (Foster) to [Employee], [Employee], [Sales employee], and [Sales employee] (Foster) dated 13 March 2014 (URN FD0505).

change their online prices so that they were no lower than the MAP. In particular, from time to time, Foster:

- requested resellers to change their online prices so that they were no lower than the MAP;
- threatened to reduce resellers' wholesale terms of supply if prices were not amended so that they were no lower than the MAP;
- temporarily or permanently ceased supply of Foster's products, or threatened to do so; and
- permanently closed a reseller's account.

5.166 The evidence presented in this Section further demonstrates that Foster's warnings of sanctions were credible, as Foster did withhold or cease supply, both temporarily and permanently, to resellers that did not comply with the MAP Policy. As such, the sanctions effectively incentivised Foster's resellers, including the Resellers, to comply with the MAP Policy.

## **6. LEGAL ASSESSMENT**

- 6.1 This Chapter sets out the key legal principles that apply in this case and the CMA's findings in respect of each of the principles, as follows:
- 6.1.1 Introduction, including a summary of the CMA's findings (**Section A**)
  - 6.1.2 Foster and each of the Resellers constitute undertakings (**Section B**)
  - 6.1.3 Foster entered into an agreement and/or concerted practice with each of the Resellers (**Section C**)
  - 6.1.4 The agreements and/or concerted practices between Foster and the Resellers had the object of preventing, restricting or distorting competition in relation to the supply of Foster products (**Section D**)
  - 6.1.5 The agreements and/or concerted practices appreciably prevented, restricted or distorted competition in relation to the supply of commercial refrigeration products, both in the EU and in the UK (**Section E**)
  - 6.1.6 The agreements and/or concerted practices had an effect on trade between EU Member States (**Section F**)
  - 6.1.7 The agreements and/or concerted practices had an effect on trade within the UK (**Section G**)
  - 6.1.8 No relevant exclusions or exemptions apply (**Section H**), and
  - 6.1.9 Conclusion (**Section I**)

### **A. Introduction**

- 6.2 This Chapter sets out the CMA's legal assessment of Foster's arrangements with the Resellers in the light of the evidence set out at Chapter 5 above.<sup>363</sup>

---

<sup>363</sup> 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 set out at Chapter 5.

- 6.3 The key legal principles are included in this Chapter to aid an understanding of the CMA's assessment. Further detail of the legal principles on which the CMA's assessment is based, and on which the CMA relies, is set out at Annex A (Legal Framework). Annex A includes references to the relevant case law and primary and secondary legislation.
- 6.4 The CMA has assessed the evidence in this case by reference to the requisite standard of proof as described in paragraphs A.94 to A.95 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.

*Summary of the CMA's findings*

- 6.5 On the basis of the facts and evidence referred to in Chapter 5 above, the CMA finds that:
- 6.5.1 Foster 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 Foster and each Reseller) that the Reseller would not advertise Foster products online below the MAP (referred to in the remainder of this Chapter as the Agreements).
- 6.5.2 Where customers buy the product online (ie 'click-to-buy sales'), the price advertised online is typically the price that a customer pays if it transacts online, ie the advertised price is the sales price. The CMA therefore concludes that by requiring the Resellers not to advertise Foster products online below the MAP, the Agreements genuinely restricted in practice<sup>364</sup> each Reseller's ability to determine its own online sales prices at a price below the MAP.
- 6.5.3 Even if it were possible for a sale to be transacted online below the MAP, the Resellers were severely restricted in their ability to communicate that a price other than the MAP was available. This restriction was reinforced by the prohibition on Resellers even indicating, through the use of strap lines (such as 'call for better price'), that prices other than the advertised prices might be available.

---

<sup>364</sup> See Section D of this Chapter.

- 6.5.4 The MAP Policy was supported by measures to identify resellers who advertised Foster products below the MAP, combined with actual or threatened sanctions for pricing below this level.
- 6.5.5 In the light of these findings, the CMA concludes that the Agreements genuinely restricted in practice<sup>365</sup> the ability of Foster resellers to determine their online sales prices at a price below the MAP, and therefore amounted to RPM in respect of online sales of Foster products.
- 6.5.6 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 commercial refrigeration products in the UK.
- 6.6 In each Agreement, the Reseller agreed to comply with Foster's instruction not to advertise Foster products below the MAP, as set out in the MAP Policy, and as requested by Foster from time to time. The duration of the Agreements is the same in each case, that is, it covers all of the Relevant Period.
- 6.7 The evidence provided to the CMA demonstrates that Foster introduced the MAP Policy as a standard policy which it communicated to all or most of its resellers, and which it monitored and enforced. Whilst they are not addressees of this Decision, for the purposes of this Decision, the CMA has identified the three Resellers as examples from the generality of resellers of Foster products in order to demonstrate the existence of an agreement and/or concerted practice with Foster.<sup>366</sup> The CMA has reasonable grounds for suspecting that other undertakings, namely other resellers selling Foster products online during the Relevant Period in addition to the Resellers, entered into similar agreements and/or concerted practices with Foster. However, for reasons of administrative efficiency, the CMA has not prioritised further investigation of these resellers and the CMA does not make any findings in respect of such other undertakings.

---

<sup>365</sup> See Section D of this Chapter

<sup>366</sup> See Annex D.

## B. Undertakings

### *Key legal principles*

- 6.8 The Chapter I prohibition and Article 101 TFEU apply to agreements and concerted practices between ‘undertakings’.<sup>367</sup> For the purposes of the Act and Article 101 TFEU, an undertaking is every entity engaged in economic activity, regardless of the legal status of the entity and the way in which it is financed.<sup>368</sup>

### *Findings*

- 6.9 The CMA finds that Foster and each of the Resellers is an entity engaged in economic activities, as set out below:
- 6.9.1 Throughout the Relevant Period, Foster was engaged in the manufacture and supply of commercial refrigeration products. See Chapter 3 for an assessment of the liability of ITW (of which Foster is a division) and the period for which it is found liable for the Infringements.<sup>369</sup>
- 6.9.2 Throughout the duration of the Agreement with Foster,<sup>370</sup> [Reseller 1] was engaged in the sale of commercial refrigeration products to end-users.<sup>371</sup>
- 6.9.3 Throughout the duration of the Agreement with Foster, [Reseller 2] was engaged in the sale of commercial refrigeration products to end-users.<sup>372</sup>

---

<sup>367</sup> See Annex A, paragraphs A.3, A.4 and A.7.

<sup>368</sup> See Annex A, paragraph A.8.

<sup>369</sup> As Rule 10(2) of the CMA Rules has been applied, the CMA is addressing the Decision to ITW only in this case and not to any resellers of Foster products. However, in order to demonstrate an infringement by ITW, the CMA must still show that Foster entered into an infringing agreement with one or more resellers. See paragraph Annex C, paragraphs C.15. Due to the application of Rule 10(2), there is no assessment of liability in relation to the Resellers.

<sup>370</sup> Foster is a trading division of ITW Limited. Whilst this Decision is addressed to ITW Limited as the responsible legal entity, for consistency with the available evidence, the CMA has referred to ‘Foster’ throughout this document.

<sup>371</sup> [REDACTED]

<sup>372</sup> [REDACTED]



6.9.4 Throughout the duration of the Agreement with Foster, [Reseller 3] was engaged in the sale of commercial refrigeration products to end-users.<sup>373</sup>

6.10 In light of the above, the CMA concludes that Foster and each of the Resellers constitutes an undertaking for the purposes of the Chapter I prohibition and Article 101 TFEU.

### **C. Agreements between undertakings and/or concerted practices**

#### ***Key legal principles***

6.11 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.<sup>374</sup> 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.<sup>375</sup>

#### ***Agreements***

6.12 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.<sup>376</sup>

6.13 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.<sup>377</sup> 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.<sup>378</sup>

---

<sup>373</sup> [38]

<sup>374</sup> See Annex A, paragraph A.13.

<sup>375</sup> See Annex A, paragraph A.14.

<sup>376</sup> See Annex A, paragraph A.16.

<sup>377</sup> See Annex A, paragraph A.18.

<sup>378</sup> See Annex A, paragraph A.20.

- 6.14 There are two ways in which acquiescence to a unilateral policy can be established:
- 6.14.1 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.
  - 6.14.2 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.<sup>379</sup>
- 6.15 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.<sup>380</sup>

### *Concerted practices*

- 6.16 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.<sup>381</sup>

## **Findings**

### *The duration of the Agreements*

- 6.17 The CMA is required to establish the duration of each Agreement.
- 6.18 Foster confirmed to the CMA that the MAP Policy was launched in January 2012 and sent to all Foster resellers.<sup>382</sup> The MAP Policy specified that the policy would commence on 6 January 2012<sup>383</sup> and Foster monitored and enforced the MAP Policy after this date.<sup>384</sup> Consequently, the CMA takes 6 January 2012 as the date on which each Agreement commenced.

---

<sup>379</sup> See Annex A, paragraph A.21.

<sup>380</sup> See Annex A, paragraph A.22.

<sup>381</sup> See Annex A, paragraph A.27.2.

<sup>382</sup> See paragraphs 5.11–5.20.2, and in particular, paragraph 5.15

<sup>383</sup> See paragraph 5.15

<sup>384</sup> See 'Resellers' compliance with the MAP Policy', paragraphs 5.44–5.135, and 'Monitoring and enforcement of resellers' compliance with the MAP Policy', paragraphs 5.136–5.166.

- 6.19 In January 2015, Foster informed the CMA that it had formally withdrawn its MAP Policy in December 2014. Foster explained that it had provided the ‘Foster General Notes’ to all resellers on 15 December, changing the MAP to a MRAP, defined as a Manufacturer’s Recommended Advertised Price. They also updated their terms and conditions on the website to explain that these prices were recommended advertised prices and resellers would be free to adopt different advertised prices should they wish to do so.<sup>385</sup> On 2 April 2015, Foster circulated a ‘dealer update’, emailed to approximately [§] resellers, which confirmed that the MAP Policy had been withdrawn ‘*with effect from 31 December 2014*’.<sup>386</sup>
- 6.20 In November 2015, Foster told the CMA that it concluded the MAP Policy following the launch of the CMA’s investigation, through conversations with resellers.<sup>387</sup> There is no supportive contemporaneous evidence that Foster communicated to the Resellers that the MAP Policy had come to a conclusion on a date any earlier than 31 December 2014.<sup>388</sup> Given that the December 2015 communication to resellers is the first written communication referring to the conclusion of the MAP Policy, the CMA takes that as the date on which each Agreement concluded.
- 6.21 On occasion, the Resellers did not comply with the MAP Policy.<sup>389</sup> However, the evidence shows that Foster monitored its resellers’ online prices, including those of each Reseller, to identify instances where Foster products were advertised at a price below the MAP, and took, or threatened to take, enforcement action where it identified such instances.<sup>390</sup> When Foster raised non-compliance with the Resellers, the evidence shows that each agreed to adjust its prices so that they were no lower than the MAP.<sup>391</sup>

*CMA’s approach to finding an agreement and/or concerted practice*

- 6.22 In light of the evidence set out in Chapter 5 above, the CMA finds that Foster and each of the Resellers entered into an agreement and/or concerted practice

---

<sup>385</sup> See paragraphs 5.23, 5.24, 5.25

<sup>386</sup> See paragraph 5.26

<sup>387</sup> See paragraph 5.21, 5.21.1, 5.21.2

<sup>388</sup> See paragraph 5.22, 5.22.1, 5.22.2

<sup>389</sup> See ‘Resellers’ compliance with the MAP Policy’, paragraphs 5.44–5.135, and in particular 5.63.

<sup>390</sup> See ‘Resellers’ compliance with the MAP Policy’, paragraphs 5.44–5.135, and ‘Monitoring and enforcement of resellers’ compliance with the MAP Policy’, paragraphs 5.136–5.166.

<sup>391</sup> See ‘Agreement between Foster and [Reseller 1]’, paragraphs 6.26–6.29, ‘Agreement between Foster and [Reseller 2]’, paragraphs 6.30–6.33 and ‘Agreement between Foster and [Reseller 3]’, paragraphs 6.34–6.38.

that prevented or restricted the Reseller from advertising online prices below the MAP.

6.23 This is based on the following findings of fact:

6.23.1 Foster created the MAP Policy which instructed the Resellers not to advertise Foster products below the MAP.<sup>392</sup>

6.23.2 The MAP Policy included sanctions for non-compliance and stated that Foster would monitor and enforce the policy.<sup>393</sup>

6.23.3 Foster monitored and enforced the MAP Policy in practice.<sup>394</sup>

6.23.4 Foster sent the MAP Policy to its network of resellers<sup>395</sup>, including each of the Resellers.<sup>396</sup>

6.23.5 Each Reseller acquiesced to the MAP Policy.<sup>397</sup>

6.24 As set out in Chapter 5, to demonstrate that each Reseller acquiesced to the MAP Policy (and thereby, agreed) the CMA relies on one or more of, the following findings of fact:

6.24.1 the Reseller committed to change an online price, when requested to do so by Foster, so that it was no lower than the MAP;

6.24.2 the Reseller took steps internally to change an online price when requested to do so by Foster, so that it was no lower than the MAP’

6.24.3 the Reseller confirmed to Foster that it had changed an online price so that it was no lower than the MAP, when requested to do so by Foster; and/or

6.24.4 the Reseller stated that it had adhered to the MAP Policy, in writing to Foster and/or the CMA during the course of its investigation.

---

<sup>392</sup> See paragraphs 5.11–5.20.2, and in particular 5.12, 5.15, 5.17, 5.18.1, 5.19, 5.20.1.

<sup>393</sup> See paragraphs 5.11–5.20.2, and in particular 5.12.3, 5.12.5, 5.13.3, 5.15, 5.17, 5.18.2, 5.19, 5.20.2.

<sup>394</sup> See ‘Resellers’ compliance with the MAP Policy’, paragraphs 5.44–5.135, and ‘Monitoring and enforcement of resellers’ compliance with the MAP Policy’, paragraphs 5.136–5.166.

<sup>395</sup> See paragraphs 5.15, 5.16, 5.19.

<sup>396</sup> See footnote 82 and paragraphs 5.64, 5.65, 5.66, 5.105, 5.120, 5.121, 5.122.

<sup>397</sup> See ‘Agreement between Foster and [Reseller 1]’, paragraphs 6.26–6.29, ‘Agreement between Foster and [Reseller 2]’, paragraphs 6.30–6.33, ‘Agreement between Foster and [Reseller 3]’, paragraphs 6.34–6.38.

- 6.25 In addition, where relevant, the CMA relies on one or more of the following pieces of evidence to support the finding that a Reseller agreed to the MAP Policy:
- 6.25.1 the Reseller informed Foster about other resellers who had advertised an online price below the MAP;
  - 6.25.2 the Reseller asked Foster to take action against other resellers who had advertised an online price below the MAP;
  - 6.25.3 the Reseller threatened to reduce its own prices or de-list Foster products if Foster did not take action against other resellers who had advertised an online price below the MAP;
  - 6.25.4 Foster stated to the Reseller that the Reseller's online advertised prices were not below the MAP; and/or
  - 6.25.5 The Reseller made a statement that indicated it was in favour of the MAP Policy.

*(a) Agreement between Foster and [Reseller 1]*

- 6.26 The evidence in relation to [Reseller 1] set out in Chapter 5 above<sup>398</sup> and, in particular, the following findings of fact, demonstrate that [Reseller 1] acquiesced, and thereby agreed, to the MAP Policy:
- 6.26.1 [Reseller 1] committed to change its online advertised price of Foster products such that [Reseller 1] prices were no lower than the MAP.<sup>399</sup>
  - 6.26.2 [Reseller 1] took steps internally to amend its online prices so that they were no lower than the MAP, and/or confirmed to Foster that it had done so, when requested to do so by Foster.<sup>400</sup>

---

<sup>398</sup> See paragraphs 5.64–5.103.

<sup>399</sup> See paragraphs 5.67–5.97, and in particular paragraphs 5.69, 5.73, 5.75, 5.83, 5.84, 5.86, 5.87, 5.88, 5.91, 5.93, 5.95, 5.96.

<sup>400</sup> See paragraphs 5.67–5.97, and in particular paragraphs 5.69, 5.70, 5.71, 5.73, 5.74, 5.75, 5.76, 5.78, 5.82, 5.83, 5.84, 5.85, 5.86, 5.87, 5.88, 5.91, 5.93, 5.94, 5.95, 5.96, 5.97.

- 6.26.3 [Reseller 1] informed Foster that other resellers were advertising online prices for Foster products below the MAP.<sup>401</sup>
- 6.26.4 [Reseller 1] threatened Foster that it would reduce its own online prices if Foster did not take action against other resellers regarding instances of other resellers advertising online prices for Foster products below the MAP.<sup>402</sup>
- 6.26.5 Foster stated to [Reseller 1] that [Reseller 1]’s online advertised prices were not, or had previously not been, below the MAP.<sup>403</sup>
- 6.27 In light of the above findings of fact, the CMA finds that there was a concurrence of wills, between [Reseller 1] and Foster, that [Reseller 1] would not advertise Foster products online at prices below the MAP. This constitutes an agreement for the purposes of the Chapter I prohibition and Article 101 TFEU.
- 6.28 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 Foster and [Reseller 1] on the basis that Foster and [Reseller 1] knowingly substituted practical cooperation between them for the risks of competition.
- 6.29 The CMA finds that [Reseller 1] was a party to an agreement and/or concerted practice with Foster from 6 January 2012 to 31 December 2014. The findings of fact above demonstrate that [Reseller 1] acquiesced to the MAP Policy during this period. Even if, on occasion, [Reseller 1] advertised prices for certain Foster products below the MAP, such instances were identified by Foster and [Reseller 1] subsequently adjusted its advertised prices. Moreover, in light of Foster’s monitoring and enforcement activity, and the monitoring by other resellers, the CMA finds that if there had been other instances during this period when [Reseller 1] had been advertising prices below the MAP, this would likely have been identified by Foster, which would then have taken action to ensure that [Reseller 1]’s prices were no lower than the MAP. The evidence demonstrates that when requested to amend its advertised prices by Foster, [Reseller 1] did so.

---

<sup>401</sup> See paragraphs 5.98–5.101.10, and in particular paragraphs 5.98, 5.99, 5.101.1, 5.101.2, 5.101.3, 5.101.4, 5.101.5, 5.101.6, 5.101.7, 5.101.8, 5.101.9, 5.101.10.

<sup>402</sup> See paragraphs 5.99, 5.100, 5.101.2, 5.101.4.

<sup>403</sup> See paragraphs 5.78.

*(b) Agreement between Foster and [Reseller 2]*

6.30 The evidence in relation to [Reseller 2] set out in Chapter 5 above<sup>404</sup> and, in particular, the following findings of fact demonstrate that [Reseller 2] acquiesced, and thereby agreed, to the MAP Policy:

6.30.1 [Reseller 2] committed to change its online advertised price of Foster products such that [Reseller 2]'s prices were no lower than the MAP.<sup>405</sup>

6.30.2 [Reseller 2] took steps internally to amend its online prices so that they were no lower than the MAP, and/or confirmed to Foster that it had done so, when requested to do so by Foster.<sup>406</sup>

6.30.3 [Reseller 2] stated that it had adhered to the MAP Policy, in writing to Foster<sup>407</sup> and the CMA.<sup>408</sup>

6.30.4 [Reseller 2] informed Foster about other resellers who had advertised an online price below then MAP.<sup>409</sup>

6.30.5 [Reseller 2] asked Foster to take action against other resellers who had advertised an online price below the MAP.<sup>410</sup>

6.30.6 [Reseller 2] threatened Foster that it may reduce its own prices if Foster did not take action against other resellers who had advertised an online price below the MAP.<sup>411</sup>

6.31 In light of the above findings of fact, the CMA finds that there was a concurrence of wills between [Reseller 2] and Foster that [Reseller 2] would not advertise Foster products online at prices below the MAP. This constitutes an agreement for the purposes of the Chapter I prohibition and Article 101 TFEU.

---

<sup>404</sup> See paragraphs 5.104–5.117.

<sup>405</sup> See paragraphs 5.106–5.114 and in particular paragraphs 5.106, 5.111 and 5.113.

<sup>406</sup> See paragraphs 5.106–5.114 and in particular paragraphs 5.106, 5.108 and 5.109, 5.113.

<sup>407</sup> See paragraphs 5.106–5.114 and in particular paragraphs 5.108 and 5.109.

<sup>408</sup> See paragraphs 5.105 and 5.106 and in particular paragraph 5.106.

<sup>409</sup> See paragraphs 5.115–5.116 and in particular paragraphs 5.116.1–5.116.4, 5.116.6, 5.116.8, 5.116.9, 5.116.11, 5.116.13 and 5.116.14.

<sup>410</sup> See paragraphs 5.108 and 5.115 to 5.116 and in particular paragraphs 5.108, 5.116.3, 5.116.5, 5.116.8, 5.116.9, 5.116.12, 5.116.13.

<sup>411</sup> See paragraphs 5.108 and 5.115 to 5.116 and in particular paragraphs 5.108 and 5.116.2.

- 6.32 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 Foster and [Reseller 2], on the basis that Foster and [Reseller 2] knowingly substituted practical cooperation between them for the risks of competition.
- 6.33 The CMA finds that [Reseller 2] was a party to an agreement and/or concerted practice with Foster from 6 January 2012 to 31 December 2014. The findings of fact above demonstrate that [Reseller 2] acquiesced to the MAP Policy during this period. Even if, on occasion, [Reseller 2] advertised prices for certain Foster products below the MAP, such instances were identified by Foster and [Reseller 2] subsequently adjusted its advertised prices. Moreover, in light of Foster's monitoring and enforcement activity, and the monitoring by other resellers, the CMA finds that if there had been other instances during this period when [Reseller 2] had been advertising prices below the MAP, this would likely have been identified by Foster, which would then have taken action to ensure that [Reseller 2]'s prices were no lower than the MAP. The evidence demonstrates that when requested to amend its advertised prices by Foster, [Reseller 2] did so.

*(c) Agreement between Foster and [Reseller 3]*

- 6.34 The evidence in relation to [Reseller 3] set out in Chapter 5 above<sup>412</sup> and, in particular, the following findings of fact demonstrate that [Reseller 3] acquiesced, and thereby agreed, to the MAP Policy:
- 6.34.1 [Reseller 3] confirmed to Foster that it had amended its online prices so that they were no lower than the MAP, when requested to do so by Foster.<sup>413</sup>
- 6.34.2 [Reseller 3] took steps internally to amend its prices so that they were no lower than the MAP and/or confirmed to Foster that it had done so, when requested to do so by Foster.<sup>414</sup>

---

<sup>412</sup> See paragraphs 5.118–5.133.

<sup>413</sup> See paragraphs 5.124–5.130 and in particular paragraphs 5.130.6 and 5.130.7.

<sup>414</sup> See paragraphs 5.124–5.130 and in particular paragraphs 5.125, 5.126, 5.127, 5.129, 5.130.4, 5.130.5, 5.130.6, 5.130.7 and 5.132.



- 6.34.3 [Reseller 3] stated that it had adhered to the MAP Policy, in writing to the CMA, specifically, [Reseller 3] stated that it amended its prices when requested to do so by Foster.<sup>415</sup>
- 6.34.4 [Reseller 3] informed Foster about other resellers who had advertised an online price below the MAP.<sup>416</sup>
- 6.35 In light of the above findings of fact, the CMA finds that there was a concurrence of wills between [Reseller 3] and Foster that [Reseller 3] would not advertise Foster products online below the MAP.
- 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 Foster and [Reseller 3], on the basis that Foster and [Reseller 3] knowingly substituted practical cooperation between them for the risks of competition.
- 6.37 In response to the Statement of Objections, [Reseller 3] submitted that it priced above the MAP independently of Foster's MAP Policy. In support of this, [Reseller 3] made reference to the evidence set out in paragraph 5.125 above, where [Reseller 3] stated to the CMA that up until 2014 (with the exception of one instance in March 2013), it did not advertise Foster's products below the MAP. [Reseller 3] told the CMA that it *'generally advertised products higher than the Foster MAP'*. The CMA does not consider that this undermines the CMA's conclusion that [Reseller 3] acquiesced to the MAP Policy. The MAP Policy required resellers not to advertise Foster products online **below** the MAP. Moreover, on the one occasion when [Reseller 3] did price below the MAP, this was picked up by Foster and [Reseller 3] amended its advertised price to ensure it was no lower than the MAP, as required by Foster's MAP Policy.<sup>417</sup> When [Reseller 3] chose to lower its prices, it set its prices with reference to the MAP.<sup>418</sup>
- 6.38 The CMA finds that [Reseller 3] was a party to an agreement and/or concerted practice with Foster from 6 January 2012 to 31 December 2014. The findings of fact above demonstrate that [Reseller 3] acquiesced to the MAP Policy during this period. Even if, on occasion in 2014, [Reseller 3] advertised prices for certain Foster products below the MAP, such instances were identified by

---

<sup>415</sup> See paragraphs 5.124–5.130 and in particular paragraphs 5.125, 5.126, 5.127 and 5.129.

<sup>416</sup> See paragraphs 5.131 and 5.132.

<sup>417</sup> See paragraph 5.126 above.

<sup>418</sup> See paragraph 5.127 above.

Foster and [Reseller 3] subsequently adjusted its advertised prices. Moreover, in light of Foster's monitoring and enforcement activity, and the monitoring by other resellers, the CMA finds that if there had been other instances during this period when [Reseller 3] had been advertising prices below the MAP, this would likely have been identified by Foster, which would then have taken action to ensure that [Reseller 3]'s prices were no lower than the MAP. The evidence demonstrates that when requested to amend its advertised prices by Foster, [Reseller 3] did so.

**D. 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.<sup>419</sup>
- 6.40 If an agreement and/or concerted practice has as its object the prevention, restriction or distortion of competition, it is not necessary to prove that there has been, or could have been, any anti-competitive effects in order to establish an infringement of the Chapter I prohibition or Article 101 TFEU.<sup>420</sup>
- 6.41 The CMA finds that the Agreements each had the object of preventing, restricting or distorting competition in the supply of commercial refrigeration products in the UK. In reaching this conclusion, the CMA has considered the following:
- 6.41.1 the content of the Agreements;
  - 6.41.2 the objectives of the Agreements; and
  - 6.41.3 the legal and economic context of the Agreements.

***Key legal principles***

- 6.42 In conducting this assessment, the CMA has had particular regard to the following legal principles:

---

<sup>419</sup> See Annex A, paragraphs A.3, A.4 and A.30.

<sup>420</sup> See Annex A, paragraphs A.31.

- 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.<sup>421</sup>
- 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.<sup>422</sup> The legal and economic context includes consideration of:
- the nature of the goods or services affected; and
  - the conditions of the functioning and structure of the market in question.<sup>423</sup>
- 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.<sup>424</sup>
- 6.42.4 The fact that the agreement pursues other legitimate objectives does not preclude it from being regarded as having a restrictive object.<sup>425</sup> 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.<sup>426</sup>
- 6.42.5 RPM has been found to constitute a restriction of competition by object. It covers both fixed and minimum resale prices and can be achieved:<sup>427</sup>
- directly, for example a contractual provision that directly sets a fixed or minimum resale price;<sup>428</sup> or
  - indirectly, for example through threats, intimidation, warnings or penalties which pressurise resellers to observe a given price

---

<sup>421</sup> See Annex A, paragraph A.32.

<sup>422</sup> See Annex A, paragraph A.33.

<sup>423</sup> *Ibid.*

<sup>424</sup> See Annex A, paragraph A.34.

<sup>425</sup> See Annex A, paragraph A.35.

<sup>426</sup> *Ibid.*

<sup>427</sup> See Annex A, paragraph A.39.

<sup>428</sup> See Annex A, paragraph A.44.

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.

- 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 the obligation on resellers to report other members of the distribution network who deviate from the agreed price level.<sup>429</sup>
- 6.42.7 Restrictions on advertising prices below a certain level have been found to lead to *de facto* RPM in certain past cases on the basis that these restrict the ability of the reseller to determine its sales prices.<sup>430</sup>

## **Findings**

### *Summary*

6.43 The CMA finds that:

- 6.43.1 Foster entered into an agreement and/or concerted practice with each of the Resellers that the Resellers would not advertise Foster products online below the MAP.<sup>431</sup>
- 6.43.2 In the legal and economic context in which they operated, the Agreements genuinely restricted in practice the ability of the Resellers to determine their online sales price for Foster products at a price below the MAP. Where customers buy the products online (ie 'click-to-buy' sales), the advertised price is typically the price paid by the customer, that is, the sales price.<sup>432</sup> This was reinforced by measures to identify resellers who priced below the MAP combined with actual or threatened sanctions for advertising prices below the MAP.<sup>433</sup>

---

<sup>429</sup> See Annex A, paragraph A.48.

<sup>430</sup> See Annex A, paragraph A.46.

<sup>431</sup> See paragraph 6.22.

<sup>432</sup> See paragraphs 6.46–6.48.

<sup>433</sup> See paragraph 6.46.

- 6.43.3 As such, the CMA finds that the Agreements amounted to RPM in respect of online sales of Foster products.<sup>434</sup>
- 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 RPM. 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 Foster when entering into the Agreements.<sup>435</sup>

### ***Content of the Agreements***

- 6.46 The CMA finds that the content of the Agreements was to prevent the Resellers from advertising Foster products online below the MAP. In particular, as set out in Chapter 5:
- 6.46.1 The MAP Policy required resellers to advertise Foster products for no less than the MAP, which was originally set as the current regional nett price plus a [✂] mark up. In the 2013 update to the MAP Policy, Foster provided the exact MAP and stated that resellers should not advertise below it.
- 6.46.2 Further, the MAP Policy specified that resellers should not make any indication that the MAPs did not represent their best offer, ie they were prohibited from indicating their willingness to sell at prices lower than the MAP.
- 6.46.3 Foster monitored resellers' websites to identify resellers who advertised Foster products online below the MAP and invited resellers to assist Foster in policing compliance.
- 6.46.4 If resellers attempted to advertise Foster products online below the MAP, they risked Foster reducing the reseller's discount, ceasing to supply Foster products or withdrawal of Foster's permission to use its branding.

---

<sup>434</sup> See paragraph 6.48.

<sup>435</sup> See paragraphs 6.55–6.60.

6.47 In the legal and economic context in which they operated,<sup>436</sup> the CMA finds that the Agreements genuinely restricted in practice the ability of the Resellers to determine their online sales prices for Foster products at a price below the MAP. This was the case where customers buy the products online (ie ‘click-to-buy’ sales), where the advertised price is typically the price paid by the customer, ie the sales price. This is supported by evidence before the CMA set out in Chapter 4:

6.47.1 The CMA has completed dummy transactions in relation to certain Foster resellers, including each of the Resellers, tracking a purchase transaction through to the final purchase screen for a Foster commercial refrigeration product. In all cases the price displayed when first arriving on the relevant website page was the price the customer is asked to pay at the final checkout.<sup>437</sup>

6.47.2 In addition, as set out in Chapter 4 above, resellers confirmed that the price paid in an online transaction is typically the same as the advertised price.<sup>438</sup>

6.48 Even if it were possible for a sale to be transacted online below the MAP, the Resellers were severely restricted in their ability to communicate that a price other than the MAP was available. This restriction was reinforced by the prohibition on Resellers even indicating, through the use of strap lines (such as ‘call for better price’), that prices other than the advertised prices might be available.

6.49 In the light of these findings, the CMA considers that by preventing the Resellers from advertising below MAP, the Agreements genuinely restricted in practice the ability of the Resellers to determine their online sales price for Foster products at a price below the MAP. As such, the CMA finds that the Agreements amounted to RPM in respect of online sales of Foster products.

6.50 RPM has been found consistently at both EU and national level (including the UK) to have the object of preventing, restricting or distorting competition.<sup>439</sup>

---

<sup>436</sup> See Chapter 4 above, and paragraph 6.54.

<sup>437</sup> See paragraph 4.13.

<sup>438</sup> *Ibid.*

<sup>439</sup> See Annex A, paragraph A.39.

### ***Objectives of the Agreements***

- 6.51 The content of the MAP Policy itself, along with contemporaneous documentary evidence, demonstrates that the main objective of the MAP Policy was to protect the margins of resellers and to reduce downward pressure on the prevailing price of Foster products in the market (the Market Price).
- 6.52 The CMA considers that, in the absence of the Agreements, each Reseller would have been able to determine independently its own price for the sale of Foster products over the internet. In this way, each Reseller would have had the freedom to attract and win customers by using the internet to signal to customers the existence of a price advantage over its competitors. As such, this would have increased the scope for price competition between the Resellers (and, more generally, other Foster resellers).
- 6.53 In the light of the above, the CMA considers that the objective of the Agreements was to:
- 6.53.1 reduce price competition between resellers from online sales; and
  - 6.53.2 reduce downward pressure on the Market Price.

### ***Context of the Agreements***

- 6.54 In reaching its findings that the Agreements each had the object of restricting competition, the CMA has had regard to the actual context<sup>440</sup> in which the Agreements operated, including the goods affected by them,<sup>441</sup> the conditions of the functioning and structure of the market,<sup>442</sup> and the relevant legal and economic context.<sup>443</sup>

### ***Subjective intent***

- 6.55 Whilst the CMA is not required to demonstrate that Foster 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

---

<sup>440</sup> See Chapter 4 above.

<sup>441</sup> See Chapter 4 above and Annex B.

<sup>442</sup> *Ibid.*

<sup>443</sup> See Chapter 4 above.

those Agreements.<sup>444</sup> Those intentions demonstrate both the nature of the Agreements and what Foster was seeking to achieve.

*The reduction of price competition online and the protection of reseller margins*

6.56 The CMA finds that Foster's principal aim in adopting the MAP Policy was to reduce or eliminate aggressive discounting on sales made online, and therefore:

6.56.1 to reduce price competition between resellers from online sales;

6.56.2 to reduce downward pressure on the Market Price; and thereby

6.56.3 to protect or increase the margins of resellers; and

6.56.4 to encourage resellers to stock Foster's products.

6.57 This is based on the totality of evidence set out in Chapter 5 above. It is based in particular on the following specific evidence:

6.57.1 Prior to the introduction of the MAP Policy, online discounting of Foster products had reduced resellers' margins.<sup>445</sup>

6.57.2 Foster introduced the MAP Policy in response to complaints from resellers about discounting by online resellers.<sup>446</sup>

6.57.3 The MAP Policy had the express aim of improving the margins available from the sale of Foster products.<sup>447</sup>

6.57.4 Foster's contemporaneous documents also demonstrate that its main objective for implementing the MAP Policy was to reduce price competition between resellers and to reduce downward pressure on the Market Price.<sup>448</sup>

---

<sup>444</sup> See Annex A paragraph A.34.

<sup>445</sup> See paragraphs 5.37, 5.37.1, 5.37.2, 5.37.3, 5.37.4, 5.42, 5.104.

<sup>446</sup> See paragraphs 5.32, 5.33, 5.34.

<sup>447</sup> See paragraphs 5.19, 5.31, 5.32, 5.33, 5.34, 5.35, 5.36, 5.40.3.

<sup>448</sup> See paragraphs 5.55, 5.130.1.



### *Protecting the value of the Foster brand*

6.58 During the course of the CMA's investigation, Foster has submitted that the rationale for introducing the MAP Policy was to protect its brand and reputation and ensure that its dealers had a continuing incentive to invest in the brand and in pre- and post-sale service.<sup>449</sup> In particular, Foster has submitted that it introduced the MAP in response to:

6.58.1 deceptive practices of certain resellers;<sup>450</sup>

6.58.2 poor or non-existent service;<sup>451</sup> and

6.58.3 unprofessional behaviour that was harmful to its brand.<sup>452</sup>

6.59 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 MAP Policy. However, the CMA considers that these objectives were, at most, subsidiary to the objective of protecting resellers' margins by reducing price competition from sales made online. Moreover, whilst these may have been genuinely held commercial concerns, they do not justify the introduction of the MAP Policy. In particular, maintaining a prestigious image is not a legitimate aim for restricting competition.<sup>453</sup> Finally, the CMA notes that the fact that an agreement pursues other legitimate objectives does not preclude it from being regarded as having a restrictive object.<sup>454</sup>

6.60 In the light of the above, the CMA finds that the Agreements had the object of preventing, restricting or distorting competition (through RPM) in the supply of Foster products in the UK.

### **E. Appreciable restriction of competition**

6.61 The CMA finds that the Agreements appreciably prevented, restricted or distorted competition in relation to the supply of commercial refrigeration products, both in the EU and in the UK.

---

<sup>449</sup> See paragraph 5.38.

<sup>450</sup> See paragraph 5.38 and 5.39.

<sup>451</sup> See paragraph 5.38.

<sup>452</sup> *Ibid.*

<sup>453</sup> See Annex A, paragraph A.43.

<sup>454</sup> See Annex A, paragraph A.35.

### ***Appreciable effect on competition within the EU***

- 6.62 An agreement or concerted practice falls outside the scope of Article 101 TFEU if its impact on competition is insignificant.<sup>455</sup>
- 6.63 According to case law<sup>456</sup> 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.
- 6.64 The CMA finds that each of the Agreements had the object of preventing, restricting or distorting competition.<sup>457</sup> The CMA therefore also finds that, by their very nature, each of the Agreements constitute an appreciable restriction of competition in the supply of commercial refrigeration products for the purposes of Article 101 TFEU.

### ***Appreciable effect on competition within the UK***

- 6.65 In order to infringe the Chapter I prohibition, an agreement and/or concerted practice must have an 'appreciable' effect on competition within the UK.
- 6.66 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.
- 6.67 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.<sup>458</sup> The CMA therefore also finds that each of the Agreements constitute, by their very nature, an appreciable restriction of competition in the supply of commercial refrigeration products for the purposes of Chapter I prohibition.
- 6.68 In any event, and in the alternative, the CMA finds that each of the Agreements had an appreciable potential effect on competition in the supply of

---

<sup>455</sup> See Annex A, paragraphs A.60 and A.61.

<sup>456</sup> See Annex A, paragraph A.62

<sup>457</sup> See paragraph 6.60.

<sup>458</sup> Annex A, paragraph A.62.

commercial refrigeration products in the UK. This conclusion is based on the following findings of fact:

- 6.68.1 The Agreements applied across the whole of the UK, rather than being confined to a particular region or locality.
  - 6.68.2 Foster's share of supply was between approximately [REDACTED] in 2014.<sup>459</sup>
  - 6.68.3 Foster is an important player in the market, compared to its main competitors.<sup>460</sup>
  - 6.68.4 ITW had turnover of £552.2 million in 2012, £534.3 million in 2013 and £534.2 million in 2014.<sup>461</sup> Foster had a total turnover of [REDACTED] in 2012, [REDACTED] in 2013, [REDACTED] in 2014.<sup>462</sup>
  - 6.68.5 The Resellers are amongst the biggest resellers of Foster products.<sup>463</sup>
- 6.69 In addition, the CMA has reasonable grounds to suspect that the potential effects of the Agreements may extend more widely. In particular, ITW confirmed to the CMA that Gamko, one of ITW's other operating divisions which specialises in refrigerated drinks storage and bar solutions and whose products are distributed via the Foster distribution network, introduced a MAP Policy in early 2013. ITW confirmed that this policy was exactly the same as that applied by Foster.<sup>464</sup>

## **F. Effect on trade between EU Member States**

### ***Key legal principles***

- 6.70 Article 101 TFEU applies where an agreement or concerted practice may affect trade between EU Member States to an appreciable extent.<sup>465</sup>

---

<sup>459</sup> See paragraphs B.32–B.36.

<sup>460</sup> See Annex B, 'RELEVANT MARKET', and in particular paragraphs B.32 and B.34–B.38.

<sup>461</sup> Turnover figures taken from ITW audited accounts year ended 31 December 2012 (URN FD0570), ITW audited accounts year ended 31 December 2013 (URN FD0571) and ITW audited accounts year ended 31 December 2014 (URN F0052). In *North Midland Construction plc v Office of Fair Trading* [2011] CAT 14 at [60], the CAT took into account the fact 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.

<sup>462</sup> Foster [REDACTED] (URN FC0046.2).

<sup>463</sup> See question 26 of Foster's response to section 26 notice dated 5 March 2015 (URN FC0052.2).

<sup>464</sup> Section 26 response dated 26 March 2015, question 10 (URN FC0046.2).

<sup>465</sup> See Annex A, paragraph A.64.

### *Potential to affect trade between EU Member States*

- 6.71 The CMA finds that the Agreements have the potential to affect trade between EU Member States. This is because the Agreements may have an influence on the pattern of trade between EU Member States. The CMA has based its finding on the following:
- 6.71.1 The Agreements involve RPM in respect of tradeable products which cover at least the whole of the UK.
  - 6.71.2 There are meaningful amounts of imports and exports of commercial refrigeration products at the wholesale level, including to and from the rest of the EU. For example, Foster itself had [X] of exports in 2012, [X] in 2013 and almost [X] in 2014 (including exports to France and Germany).<sup>466</sup>
  - 6.71.3 A number of Foster's competitors in the UK are subsidiaries of companies based in other EU Member States, eg [Supplier].
  - 6.71.4 There is evidence that certain resellers have the facility to sell commercial refrigeration products to overseas customers.<sup>467</sup>

### *Appreciability*

- 6.72 The CMA finds that the Agreements may appreciably affect trade between EU Member States. This is based on the following factors:
- 6.72.1 The nature of the Agreements: the Agreements were applied across the whole of the UK and were not limited to a particular region or locality.
  - 6.72.2 The nature of the affected products: the Agreements cover online sales, which, by their nature, are more likely to attract customers in other EU Member States. There are no significant barriers to cross-border trade for commercial refrigeration products. There are meaningful amounts of imports and exports of commercial refrigeration products at the wholesale level, including to and from

---

<sup>466</sup> See question 24 Foster's response to section 26 Notice dated 5 March 2015 (URN FC0046.2).

<sup>467</sup> See for example the following websites: [Reseller] (URN F0059).

the rest of the EU.<sup>468</sup> In addition, there is evidence that certain resellers have the facility to sell commercial refrigeration products to overseas customers.<sup>469</sup>

6.72.3 Foster's market position: Foster's share of supply is between [X] and Foster is an important player in the commercial refrigeration sector.<sup>470</sup>

6.73 In the light of the above, the CMA has concluded that the Agreements may affect trade between EU Member States to an appreciable extent.

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

6.74 The Chapter I prohibition applies to agreements 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).<sup>471</sup> Unlike the position under Article 101 TFEU, there is no requirement that the effect on trade within the UK should be appreciable.<sup>472</sup>

6.75 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.

#### **H. Exclusion or exemption**

##### ***Exclusion***

6.76 The Chapter I prohibition does not apply to any of the cases in which it is excluded by or as a result of Schedules 1–3 of the Act.

6.77 The CMA finds that none of the relevant exclusions applies to the Agreements.

---

<sup>468</sup> See question 24 Foster's response to section 26 Notice dated 5 March 2015 (URN FC0046.2).

<sup>469</sup> See for example the following websites: [Reseller] (URN F0058) and [Reseller] (URN F0059).

<sup>470</sup> See Annex B, 'RELEVANT MARKET', and in particular paragraphs B.32 and B.34–B.38.

<sup>471</sup> See Annex A, paragraph A.80.

<sup>472</sup> See Annex A, paragraph A.81.

## ***Exemption***

### ***Block Exemption***

- 6.78 Vertical agreements that restrict competition may be exempt from the Chapter I prohibition and/or Article 101(1) TFEU if they fall within the Vertical Agreements Block Exemption Regulation (VABER).<sup>473</sup> 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’ restrictions.<sup>474</sup> A hardcore restriction includes a restriction of the buyer's ability to determine its sale price (ie it amounts to RPM).<sup>475</sup>
- 6.79 The CMA finds that the VABER does not apply to the Agreements, and therefore that the Agreements are not exempt from the application of Article 101 or the Chapter I prohibition. This is for the following reasons:
- 6.79.1 The Agreements prevented the Resellers from advertising Foster products online below the MAP.<sup>476</sup>
- 6.79.2 For the reasons set out in the ‘Object’ section above, the Agreements therefore restricted the buyer’s ability to determine its sale price (ie they amounted to RPM).<sup>477</sup>
- 6.79.3 Therefore, Article 4(a) of the VABER applies and the Agreements fall outside the scope of the VABER.

### ***Individual exemption***

- 6.80 Agreements and/or concerted practices which restrict competition are exempt from the Chapter I prohibition and/or Article 101 if certain criteria are satisfied.<sup>478</sup> In particular, it must be shown that the agreement in question:
- 6.80.1 contributes to improving production or distribution or promoting technical or economic progress while allowing consumers a fair share of the resulting benefits, but

---

<sup>473</sup> See Annex A, paragraph A.86.

<sup>474</sup> See Annex A, paragraph A.86.

<sup>475</sup> See Annex A, paragraph A.87.

<sup>476</sup> See paragraph 6.46.

<sup>477</sup> See paragraphs 6.47 and 6.49.

<sup>478</sup> See Annex A, paragraphs A.88 and A.89.

- 6.80.2 does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives, or
- 6.80.3 affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.
- 6.81 The CMA notes that agreements and/or concerted practices, which have as their object the restriction of competition, are very unlikely to benefit from individual exemptions.<sup>479</sup> It is for the party claiming the benefit of exemption to adduce evidence that substantiates its claim.<sup>480</sup> No such evidence has been provided by Foster.
- I. Conclusion on the application of the Chapter I prohibition and Article 101 TFEU**
- 6.82 In the light of the above, the CMA finds that Foster 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 commercial refrigeration products in the UK.

---

<sup>479</sup> See Annex A, paragraph A.90.

<sup>480</sup> See Annex A, paragraph A.91.

## **7. THE CMA'S ACTION**

### **A. Decision**

7.1 On the basis of the evidence set out and analysed above, the CMA has concluded that Foster 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 that ITW, as the legal entity, of which Foster forms part, is liable for the Infringements.

7.2 Specifically, the CMA has concluded the following:

7.2.1 From 6 January 2012 to 31 December 2014, Foster, as a division of ITW, and [Reseller 1] were party to an agreement and/or concerted practice that [Reseller 1] would not advertise Foster products online below the MAP, which had as its object the appreciable prevention, restriction, or distortion of competition (through resale price maintenance) in relation to the supply of commercial refrigeration products in the UK.

7.2.2 From 6 January 2012 to 31 December 2014, Foster, as a division of ITW, and [Reseller 2] were party to an agreement and/or concerted practice that [Reseller 2] would not advertise Foster products online below the MAP, which had as its object the appreciable prevention, restriction, or distortion of competition (through resale price maintenance) in relation to the supply of commercial refrigeration products in the UK.

7.2.3 From 6 January 2012 to 31 December 2014, Foster, as a division of ITW, and [Reseller 3] were party to an agreement and/or concerted practice that [Reseller 3] would not advertise Foster products online below the MAP, which had as its object the appreciable prevention, restriction, or distortion of competition (through resale price maintenance) in relation to the supply of commercial refrigeration products 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 that 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 agreement<sup>481</sup> infringes the Chapter I prohibition and Article 101(1) TFEU, it may give to such person(s) 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 31 December 2014.
- 7.6 Foster informed the CMA that it had withdrawn its MAP Policy in December 2014, and that it was no longer being enforced. Revised reseller terms were made available on the Foster website during December 2014, which stated that resellers were free to set their own advertising and sale prices.<sup>482</sup> Further, in a 'Dealer Update' of 2 April 2015, Foster communicated to approximately [X] resellers that the MAP Policy had been withdrawn with effect from 31 December 2014.<sup>483</sup>
- 7.7 There is no contemporaneous evidence that Foster communicated to the Resellers that the MAP Policy had come to a conclusion on a date any earlier than 31 December 2014. For some Resellers, the dealer update of 2 April 2015 may have been the first communication from Foster which stated that Foster had withdrawn the MAP Policy. Nonetheless, the CMA accepts Foster's submission that the MAP Policy was not enforced after 31 December 2014. Consequently, the CMA takes that as the date on which each Agreement concluded.
- 7.8 In addition, the CMA notes that ITW has now adopted a comprehensive competition law compliance programme.
- 7.9 In the light of the above, the CMA considers that the Infringements have ceased. In these circumstances, the CMA considers that it is not necessary to give directions to ITW.

---

<sup>481</sup> Or, as appropriate, concerted practice or decision by an association of undertakings – see section 2(5) of the Act.

<sup>482</sup> *'This is to inform you that last month Foster withdrew its MAP policy, which is no longer being enforced.'* Email from Steptoe & Johnson (representing ITW) to the CMA, 7 January 2015 (URN FC0023). See also URN FC0023.2 for the Foster General Notes and URN FC0023.1 for the Reseller Specific Terms.

<sup>483</sup> Email from [Lawyer] (Steptoe & Johnson (representing ITW)), to the CMA, dated 15 April 2015, enclosing 'Dealer Update' newsletter dated 2 April 2015 (URN FC0049).

## C. Financial penalties

- 7.10 Section 36(1) of the Act provides that on making a decision that an agreement<sup>484</sup> has infringed the Chapter I prohibition and/or Article 101 TFEU, the CMA may require an undertaking which is a party to that 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).<sup>485</sup>
- 7.11 A penalty in respect of the Infringements are imposed on ITW as the legal entity that participated in the conduct that is the subject of the Infringements, through its division Foster.

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

- 7.12 Provided the penalties it imposes in a particular case are:
- 7.12.1 within the range of penalties permitted by section 36(8) of the Act<sup>486</sup> and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (the 2000 Order),<sup>487</sup> and
  - 7.12.2 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.<sup>488</sup>
- 7.13 The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.<sup>489</sup> Rather, the CMA makes its assessment on a case-by-case basis,<sup>490</sup> having regard to all relevant circumstances and the twin objectives of the CMA's policy on financial penalties, namely:

---

<sup>484</sup> Or, as appropriate, concerted practice or decision by an association of undertakings – see section 2(5) of the Act.

<sup>485</sup> 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.

<sup>486</sup> Section 36(8) is addressed at paragraphs 7.49 and following below.

<sup>487</sup> SI 2000/309, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

<sup>488</sup> *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].

<sup>489</sup> See, for example, *Eden Brown and Others v OFT* [2011] CAT 8, at [78].

<sup>490</sup> See, for example, *Kier Group and Others v OFT* [2011] CAT 3, at [116] where the CAT noted that '*other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent*'. See also *Eden Brown and Others v OFT*

- 7.13.1 to impose penalties on infringing undertakings which reflect the seriousness of the infringement, and
- 7.13.2 to ensure that the threat of penalties will deter both the infringing undertaking and other undertakings from engaging in anti-competitive activities.<sup>491</sup>

#### *Small agreements*

- 7.14 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.<sup>492</sup>
- 7.15 [X] The turnover of ITW exceeded £20 million in the calendar year 2013. Accordingly, ITW does not benefit from immunity from penalty under section 39(3).

#### *Intention/negligence*

- 7.16 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.<sup>493</sup> However, the CMA is not obliged to specify whether it considers the infringement to be intentional or merely negligent.<sup>494</sup>
- 7.17 The CAT has defined the terms ‘intentionally’ and ‘negligently’ as follows:

*[A]n 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*

---

[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.’

<sup>491</sup> Section 36(7A) of the Act and the Penalties Guidance, paragraph 1.4.

<sup>492</sup> 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.

<sup>493</sup> Section 36(3) of the Act.

<sup>494</sup> *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].

*would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition.*<sup>495</sup>

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

*[T]he 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.*<sup>496</sup>

7.19 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.<sup>497</sup> The CMA considers that the Infringements had as their object the prevention, restriction or distortion of competition.<sup>498</sup>

7.20 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.<sup>499</sup>

7.21 In the light of the evidence set out at Chapter 5 above, the CMA considers that ITW through its division, Foster, was (i) aware or (ii) should reasonably have been aware that its conduct was capable of restricting or distorting competition.<sup>500</sup> For example, Foster's internal correspondence expresses

---

<sup>495</sup> *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at [221].

<sup>496</sup> 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] ECR 3369, paragraph 45 and *Nederlandsche Banden-Industrie Michelin v Commission*, paragraph 107.

<sup>497</sup> See *Enforcement* (OFT407; December 2004), adopted by the CMA Board, paragraph 5.9.

<sup>498</sup> See paragraph 6.60 above.

<sup>499</sup> 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.

<sup>500</sup> See *Enforcement* (OFT407; December 2004, adopted by the CMA Board), paragraph 5.9, second and third bullets.

concern about the legality of the MAP Policy over a year before the Infringements ceased<sup>501</sup> and the aim of the policy was clear.<sup>502</sup>

7.22 Accordingly, in the present case, the CMA considers that the very nature of the Infringements means that ITW through its division, Foster, was (i) aware or (ii) could not have been unaware, that the Agreements were reasonably likely to be restrictive of competition. At the very least, the CMA considers that ITW through its division, Foster, ought to have known that its actions would result in a restriction of competition.<sup>503</sup>

7.23 The CMA therefore finds that ITW through its division, Foster, committed the Infringements intentionally or, at the very least, negligently.

#### *Single penalty*

7.24 The CMA has discretion as to whether to impose a single penalty or multiple penalties for infringing behaviour that could in principle be characterised as more than one infringement.<sup>504</sup>

7.25 In the present case, the CMA considers it appropriate to impose a single penalty on ITW for the Infringements in view of the fact that:

7.25.1 the Infringements were related and involved almost identical subject matter;

7.25.2 the Infringements were part of a larger collection of similar arrangements between Foster and its resellers selling Foster products; and

7.25.3 the CMA's decision to pursue three such arrangements as infringements was a matter of discretion.

---

<sup>501</sup> See email from [Sales employee] (Foster) to [Sales employee], [Sales employee], [Sales employee] and [Employee] (Foster) dated 27 November 2013 at 1023h (FD0579). In this email, seeking approval of a letter to inform [Reseller] that its account had been closed (for a combination of reasons), [Sales employee] writes '*He [Reseller] has just called me and he is quoting the Office of Fair Trading and interim decisions. I will not be making reference to the MAP directly as it could open up issues in the future.*' In an email from [Sales employee] (Foster) to [Director] (Foster) of the same date (1042h), forwarding the 1023h email, [Sales employee] asks '*Can you advise of the best way to do this as I do not want this to become a legal issue in the future?*'

<sup>502</sup> See paragraphs 6.56 and 6.57 above.

<sup>503</sup> See *Enforcement* (OFT407; December 2004, adopted by the CMA Board), paragraph 5.12.

<sup>504</sup> See, for example, *Kier Group and Others v OFT* [2011] CAT 3, at [179].

## **Calculation of penalties**

7.26 As noted at paragraph 7.10 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**

7.27 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.<sup>505</sup> The ‘relevant 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.<sup>506</sup> The ‘last business year’ is the undertaking’s financial year preceding the date when the infringement ended.<sup>507</sup>

7.28 In the present case, the relevant turnover for ITW comprises the turnover generated by ITW in the supply of commercial refrigeration products through resellers in the UK for the financial year ending 31 December 2013.

7.29 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.<sup>508</sup> 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.<sup>509</sup> 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

---

<sup>505</sup> Penalties Guidance, paragraphs 2.3 to 2.6.

<sup>506</sup> Penalties Guidance, 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).

<sup>507</sup> Penalties Guidance, paragraph 2.7.

<sup>508</sup> Penalties Guidance, paragraph 2.5.

<sup>509</sup> Penalties Guidance, paragraph 2.4.

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.<sup>510</sup>

- 7.30 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 ‘hardcore’ restriction.<sup>511</sup> 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 ITW and other undertakings from engaging in such infringements in the future.
- 7.31 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.
- 7.32 The CMA has also taken into account the following factors in assessing the seriousness of the Infringements:
- 7.32.1 *The nature of the products:* The relevant product market for the purposes of the Infringements is the supply of commercial refrigeration products.<sup>512</sup> Price, including prices offered online, is an important parameter of competition.<sup>513</sup>
- 7.32.2 *The structure of the market and ITW’s market share:* Foster is an important player in the market, compared to its main competitors.<sup>514</sup> The intensity of competition amongst suppliers appears to have increased in recent years, with a large number of commercial refrigeration brands in the market.<sup>515</sup> ITW has an estimated share of supply of between [X].<sup>516</sup>

---

<sup>510</sup> Penalties Guidance, paragraph 2.6.

<sup>511</sup> See Article 4(a) of the VABER.

<sup>512</sup> See paragraph B.29 below.

<sup>513</sup> See paragraph 4.12 above.

<sup>514</sup> See paragraph B.38 below.

<sup>515</sup> See paragraph B.37 below.

<sup>516</sup> See paragraph B.32–B.36 below.

7.32.3 *Entry conditions:* The CMA is aware that the market for refrigeration has seen new entry in recent years, in particular an increasing variety of products and brands are now being imported from overseas, particularly lower cost products.<sup>517</sup>

7.32.4 *Impact on competitors and third parties:* The Infringements, by restricting in practice the ability of the Resellers to determine their online sales prices at a price below the MAP, reduced price competition from sales of commercial refrigeration products made online and reduced downward pressure on the price of commercial refrigeration products.

7.33 In view of the foregoing, the CMA has applied a starting point of 19% of relevant turnover.

*Step 2 – adjustment for duration*

7.34 The starting point under step 1 may be increased, or in particular circumstances decreased, to take into account the duration of an infringement.<sup>518</sup> 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.<sup>519</sup>

7.35 The CMA has found that the Infringements lasted from 6 January 2012 to 31 December 2014 (two years, 11 months and 26 days).<sup>520</sup> The CMA has accordingly applied a multiplier of three to the figure reached at the end of step 1.

*Step 3 – adjustment for aggravating and mitigating factors*

7.36 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.<sup>521</sup> A non-exhaustive list of aggravating and mitigating factors is set out in the Penalties Guidance.<sup>522</sup> In the circumstances of this case, the

---

<sup>517</sup> See paragraph B.26.4 below and paragraph 6.71 above.

<sup>518</sup> *Penalties Guidance*, paragraph 2.12.

<sup>519</sup> *Penalties Guidance*, paragraph 2.12.

<sup>520</sup> See paragraph 7.2 above.

<sup>521</sup> *Penalties Guidance*, paragraph 2.13.

<sup>522</sup> *Penalties Guidance*, paragraphs 2.14 and 2.15.



CMA has adjusted the penalty at step 3 to take account of the factors set out below.

### *Mitigating factors*<sup>523</sup>

#### *Cooperation*

- 7.37 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).<sup>524</sup>
- 7.38 The CMA considers that it is appropriate to decrease the penalty at step 3 to reflect ITW's cooperation in promptly making key staff available for voluntary interviews, attending meetings at the CMA's offices and responding to requests for information and other communications from the CMA in a timely and constructive fashion, going beyond the minimum required by the CMA.
- 7.39 ITW's cooperation enabled the enforcement process to be concluded more efficiently. The CMA considers that a 10% reduction for cooperation is appropriate and proportionate in the circumstances of this case.

#### *Compliance*

- 7.40 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.<sup>525</sup>
- 7.41 Following the CMA's investigation and the settlement discussions in the present case, ITW has introduced a comprehensive competition law compliance programme throughout the undertaking, to which its Board has fully and publicly committed.
- 7.42 The CMA notes that the identified compliance activities by ITW 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

---

<sup>523</sup> Penalties Guidance, paragraph 2.15.

<sup>524</sup> Penalties Guidance, paragraph 2.15 and footnote 28.

<sup>525</sup> Penalties Guidance, paragraph 2.15.

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, ITW will submit a report to the CMA on its compliance activities every year, for the next three years.

- 7.43 In addition, Illinois Tool Works Inc has committed to ensuring that a culture of compliance and awareness is disseminated throughout the Illinois Tool Works Inc group of companies, including ITW and its division, Foster.
- 7.44 The CMA therefore considers that it is appropriate and proportionate to decrease the penalty by 10% to reflect the ITW compliance activities.

*Step 4 – adjustment for specific deterrence and proportionality*

- 7.45 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.<sup>526</sup> 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.
- 7.46 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.<sup>527</sup>
- 7.47 ITW's penalty after step 3 is [£]. The CMA considers that this figure should be decreased to ensure that the level of penalty is not disproportionate or

---

<sup>526</sup> Penalties Guidance, 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 ITW 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.

<sup>527</sup> Penalties Guidance, paragraph 2.20.

excessive. In reaching this view, the CMA has had regard to the following factors:

- 7.47.1 *ITW's size and financial position:* Having had regard to a range of financial indicators for ITW,<sup>528</sup> the CMA does not consider that it is necessary to make any adjustment at step 4 in respect of this factor.
- 7.47.2 *The nature of the Infringements:* The Infringements were a serious breach of the Chapter I prohibition and Article 101 TFEU.<sup>529</sup> 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.
- 7.47.3 *ITW's role in the infringements:* Foster 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.
- 7.47.4 *The impact of ITW's infringing activity on competition:* having regard to a range of factors, the CMA considers that ITW's penalty should be decreased to ensure that its penalty is not disproportionate or excessive. Whilst the ability to advertise and sell products at discounted prices on the internet can intensify price competition, both between online resellers and between online and offline resellers,<sup>530</sup> the CMA notes that the proportion of sales of Foster products directly affected by the infringement, that is online sales, is low.<sup>531</sup>
- 7.48 In view of the foregoing, in the circumstances of this case, the CMA has decreased ITW's penalty at step 4 by [X], to a figure of £2,873,526. Assessing the resulting penalty in the round, the CMA considers that the adjusted penalty

---

<sup>528</sup> 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 (Penalties Guidance, 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 ITW 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.

<sup>529</sup> See paragraph 7.30 above.

<sup>530</sup> See paragraphs 4.30 and 4.31 above

<sup>531</sup> See paragraph 4.9 above.

is appropriate to deter ITW 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*

- 7.49 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.<sup>532</sup> The CMA has assessed ITW's penalty against this threshold. This assessment has not necessitated any reduction to the penalty at step 5 of the penalty calculation.
- 7.50 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.<sup>533</sup> 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*

- 7.51 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.<sup>534</sup>
- 7.52 ITW 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 ITW and not to any of the counterparties to the agreements or concerted practices with ITW.<sup>535</sup> Therefore, settlement discussions took place after the Resellers had been given an opportunity to make representations on the Statement of Objections.

---

<sup>532</sup> Section 36(8) of the Act and the 2000 Order, as amended. See also Penalties Guidance, paragraph 2.21.

<sup>533</sup> Penalties Guidance, paragraph 2.24.

<sup>534</sup> Penalties Guidance, paragraph 2.26.

<sup>535</sup> See paragraphs C.15 and C.16 below.

- 7.53 As part of settlement ITW cooperated with the CMA and expedited the process for concluding the investigation both prior to and after the issue of the Statement of Objections.
- 7.54 ITW 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,<sup>536</sup> which are now reflected in the Decision. In light of those admissions, and ITW's agreement to cooperate in expediting the process for concluding the investigation, the CMA has reduced ITW's financial penalty by 20% at step 6.

### ***Payment of Penalty***

- 7.55 The CMA requires ITW to pay the penalty applicable to it as set out in the table below.

Step	Description	Adjustment	Figure
	<b>Relevant turnover</b>		£[X]
1	Starting point as a percentage of relevant turnover	19%	£[X]
2	Adjustment for duration	x 3	£[X]
3	Adjustment for aggravating and mitigating factors	<i>Mitigating: Cooperation</i>	- 10%
		<i>Mitigating: Compliance</i>	- 10%
		Total adjustment	- 20%
4	Adjustment for specific deterrence and proportionality	- [X]%	£2,873,526
5	Adjustment to prevent the statutory maximum being exceeded	N/A	N/A
	<b>Total penalty</b>		<b>£2,873,526</b>
6	Settlement discount	- 20%	- £574,705
	<b>Total penalty payable</b>		<b>£2,298,820</b>

<sup>536</sup> See paragraph C.10 below.

7.56 The penalty will become due to the CMA in its entirety on 26 July 2016<sup>537</sup> and must be paid to the CMA by close of banking business on that date. If that date has passed and:

7.56.1 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

7.56.2 such an appeal has been made and determined,

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.<sup>538</sup>

---

<sup>537</sup> The next working day two calendar months from the expected date of receipt of the Decision.

<sup>538</sup> Section 37(1) of the Act.

SIGNED:

[            ]

24 May 2016

Ann Pope, on behalf of the Competition and Markets Authority  
Senior Director

## **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.<sup>539</sup>
- 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.

---

<sup>539</sup> The Act, sections 2(1), 2(3) and 2(7).



- 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 European Courts, and any relevant decision of the European Courts.<sup>540</sup> The CMA must, in addition, have regard to any relevant decision or statement of the European Commission (the Commission).<sup>541</sup>

#### **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*’.<sup>542</sup>
- 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*’.<sup>543</sup>
- 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,<sup>544</sup> partnerships,<sup>545</sup> individuals operating as sole traders,<sup>546</sup> and trade associations.<sup>547</sup>

---

<sup>540</sup> 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).

<sup>541</sup> 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.

<sup>542</sup> Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, EU:C:1991:161, paragraph 21.

<sup>543</sup> Case C-118/85 *Commission v Italian Republic*, EU:C:1987:283, paragraph 7.

<sup>544</sup> In all their corporate forms, including a limited partnership (see Case 258/78 *LC 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).

<sup>545</sup> Commission Decision 78/823/EEC *Breeders' rights: roses* (IV/30.017) [1985] L369/9.

<sup>546</sup> Case 210/81 *Oswald Schmidt, trading as Demo-Studio Schmidt, v Commission*, EU:C:1983:277.

<sup>547</sup> 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.

- A.11. The concept also covers an economic unit, even if in law that unit consists of several natural or legal persons.<sup>548</sup> The undertaking that committed the infringement can therefore be larger than the legal entity whose representatives actually took part in the infringing activities. When an undertaking infringes the competition rules, it is for that entity, according to the principle of personal responsibility, to answer for that infringement.<sup>549</sup>

### ***Attribution of liability***

- 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 person(s) who form part of the undertaking involved in the infringement.

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

### ***General***

- A.13. 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.*’<sup>550</sup>

- A.14. In the recent *MasterCard* case, the CJ confirmed the principle:

*[I]t 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*

---

<sup>548</sup> Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 55.

<sup>549</sup> *Ibid*, paragraph 56.

<sup>550</sup> Case C-8/08 *T-Mobile Netherlands BV and others v NMa*, EU:C:2009:343, paragraph 23 (citing Case C-49/92 P *Commission v Anic Participazioni*, EU:C:1999:356, paragraph 131). See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4 [206(ii)].

*the prohibition of that article catch different forms of coordination between undertakings of 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.*<sup>551</sup>

- A.15. 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.<sup>552</sup> 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.<sup>553</sup>

### *Agreements*

- A.16. The Chapter I prohibition and Article 101 TFEU are intended to catch a wide range of agreements, including oral agreements and ‘gentlemen’s agreements’.<sup>554</sup> 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

<sup>551</sup> Case C-382/12 P *MasterCard Inc v European Commission*, EU:C:2014:2201, paragraph 63 and the case law cited. The unlawful coordination 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 coordination 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*, 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.*’

<sup>552</sup> Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission*, EU:T:2006:265, paragraph 77 (upheld on appeal in Joined cases C-501/06 P etc *GlaxoSmithKline Unlimited v Commission*, EU:C:2009:610).

<sup>553</sup> *Agreements and Concerted Practices* (OFT401), December 2004 (adopted by the CMA Board), paragraph 2.8. See also eg 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.

<sup>554</sup> Case C-41/69 *ACF Chemiefarma NV v Commission*, EU:C:1970:71, in particular, paragraphs 106–114.

any enforcement mechanisms.<sup>555</sup> An agreement may also consist of either an isolated act, or a series of acts, or a course of conduct.<sup>556</sup>

- A.17. 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.<sup>557</sup> An undertaking may also be party 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.<sup>558</sup>
- A.18. The key question is whether there has been ‘*a concurrence of wills between at least two parties, the form in which it is manifested being unimportant, so long as it constitutes the faithful expression of the parties’ intention*’.<sup>559</sup>
- A.19. An agreement may be inferred from the conduct of the parties, including conduct that appears to be unilateral.<sup>560</sup> As held by the GC:<sup>561</sup> ‘*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.20. In the absence of an explicit agreement (ie laid down or based on a contract) expressing the concurrence of wills<sup>562</sup> or joint intention<sup>563</sup> 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.<sup>564</sup>

---

<sup>555</sup> *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).

<sup>556</sup> Case C-49/92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraph 81.

<sup>557</sup> Case T-99/04 *AC-Treuhand AG v Commission*, EU:T:2008:256, paragraph 122.

<sup>558</sup> *Ibid*, paragraph 127.

<sup>559</sup> 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.

<sup>560</sup> 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.

<sup>561</sup> Case T-7/89 *SA Hercules Chemicals NV v Commission*, EU:T:1991:75, paragraph 256.

<sup>562</sup> 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).

<sup>563</sup> Case T-7/89 *SA Hercules Chemicals NV v Commission*, EU:T:1991:75, paragraph 256.

<sup>564</sup> Case C-74/04 P *Commission v Volkswagen AG* EU:C:2006:460, paragraph 39; and *Vertical Guidelines*, paragraph 25.

- A.21. The Commission's Vertical Guidelines, summarising the relevant case law and citing the judgments of the CJ,<sup>565</sup> describe the two ways (which can be used jointly) to establish acquiescence to a unilateral policy:<sup>566</sup>

*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 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.22. 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:

*[F]or 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***

---

<sup>565</sup> 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 judgment 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 resellers.

<sup>566</sup> Vertical Guidelines, paragraph 25(a).

***if this system allows the supplier to implement in practice its policy.***<sup>567</sup> [Emphasis added.]

- A.23. However, a system of deterrence or punishments may not be necessary in all cases for there to be a concurrence of wills based on tacit acquiescence.<sup>568</sup>

*Concerted practices*

- A.24. 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’.<sup>569</sup>
- A.25. 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 whether there is consensus between the undertakings said to be party to a concerted practice.<sup>570</sup>
- A.26. 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).<sup>571</sup> 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*

---

<sup>567</sup> Vertical Guidelines, paragraph 25(a).

<sup>568</sup> Case C-260/09 P *Activision Blizzard Germany GmbH v Commission*, EU:C:2011:62, paragraph 72.

<sup>569</sup> 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)].

<sup>570</sup> *Argos Limited and Others v Office of Fair Trading* [2006] EWCA Civ 1318 [22].

<sup>571</sup> See, for example, Case T-43/92 *Dunlop Slazenger International Ltd v Commission* EU:T:1994:259, paragraphs 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).

*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.*<sup>572</sup>

A.27. For present material purposes, the following key points arise from the case law on the concept of a concerted practice:

A.27.1 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.<sup>573</sup>

A.27.2 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.’*<sup>574</sup> 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.’*<sup>575</sup>

A.27.3 The coordination (which is prohibited by the requirement of independence) comprises ‘any direct or indirect contact’ between undertakings, which has the object or effect of influencing the conduct on the market of an undertaking<sup>576</sup> thereby creating

---

<sup>572</sup> *Argos Limited and Others v Office of Fair Trading* [2006] EWCA Civ 1318, [28].

<sup>573</sup> 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)].

<sup>574</sup> 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; and *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, [151]–[153].

<sup>575</sup> 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].

<sup>576</sup> 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 has concluded 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.

conditions of competition which do not correspond to the normal conditions of the market in question.<sup>577</sup>

A.27.4 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.*’<sup>578</sup> However, that does not necessarily mean that the conduct should produce the concrete effect of restricting, preventing or distorting competition.<sup>579</sup>

A.28. 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.28.1 It is ‘*especially the case*’ that a concerted practice leads to conditions of competition which do not correspond to the normal conditions of 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.*’<sup>580</sup>

A.28.2 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.*’<sup>581</sup>

---

<sup>577</sup> 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.

<sup>578</sup> 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)].

<sup>579</sup> 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)].

<sup>580</sup> Cases 48/69 etc *ICI Ltd v Commission* EU:C:1972:70, paragraph 67.

<sup>581</sup> Case 172/80, *Gerhard Züchner v Bayerische Vereinsbank* EU:C:1981:178, paragraphs 19–20.



- A.29. An agreement or concerted practice may be made on an undertaking's behalf by its employees acting in the ordinary course of their employment, despite the ignorance of more senior management.<sup>582</sup>

## **F. Prevention, restriction or distortion of competition**

- A.30. 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.31. 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.<sup>583</sup> 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.<sup>584</sup>

### **Anti-competitive object**

- A.32. 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 competition<sup>585</sup> or, in other words,

---

<sup>582</sup> Joined cases 100/80 etc *SA Musique Diffusion Française and others v Commission*, EU:C:1983:158, paragraphs 97–98. See also *Tesco Stores Limited and Others v Office of Fair Trading* [2012] CAT 31 [62]: '[A]ny act by any employee could, potentially lead to an infringement attributable to their corporate employer, with whom they comprise the same undertaking.'

Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235, page 375. See also cases C-209/07 *Beef Industry Development Society and Barry Brothers* [2008] ECR I-0000, at paragraph 15, C-32/11 *Allianz Hungária Biztosító Zrt and Others*, judgment of 14 March 2013, at paragraph 33, C-501/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291 at paragraph 55, C-8/08 *T-Mobile Netherlands and Others v NMa* [2009] ECR I-4529, at paragraph 28.

<sup>583</sup> See eg Joined cases 56 and 58/64 *Établissements Consten SàRL 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, paragraphs 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].

<sup>584</sup> Joined cases 56 and 58/64 *Établissements Consten SàRL 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' (judgment pending).

<sup>585</sup> 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 *Groupement des cartes bancaires v Commission* (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

reveal a sufficient degree of harm to competition that there is no need to examine the effects.<sup>586</sup>

- A.33. 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.<sup>587</sup> 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.<sup>588</sup> Where appropriate, the way in which the coordination (or collusive behaviour) is implemented may be taken into account.<sup>589</sup>
- A.34. 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.<sup>590</sup>
- A.35. Furthermore, the fact that an agreement pursues other legitimate objectives does not preclude it being regarded as having a restrictive object.<sup>591</sup> Moreover, the CJ has held that the aim of maintaining a prestigious image is not a

---

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.

<sup>586</sup> Case C-67/13 P *Groupement des cartes bancaires v Commission*, EU:C:2014:2204, paragraph 49.

<sup>587</sup> 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, paragraphs 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.

<sup>588</sup> 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.

<sup>589</sup> *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.'

<sup>590</sup> 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.

<sup>591</sup> 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.

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.<sup>592</sup>

- A.36. 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.<sup>593</sup>
- A.37. The CJ has held that the notion of restriction of competition by object should not be limited to the examples of anti-competitive agreements of Article 101(1) TFEU.<sup>594</sup>

### **Resale price maintenance**

- A.38. 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.39. 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’*.<sup>595</sup> RPM has been found consistently in EU and national decisional practice (including that of the UK) to constitute a

---

<sup>592</sup> Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Commission*, EU:C:2011:649, paragraph 46.

<sup>593</sup> Case C-32/11 *Allianz Hungária Biztosító Zrt and Others v Gazdasági Versenyhivatal*, EU:C:2013:160, paragraph 43.

<sup>594</sup> Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd.*, EU:C:2008:643, paragraph 23.

<sup>595</sup> Vertical Guidelines, paragraph 48.

restriction of competition by object.<sup>596</sup> The CJ has also held that RPM is restrictive of competition by object.<sup>597</sup>

- A.40. According to the Vertical Guidelines, where an agreement includes RPM, that 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.<sup>598</sup>
- A.41. 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).<sup>599</sup>
- A.42. 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],<sup>600</sup> threats, intimidation, warnings, penalties or incentives.’<sup>601</sup>* This would include, for example, threats to delay or suspend

---

<sup>596</sup> 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, paragraphs 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).

<sup>597</sup> 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. Case 243/83, *SA Binon & Cie v SA Agence et messageries de la presse*, EU:C:1985:284, paragraph 44.

<sup>598</sup> Vertical Guidelines, paragraph 223. Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis*, EU:C:1986:41, paragraph 25.

<sup>599</sup> 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.

<sup>600</sup> Vertical Guidelines, paragraph 48.

<sup>601</sup> 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).

deliveries or to terminate supply in the event that the retailer does not observe a given price level.<sup>602</sup> Other measures include the withdrawal of credit facilities, prevailing on other dealers not to supply<sup>603</sup> and threatened legal action, pressuring telephone calls and letters.<sup>604</sup>

- A.43. In *Volkswagen*, the Commission noted various measures taken to enforce 'price discipline' among dealers, including threats of legal action against dealers offering discounts, dealers reporting discounts to Volkswagen and telephone calls and letters from Volkswagen demanding that discounts and promotions be ceased.<sup>605</sup> 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 recommended retail prices could involve unlawful RPM.
- A.44. RPM can be achieved not only directly, for example, via a contractual provision that directly sets a fixed or minimum resale price,<sup>606</sup> but also indirectly.<sup>607</sup> 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.<sup>608</sup>
- A.45. Examples of indirect RPM include the following:
- A.45.1 fixing the maximum level of discount that resellers can grant from a prescribed price level;<sup>609</sup>

---

<sup>602</sup> 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.

<sup>603</sup> Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65.

<sup>604</sup> Commission Decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4.

<sup>605</sup> Commission Decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4, paragraphs 44–55.

<sup>606</sup> 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 Lladró Comercial SA and UK retailers fixing the price for porcelain and stoneware figures*, CP/0809-01, 31 March 2003.

<sup>607</sup> See analysis of the case law that follows. See also Vertical Guidelines, paragraph 48.

<sup>608</sup> 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).

<sup>609</sup> Case C-260/07 *Pedro IV Servicios SL v Total España SA*, EU:C:2009:215, paragraph 80.

- A.45.2 incentives to adhere to a given price level;<sup>610</sup>
  - A.45.3 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;<sup>611</sup> and
  - A.45.4 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).<sup>612</sup>
- A.46. 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.46.1 In *Yamaha*, the Commission objected to:
    - A.46.1.1. restrictions contained in selective distribution agreements which prevented dealers from advertising prices which were different to Yamaha's list prices; and<sup>613</sup>
    - A.46.1.2. a contractual requirement not to produce advertising material which included prices different from the supplier's price list without the supplier's approval.<sup>614</sup>

<sup>610</sup> 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.

<sup>611</sup> Commission Decision 80/1333/EEC *Hennessy-Henkel* (IV/26.912) [1980] OJ L383/13.

<sup>612</sup> Commission Decision 2001/135/EC *Nathan-Bricolux* (COMP.F.1/36.516) [2001] OJ L 54/1.

<sup>613</sup> 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.'

<sup>614</sup> *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.

- A.46.2 In *Hasselblad*, the Commission objected to a clause in a selective distribution agreement which allowed the manufacturer, Hasselblad, to prohibit adverts by a dealer.<sup>615</sup>
- A.46.3 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.<sup>616</sup>
- A.47. 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<sup>617</sup>
- A.48. 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.<sup>618</sup> However, the use of such measures does not, in itself, constitute RPM.<sup>619</sup>

### Price advertising, advertising and other similar restrictions

- A.49. 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

<sup>615</sup> 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.*'

<sup>616</sup> Case 73/74 *Groupeement des Fabricants de Papiers Peints de Belgique and others v Commission* EU:C:1975:160.

<sup>617</sup> *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 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.

<sup>618</sup> Vertical Guidelines, paragraph 48.

<sup>619</sup> *Ibid.*

manufacturers in supply agreements in a number of investigations.<sup>620</sup> The OFT has also concluded that an advertising restrictions restrict retailers' ability to determine their own sale prices in a previous decision.<sup>621</sup>

- A.50. The relevant restrictions have taken different forms in different cases, including:
- A.50.1 guidelines issued to retailer requiring them to use in shops or outside the supplier's recommended list prices;<sup>622</sup>
  - A.50.2 a contractual requirement not to produce advertising material which includes prices different from the supplier's price list without the supplier's approval;<sup>623</sup>
  - A.50.3 a contractual requirement to withdraw and not to repeat advertisements to which the supplier objected in writing (where there was evidence that this was being used to exclude dealers who were offering low prices from the supplier's distribution network);<sup>624</sup>
  - A.50.4 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;<sup>625</sup> and
  - A.50.5 a prohibition on dealers mentioning discounts or price reductions in any advertising materials, advertisements or promotional campaigns.<sup>626</sup>

---

<sup>620</sup> See also *Trade associations, professions and self-regulating bodies* (OFT 408, December 2004), adopted by the CMA Board, paragraph 3.14.

<sup>621</sup> *Agreements between Lladró Comercial SA and UK retailers fixing the price for porcelain and stoneware figures*, CP/0809-01, 31 March 2003.

<sup>622</sup> Commission Decision 16 July 2003 *PO/Yamaha* (COMP/37.975). *Infra*.

<sup>623</sup> *Ibid.*

<sup>624</sup> 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. *Infra*.

<sup>625</sup> Case 73/74 *Groupeement des Fabricants de Papiers Peints de Belgique and others v Commission* EU:C:1975:160.

<sup>626</sup> *Agreements between Lladró Comercial SA and UK retailers fixing the price for porcelain and stoneware figures*, CP/0809-01, 31 March 2003.



- A.51. The *Hasselblad*<sup>627</sup> and *Yamaha*<sup>628</sup> decisions stress the importance of price advertising in terms of communicating with customers and in encouraging price competition.
- A.52. In *Yamaha*,<sup>629</sup> the Commission objected to restrictions contained in selective distribution agreements on dealers' advertising prices which were different to Yamaha's list prices. In particular, the Commission was concerned by advertising restrictions which formed part of a wider policy by Yamaha to enforce RPM in a number of territories including the Netherlands and Italy. Yamaha placed restrictions on its dealers in the Netherlands and Italy preventing them from advertising prices below Yamaha's recommended retail prices.
- A.53. The Dutch dealer contracts (described as 'guidelines') prohibited dealers from advertising prices which differed from Yamaha's list prices. The Commission stated that:

*[Yamaha's 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.*<sup>630</sup>

- A.54. Meanwhile, the distribution agreement with dealers in Italy prohibited dealers from publishing '*in whichever form*' prices which differed from Yamaha's official price lists. The dealers were also prohibited from reproducing advertising material and price lists which were different to Yamaha's official price lists. The Commission found that '*the dealers' freedom to set prices is strictly limited*.'

---

<sup>627</sup> Commission Decision 82/367/EEC *Hasselblad* (IV/25.757) [1982] OJ L161/18.

<sup>628</sup> Commission Decision 16 July 2003 *PO/Yamaha* (COMP/37.975).

<sup>629</sup> *Ibid.*

<sup>630</sup> *Ibid.*, paragraphs 125–126.

*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].*<sup>631</sup> The Commission concluded that Yamaha’s agreements had the object of influencing resale prices, thereby restricting or distorting price competition.

- A.55. In *Groupeement des Fabricants de Papiers Peints de Belgique*, the CJ equated a prohibition on announcing rebates with ‘a system of fixing selling prices’.<sup>632</sup>
- A.56. In both *Yamaha* and *Groupeement des Fabricants de Papiers Peints de Belgique*, it was accepted that the possibility of resellers being able to grant discounts did not prevent the restriction from infringing Article 101(1) TFEU. In *Yamaha*, the Commission stated of the restrictions that *‘[e]ven 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.’*<sup>633</sup>
- A.57. In *Hasselblad*,<sup>634</sup> the Commission condemned a selective distribution agreement which allowed the manufacturer to prohibit adverts by a dealer containing statements that it ‘*can match any other retailer’s selling prices*’. In addition to prohibiting particular adverts, Hasselblad had also threatened to withdraw credit facilities from dealers who did not treat prices in its retail price list as minimum selling prices and had terminated a UK dealership which had advertised its products at discounted prices. The Commission found that Hasselblad’s contractual right to prohibit adverts restricted competition within the meaning of Article 101(1) for the following reason:<sup>635</sup>

*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.*

---

<sup>631</sup> *Ibid*, paragraphs 133–135.

<sup>632</sup> Case 73/74 *Groupeement des Fabricants de Papiers Peints de Belgique and others v Commission*, EU:C:1975:160.

<sup>633</sup> Commission Decision 16 July 2003 *PO/Yamaha* (COMP/37.975), paragraph 125.

<sup>634</sup> Commission Decision 82/367/EEC *Hasselblad* (IV/25.757) [1982] OJ L161/18.

<sup>635</sup> *Ibid*, recital 60.

A.58. The Commission concluded 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*'.<sup>636</sup> The Commission considered that Hasselblad's use of its dealer agreements (including the advertising restrictions) '*as a means to influence retail prices*', amounted to a restriction of competition under Article 101(1) TFEU. On appeal,<sup>637</sup> the CJ found that the Commission had been right to conclude that the advertising restriction constituted an infringement of Article 101(1) TFEU.

A.59. In *Lladró*,<sup>638</sup> the OFT noted that the advertising of resale prices, including discounts, promotes price transparency between retailers and provides a significant incentive for retailers to compete on 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. The OFT concluded in *Lladró* that the '*obvious consequence*' of price advertising restrictions is to restrict retailers' ability to determine their own sale prices and that '*any such provision has as its object the prevention, restriction or distortion of competition*'.<sup>639</sup>

## **G. Appreciable restriction of competition**

A.60. 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.<sup>640</sup>

A.61. In *Völk v Vervaecke*, the CJ held that:

*[A]n agreement falls outside the prohibition in Article [101(1) TFEU] when it has only an insignificant effect on the markets, taking into*

---

<sup>636</sup> *Ibid*, recital 66.

<sup>637</sup> Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65, paragraph 43.

<sup>638</sup> *Agreements between Lladró Comercial SA and UK retailers fixing the price for porcelain and stoneware figures*, CP/0809-01, 31 March 2003.

<sup>639</sup> *Ibid*, paragraph 70.

<sup>640</sup> *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].

*account the weak position which the persons concerned have on the market of the product in question.*<sup>641</sup>

- A.62. 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.<sup>642</sup>
- A.63. 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.<sup>643</sup>

#### **H. Effect on trade between EU Member States**

- A.64. Article 101 TFEU applies to agreements and/or concerted practices which may affect trade between EU Member States. 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.<sup>644</sup>
- A.65. 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.<sup>645</sup>
- A.66. 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.<sup>646</sup> Whilst not binding on

---

<sup>641</sup> Case 5/69 *Franz Völk v SPRL 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.

<sup>642</sup> 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.

<sup>643</sup> See *Carewatch and Care Services Limited v Focus Caring Services Limited and Others* [2014] EWHC 2313 (Ch) [148ff].

<sup>644</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1, Article 3.

<sup>645</sup> Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH*, EU:C:1966:38, [1966] OJ Spec Ed 249.

<sup>646</sup> 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).

the CMA,<sup>647</sup> the CMA will have regard to the Effect on Trade Guidelines when determining whether Article 101 TFEU applies.<sup>648</sup>

*‘Trade between Member States’*

- A.67. 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.<sup>649</sup> 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.<sup>650</sup>
- A.68. 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.<sup>651</sup> It also encompasses an effect on the competitive structure of the market, for example where an agreement eliminates or threatens to eliminate a competitor.<sup>652</sup>

*‘May affect’*

- A.69. 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.<sup>653</sup> However, hypothetical or speculative effects are not sufficient.<sup>654</sup> 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.’*<sup>655</sup>
- A.70. The assessment of whether an agreement is capable of affecting trade between Member States involves consideration of various qualitative and

---

<sup>647</sup> 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.

<sup>648</sup> *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 2.23.

<sup>649</sup> Effect on Trade Guidelines, paragraph 21.

<sup>650</sup> *Ibid*, paragraph 22.

<sup>651</sup> *Ibid*, paragraph 19.

<sup>652</sup> Joined Cases T-24/93 etc *Compagnie Maritime Belge SA and Others v Commission*, EU:T:1996:139, paragraph 203.

<sup>653</sup> 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.

<sup>654</sup> Effect on Trade Guidelines, paragraph 43.

<sup>655</sup> Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH*, EU:C:1966:38, [1966] OJ Spec Ed 249. See further eg Joined cases 209/78 etc *Heintz van Landewyck SARL and others v Commission*, EU:C:1980:248,

quantitative factors which, taken individually, may not be decisive.<sup>656</sup> 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.71. Agreements which are confined to a single member state (or even part of a Member States) may still give rise to an effect on trade between Member States.
- A.72. The Effect on Trade Guidelines<sup>657</sup> explain that agreements involving RPM in respect of 'tradeable'<sup>658</sup> 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 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.73. 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.<sup>659</sup>

---

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.

<sup>656</sup> Case C-250/92 *Gøttrup-Klim ea Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA*, EU:C:1994:413, paragraph 54.

<sup>657</sup> Effect on Trade Guidelines, paragraph 88.

<sup>658</sup> 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.

<sup>659</sup> Effect on Trade Guidelines, paragraph 30.

(c) *The position and importance of the undertakings concerned*

- A.74. 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.<sup>660</sup>

(d) *The economic and legal context*

- A.75. It is relevant to consider whether there are barriers to cross-border trade between EU Member States.<sup>661</sup> It is also relevant to take into account whether the agreement is part of a network of similar agreements.<sup>662</sup>
- A.76. Moreover, in order to fall within the scope of Article 101 TFEU, an agreement must be capable of affecting trade between Member States to an appreciable extent.<sup>663</sup> The assessment of the appreciability depends on the circumstances of each case.
- A.77. 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.<sup>664</sup> In addition, the stronger the market position of the undertakings concerned, the more likely it is that an agreement that is capable of affecting trade between Member States can do so appreciably.<sup>665</sup>
- A.78. 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.<sup>666</sup> 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.<sup>667</sup> The relative market position of the parties compared to other market players is also important. In *Musique Diffusion Française*,<sup>668</sup> the products in question accounted for just above 3% of sales on the markets concerned. The CJ held that the agreements, which restricted

---

<sup>660</sup> *Ibid*, paragraph 31.

<sup>661</sup> *Ibid*, paragraph 32.

<sup>662</sup> *Ibid*, paragraph 49.

<sup>663</sup> Case 22/71 *Béguelin Import Co. v S.A.G.L. Import Export*, EU:C:1971:113, paragraph 16.

<sup>664</sup> Effect on Trade Guidelines, paragraph 45.

<sup>665</sup> *Ibid*, paragraphs 45–47.

<sup>666</sup> Case 19/77 *Miller International Schallplatten GmbH v Commission*, EU:C:1978:19, paragraph 9-10; and Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission*, EU:C:1983:293, paragraph 58.

<sup>667</sup> Effect on Trade Guidelines, paragraphs 46 and 48.

<sup>668</sup> Joined cases 100/80 etc *SA Musique Diffusion Française and Others v Commission*, EU:C:1983:158, paragraph 86.

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.79. 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.<sup>669</sup>

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

- A.80. 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.<sup>670</sup> An agreement or concerted practice is not in fact required to affect trade provided it is capable of doing so.<sup>671</sup>
- A.81. 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 CAT in *Aberdeen Journals*.<sup>672</sup> Effect on trade within the UK is a purely jurisdictional test to demarcate the boundary line between the application of EU competition law and national competition law. 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.<sup>673</sup>

---

<sup>669</sup> Effect on Trade Guidelines, paragraph 49.

<sup>670</sup> The Act, section 2(7).

<sup>671</sup> Joined cases T-202/98 etc *Tate & Lyle plc and Others v Commission*, EU:T:2001:185, paragraph 78.

<sup>672</sup> *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*’.

<sup>673</sup> *North Midland Construction plc v Office of Fair Trading* [2011] CAT 14 [62].



## **J. Exclusion or exemption**

### ***Exclusion***

A.82. 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.82.1 Schedule 1 covers mergers and concentrations;

A.82.2 Schedule 2 covers competition scrutiny under other enactments;  
and

A.82.3 Schedule 3 covers general exclusions.

### ***Exemption***

#### ***Block exemption***

A.83. 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.84. 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.85. It is for the parties wishing to rely on these provisions to adduce evidence that the exemption criteria are satisfied.<sup>674</sup> 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.86. 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' where the relevant market shares of the supplier and the buyer are each below 30%, unless the agreement contains one of the hardcore restrictions in Article 4 of the VABER.

---

<sup>674</sup> The Act, section 9(2).

- A.87. 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.88. 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.89. These criteria are that:
- A.89.1 the agreement contributes to improving production or distribution or promoting technical or economic progress;
  - A.89.2 while allowing consumers a fair share of the resulting benefits; but
  - A.89.3 does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
  - A.89.4 afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.
- A.90. 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.<sup>675</sup>
- A.91. 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 third condition (indispensability).<sup>676</sup> In the presence of hardcore restrictions, it

---

<sup>675</sup> 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.

<sup>676</sup> Article 101(3) Guidelines, paragraph 46 and 79 (in respect of severe and so-called ‘hardcore’ restrictions).

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.<sup>677</sup>

## **K. Burden and standard of proof**

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

- A.92. The burden of proving an infringement of the Chapter I prohibition/Article 101 TFEU lies with the CMA.<sup>678</sup>
- A.93. This burden does not preclude the CMA from relying, where appropriate, on inferences or evidential presumptions. In *Napp*, the CAT stated:

*That approach does not in our view preclude the Director,<sup>679</sup> 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.<sup>680</sup>*

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

- A.94. The CMA is required to demonstrate that an infringement has occurred on the balance of probabilities which is the civil standard of proof.<sup>681</sup> The CAT clarified in the *Replica Kit* appeals that:<sup>682</sup> *[t]he standard remains the civil standard. The evidence must however be sufficient to convince the Tribunal in the*

---

<sup>677</sup> Vertical Guidelines, paragraphs 47 and 223 (in the context of RPM).

<sup>678</sup> *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].

<sup>679</sup> 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.

<sup>680</sup> *Napp Pharmaceutical Holdings Ltd and Subsidiaries v Director General of Fair Trading* [2002] CAT 1 [110].

<sup>681</sup> *Tesco Stores Limited and Others v Office of Fair Trading* [2012] CAT 31 [88].

<sup>682</sup> *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].

*circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking concerned is entitled.'*

- A.95. The Supreme Court has further clarified that this standard of proof is not connected to the seriousness of the suspected infringement.<sup>683</sup> The CAT has also expressly accepted the reasoning in this line of case law.<sup>684</sup>

---

<sup>683</sup> *Re S-B (Children)* [2009] UKSC 17 [34]. See also *Re B (Children)* [2008] UKHL 35 [72].

<sup>684</sup> *North Midland Construction plc v Office of Fair Trading* [2011] CAT 14 [15]–[16].

## RELEVANT MARKET

### A. 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, 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.<sup>685</sup> Such a situation does not apply in this case.
- 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, the CMA will consider an undertaking's '*relevant turnover*'.<sup>686</sup> 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.<sup>687</sup> 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*'.<sup>688</sup> The Court of Appeal has made clear that the market which is taken for the purposes of penalty assessments may properly be assessed on a broad view of the particular trade which has been affected by the proved infringement, rather than by a relatively exact application of principles that would be relevant for a formal analysis.<sup>689</sup>

---

<sup>685</sup> 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. 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, [Toys] 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].

<sup>686</sup> *Guidance as to the appropriate amount of a penalty* (OFT 423; September 2012), adopted by the CMA Board, paragraphs 2.1 and 2.3–2.11.

<sup>687</sup> *Ibid*, paragraph 2.7.

<sup>688</sup> *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, paragraph 170.

<sup>689</sup> *Ibid*, paragraph 173.

## B. 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));<sup>690</sup>
  - B.4.2. and considering whether they exercise a competitive constraint on the ability to raise prices of those focal products.<sup>691</sup>
- B.5. The products affected by the Infringements are those products covered by the MAP Policy. The CMA has therefore identified the focal products as all types of commercial refrigeration products supplied by Foster through resellers.
- B.6. The Infringements constitute vertical agreements and/or concerted practices, which were entered into between Foster, in its capacity as a supplier, and the Resellers.<sup>692</sup> Foster supplies commercial refrigeration products both directly to end-users and indirectly through resellers.
- B.7. There are a number of competing suppliers for commercial refrigeration products within the UK.<sup>693</sup> During the course of its investigation, the CMA contacted a number of these resellers. Each of the main commercial refrigeration suppliers contacted listed a similar range of suppliers as their main competitors.<sup>694</sup> Most suppliers agreed that the main competitors were similar, across the main product categories and across customer groups.<sup>695</sup> As such, the CMA considers that the starting point for its consideration of the

---

<sup>690</sup> See *Market Definition: understanding Competition Law* (OFT403, December 2004), adopted by the CMA Board, paragraph 3.2.

<sup>691</sup> *Ibid*, paragraphs 2.9–2.10. 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).

<sup>692</sup> See Section 6.

<sup>693</sup> See paragraph B.35 and footnote 728.

<sup>694</sup> See Question 4 of responses to section 26 notices: [Supplier] (URN F180009.3), [Supplier] (URN F190004.3), [Supplier] (URN F200004.1), [Supplier] (URN F220003), [Supplier] (URN F230004.1), [Supplier] (URN F240003.1), [Supplier] (URN F250003), [Supplier] (URN F260002.1), [Supplier] (URN F270004.1), [Supplier] (URN F280005.1), [Supplier] (URN F110205.1), [Supplier] (URN F290005.2), [Supplier] (URN F300002), [Supplier] (URN F310004) and [Supplier] (URN F320003).

<sup>695</sup> [Supplier] told us that the suppliers active in different product categories across ranges sold in the UK are broadly similar; and that all customer groups broadly require a 'similar standard' product (See Question 5 of [Supplier]'s response to section 26 notice, URN F240003.1). [Supplier] also said that their main competitors would not change with the product category or customer grouping (Question 5 of [Supplier]'s response to section 26 notice, URN F200004.1). More generally see Questions 5 and 6 of suppliers' responses to section 26 notices.

relevant product market is the supply of all brands of commercial refrigeration products.

B.8. The following section considers whether the relevant product market should be defined more narrowly than the supply of all commercial refrigeration products, in particular by segmenting by product category.<sup>696</sup>

B.9. The CMA has also considered whether the relevant product market should be defined more broadly, to include:

B.9.1. direct sales to end-users;<sup>697</sup> and

B.9.2. domestic, as well as commercial, refrigeration products.<sup>698</sup>

### ***Narrower segmentation of commercial refrigeration products***

#### ***Segmentation by product category***

B.10. The CMA notes that Foster supplies a wide range of different types of commercial refrigeration products, including:

B.10.1. cabinets;

B.10.2. counters;

B.10.3. display cabinets;

B.10.4. preparation counters;

B.10.5. wine fridges;

B.10.6. cold rooms;

B.10.7. blast chillers;

B.10.8. bakery refrigeration;

B.10.9. ice makers;

---

<sup>696</sup> See paragraphs B.10–B.11 below.

<sup>697</sup> See paragraphs B.12–B.17 below.

<sup>698</sup> See paragraphs B.18–B.24 below.

B.10.10. water fountains/chillers; and

B.10.11. back bar (bottle) fridges.<sup>699</sup>

B.11. The MAP Policy applied to the full range of commercial refrigeration products supplied by Foster, including each of the categories listed above. It would therefore make no difference to the CMA's 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 uses this as a basis for calculating any applicable financial penalty. For the purposes of this Decision, the CMA has not therefore 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 categories above to include each of them in the supply of all 'commercial refrigeration products'.

### ***Broader product market***

#### *Broader product market: direct sales to end-users*

B.12. Foster distributes its products through a vertical network of resellers, but also makes direct sales of commercial refrigeration products to large end-users.<sup>700</sup>

B.13. The CMA has considered whether direct sales to end-users fall within the same market as sales to resellers. [REDACTED],<sup>701</sup> [REDACTED],<sup>702</sup> [REDACTED]<sup>703</sup> or [REDACTED].<sup>704</sup> These customers may have a preference for negotiating directly with a manufacturer either to secure a better price, because the bespoke nature or volume of their orders may be better served by direct sales;<sup>705</sup> or because they have specific service requirements.<sup>706</sup>

---

<sup>699</sup> Bar refrigeration is sold by Foster's sister company Gamko (which is also owned by ITW) and, as noted in Chapter 6, Foster told the CMA that a similar policy to the MAP Policy was also applied to Gamko products. In the context of market definition we do not distinguish between the two companies.

<sup>700</sup> See footnote 17.

<sup>701</sup> [REDACTED]

<sup>702</sup> [REDACTED]

<sup>703</sup> [REDACTED]

<sup>704</sup> [REDACTED]

<sup>705</sup> Foster explained that in some cases it may produce customer specific products. These are driven by [REDACTED] customers where there is an identifiable need for products to fulfil a specific function. This ranges from minor customisations (but on a repeat production basis) to a complete new product. [REDACTED] (question 47 of section 26 notice dated 5 March 2015 (URN FD0680)).

<sup>706</sup> See paragraph 4 of explanation of response to question 24.2 of Foster's response to section 26 notice dated 5 March 2015 (URN FD0657).



- B.14. The CMA would not normally define a separate market for different customers, where customers are sold an identical product. In determining whether there are separate markets, the key question is whether conditions of competition differ significantly between different customer groups, such that some customers could get better terms for the same requirements.<sup>707</sup>
- B.15. Evidence provided by Foster suggests that although it does charge a different price to different customers, the price differences are driven by differences in the size of the customer, rather than whether that customer is a reseller or an end-user.<sup>708</sup>
- B.16. Hence, the CMA considers that direct sales of commercial refrigeration products to large end-users and the sale of commercial refrigeration products to resellers may fall within the same relevant market.
- B.17. However, in the absence of strong evidence to confirm that there is a single market and given that the MAP Policy does not apply to direct sales, the CMA has defined the relevant market as the supply of commercial refrigeration products through resellers.

*Broader product market: domestic refrigeration products*

- B.18. During the course of the CMA's investigation, Foster submitted that some caterers and resellers regard domestic refrigerators as substitutable for commercial ones and source these from domestic appliance suppliers for use in a commercial context.<sup>709</sup> The CMA has therefore also considered whether the relevant product market should be expanded to include refrigeration appliances intended for domestic use.
- B.19. The CMA considers that domestic refrigeration products are those that are primarily supplied by domestic refrigeration suppliers and aimed at domestic customers, even though they may in some instances share certain characteristics with commercial refrigeration products.

---

<sup>707</sup> See Merger assessment guidelines, CC2/OFT1254, paragraphs 5.2.28–5.2.31.

<sup>708</sup> Question 13 of Foster's response to section 26 notice dated 5 March 2015 (URN FC0046.2): the section 26 notice asked Foster to explain whether certain types of dealers are more or less attractive to Fosters than others. Foster responded: [§] In Question 23 of Foster's response to section 26 notice dated 22 May 2015 (URN FD0656 and FD0656.1), [§].

<sup>709</sup> Part B3.2, paragraph 1, page 3 of the letter from Steptoe & Johnson (representing ITW) to the CMA dated 18 September 2014 in response to section 26 notice dated 28 August 2014 (URN FC0008.1).

- B.20. Commercial refrigeration units are specifically designed for the more demanding usage requirements of a professional environment and the requirements of health and safety legislation.<sup>710</sup> For example, commercial refrigeration products:
- B.20.1. contain a more powerful compressor than domestic alternatives and are often fan assisted, to spread the cool air evenly through the cabinet and ensure that low temperatures are rapidly recovered to replace heat loss when the appliance door is opened and closed regularly;
  - B.20.2. are made of sturdier materials and are better insulated than the domestic equivalent, meaning they can cope with extreme ambient temperatures (such as high heat and humidity);
  - B.20.3. often include a digital temperature display, to allow business owners to log temperatures and prove conformity with food safety regulations; and
  - B.20.4. are designed to last longer than domestic refrigeration products and require regular maintenance and servicing.
- B.21. The higher demands placed on refrigeration products used in a commercial context is reflected in the fact that warranties provided by manufacturers of domestic appliances, including refrigeration products, generally only cover domestic use, and specifically exclude liability for commercial use. Industry participants support the view that domestic refrigeration is not suitable for use in a commercial setting.<sup>711</sup>
- B.22. Foster identified a range of refrigeration equipment sold by commercial refrigeration suppliers, with specifications that are similar to refrigeration equipment sold to domestic customers. While the products referenced by Foster may have some characteristics in common with refrigeration products bought by domestic customers, they are sold by commercial equipment suppliers that sell mainly to the commercial sector. As such, products sold by

---

<sup>710</sup> An article from *Catering Insight* of 17 March 2015 quotes Peter Kay, the director of technical support for the industry trade body, CEDA, as saying '*domestic refrigerators do not have the same levels of insulation or compressor power as commercial units and therefore they cannot maintain safe temperatures in commercial use.*' (Clare Nicholls, 'Domestic issue remains', *Catering Insight*, 17 March 2015 (URN F0050)).

<sup>711</sup> See comments from [Reseller] (paragraph 8, page 3 of note of telephone call between CMA and [Reseller] on 27 April 2015 (URN F140005), which support the CMA's view.

commercial equipment suppliers to commercial caterers would fall within our definition of commercial refrigeration products, whether or not they have characteristics in common with domestic appliances.

- B.23. The CMA acknowledges that some small businesses may choose to use domestic refrigeration equipment in commercial contexts.<sup>712</sup> However, the CMA considers that in most instances, commercial catering enterprises would not see domestic refrigeration appliances as credible substitutes for commercial refrigeration products.<sup>713</sup> While the CMA accepts that there may be some overlap between the domestic and commercial refrigeration sectors, it does not consider it likely that the price of domestic refrigeration products would constrain the price of commercial refrigeration products to within 5–10% of competitive levels.
- B.24. The CMA has not conducted a full assessment of whether the market should be expanded to include domestic refrigeration equipment. However, in the light of the above, the CMA's view is that domestic refrigeration products are unlikely to form part of the relevant product market.

### **C. The relevant geographic market**

- B.25. While formal definition of the market is not necessary for the purposes of this Decision,<sup>714</sup> 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.25.1. there is no discernible difference in the range of products sold by resellers based in different parts of the country, suggesting suppliers have UK-wide distribution strategies; and
- B.25.2. the Infringements covered the supply of commercial refrigeration products across the whole of the UK.
- B.26. The CMA has also considered whether the evidence suggests a wider than national geographic scope. However, the CMA does not consider that suppliers located outside the UK should be included in the relevant market for the following reasons:

---

<sup>712</sup> Clare Nicholls, 'Domestic issue remains', *Catering Insight*, 17 March 2015 (URN F0050).

<sup>713</sup> See footnote 711 above.

<sup>714</sup> See paragraph B.1 above.

- B.26.1. The MAP Policy was applied to UK distributors only.
- B.26.2. End-users typically use the services of a UK distributor to fulfil their catering refrigeration requirements, with end-users unlikely to import refrigeration products directly from overseas.
- B.26.3. Direct imports to the UK by resellers appear to account for a relatively small proportion of the sales of commercial refrigeration products in the UK.<sup>715</sup>
- B.26.4. The CMA is aware that the market for refrigeration has seen new entry in recent years, in particular an increasing variety of products and brands are now being imported from overseas, particularly lower cost products.<sup>716</sup> However, rather than being imports from suppliers overseas, many brands have either set up distinct sales and distribution channels in the UK<sup>717</sup> or relied on specialist wholesale importers to market the product in the UK.<sup>718</sup>
- B.27. Therefore, the CMA considers that imports by suppliers based overseas would not act as a sufficient constraint on commercial refrigeration products supplied through suppliers located in the UK such that suppliers located overseas should be included in the relevant market.
- B.28. In the light of the above, the CMA will take the relevant geographic market to be the UK to establish the relevant turnover for the purposes of setting the fine.

---

<sup>715</sup> [X]

<sup>716</sup> [Supplier]: 'An increasing number of companies are importing commercial refrigeration from outside the EU; Turkey, China & Eastern Europe are the major sources,' response to question 7, page 3 of [Reseller]'s response to Section 26 notice dated 2 June 2015 (URN F110205.1). [Supplier] noted the growth of imports from Chinese manufacturers of refrigeration at the bottom end of the market driving higher volumes at lower prices. Response to question 7, page 2 of [Supplier]'s response to Section 26 notice dated 28 May 2015 (URN F230004.1). [Supplier] stated: 'The main difference from our point of view is that there are more manufacturers from all over the world becoming available in the UK which has the obvious effect of driving the price down on projects and tenders as the end-users have a greater variety of choice.' Response to question 7, page 3 of [Supplier]'s response to Section 26 notice dated 27 May 2015 (URN F250003). [Supplier] stated: 'With the introduction of lower priced Chinese, as well as European imports I believe the options for the end-user in the commercial sector has become more varied with a wider range of products and companies to choose from.' Response to question 7, page 2 of [Supplier]'s response to Section 26 notice dated 29 May 2015 (URN F260002.1).

<sup>717</sup> For example [Supplier], a recent Chinese import, has a UK-based sales team. Furthermore, market reports indicate suppliers of commercial catering refrigeration products supply across the UK based on national distribution strategies. For example, AMA Research Ltd, *Non-Domestic Catering Equipment Market Report – UK 2015–2019 Analysis* (the AMA 2015 Report) (pages 74–75) discusses a number of different competitors, most of which appear to have a UK base, distribution centre or manufacturing facility (F0001).

<sup>718</sup> For example, [Supplier], [Supplier], [Supplier]. [Supplier] suggested that there had been a development and expansion of principal equipment wholesalers importing and marketing a wider product portfolio of own brand appliances. Response to question 7, page 4 of [Supplier]'s response to Section 26 notice dated 28 May 2015 (URN F180009.3).

## **D. Conclusion on the relevant market**

B.29. For the purposes of establishing the level of any financial penalties, the CMA finds that:

- B.29.1. the relevant product market for the Infringement is the supply of commercial refrigeration products through resellers; and
- B.29.2. the relevant geographic market for the supply of commercial refrigeration products through resellers is the UK.

B.30. 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.

## **E. UK sales of commercial refrigeration products by suppliers**

B.31. It is difficult to obtain a precise estimate of the value of sales of commercial refrigeration products by suppliers in the UK, as there are relatively few comprehensive reports on the industry. The CMA has seen various estimates of the value of the supply of commercial refrigeration, including reports by the AMA<sup>719</sup> (being the most recent), CESASTAT<sup>720</sup> (being based on a comprehensive survey of the industry organised by the Catering Equipment Suppliers' Association (CESA)) and Freedonia.<sup>721</sup> The AMA and CESASTAT reports suggest that UK sales of commercial refrigeration products by commercial refrigeration product suppliers were between £168 million and £191 million in 2014.<sup>722</sup> The Freedonia report indicates a value of as much as £612 million.<sup>723</sup>

---

<sup>719</sup> The AMA 2015 Report estimated that the market for refrigeration within UK non-domestic catering applications was £191 million in 2014 (based on manufacturers' selling prices in the UK) (page 35) (F0001).

<sup>720</sup> The CESASTAT 2011 Report was a study prepared by CESASTAT, a data-collection service operated on behalf of CESA, which, following a survey of suppliers, estimated that the value of the commercial refrigeration sector was £150 million in 2010 (based on manufacturers' selling prices) (FT0022.2). Adjusted for inflation, this suggests that the market for commercial refrigeration would be worth approximately £168 million in 2014. In order to adjust the 2010 CESASTAT data for inflation, the CMA has used the CPI index for the years 2011 to 2014 (Office for National Statistics (URN F0056)).

<sup>721</sup> Freedonia Group, *World Commercial Refrigeration Equipment Industry Study with Forecasts for 2014 & 2019*, Study #2706, January 2011 (FD0580) (the Freedonia 2011 Report).

<sup>722</sup> These reports do not distinguish between direct sales to end-users and sales to resellers.

<sup>723</sup> Foster estimated the total size of the market in 2014 to be £612 million, based on the Freedonia 2011 Report. Freedonia estimated that the value of UK commercial refrigeration in 2009 was \$880 million. Predicting that growth would be 3.6% per year between 2009 and 2014 it forecast that by 2014 the UK commercial refrigeration

## F. Foster's share of supply

- B.32. In 2014, Foster had UK sales of commercial refrigeration products totalling [REDACTED].<sup>724</sup> Using the estimates of the value of the market from paragraph B.29 above would suggest its share in the supply of commercial refrigeration products is between [REDACTED].<sup>725</sup>
- B.33. Foster submitted that its market share was approximately [REDACTED] or lower.<sup>726</sup> However, this figure is based on Foster's sales to dealers, expressed as a percentage of all UK sales of commercial refrigeration products, whether sold through dealers or direct. While the value of total UK sales used in the calculation included both sales through dealers and direct sales, the Foster sales figure excluded the value of Foster's direct sales to end customers, which represented approximately [REDACTED] of Foster's UK sales in 2014 (ie excluding non-equipment sales).<sup>727</sup>
- B.34. On the basis of Foster's total sales of commercial refrigeration products (ie including both sales via dealers and direct to end-users), the AMA 2015 Report's estimate for total market size would imply a market share of [REDACTED]. Using the estimate contained in the CESASTAT 2011 Report (adjusted as explained at footnote 720 above) would result in a market share of [REDACTED], and the total market size specified in the Freedonia 2011 Report would imply a market share of [REDACTED]. It is not clear which categories of commercial

---

market would be worth \$1,050 million, which Foster has converted to £612 million (using an exchange rate of approximately £1:\$1.71). However, the CMA considers that this likely overestimates the value of the UK sales of UK commercial refrigeration by suppliers as it is based on UK commercial refrigeration equipment 'demand', suggesting it is an estimate of the value of sales to end-users and is not calculated by reference to manufacturers' selling price.

<sup>724</sup> For the purpose of estimating Foster's share of UK refrigeration equipment sales Foster's revenue sources were limited to sales to dealers, [REDACTED] and [REDACTED]. This value was [REDACTED] in 2014. It excludes the following sources of revenue: (i) 'commissions received' (ii) 'service'; (iii) 'spares'; (iv) 'exports'; and (v) 'intercompany' (URN FD0657 and FC0046.2). The CMA has added to this the value of sales made by Gamko in the UK in 2014 ([REDACTED]) (URN FD0678).

<sup>725</sup> Based on estimated market size of between £168 million and £191 million. Sales include both direct sales from suppliers to end-users and sales from suppliers through resellers. The AMA 2015 Report and the adjusted CESASTAT 2011 Report estimate a total market value of £168 million and £191 million respectively. These figures suggest that Foster's market share is approximately [REDACTED]. However, the 2011 Freedonia Report estimates a significantly larger market value (£612 million). This would give Foster a [REDACTED] market share, although the CMA notes that in contrast to the AMA and CESASTAT figures, the Freedonia estimates are drawn from the value of sales to end-users and not manufacturers' selling prices (see footnote 723 above).

<sup>726</sup> Letter from Foster's legal representatives to the CMA dated 18 September 2014, Part B3.2, page 3 (URN FC0008.1).

<sup>727</sup> See footnote 17 above.

refrigeration products have been included in these estimates of the value of the market, hence the broad range of estimates of share of supply.

- B.35. The CMA sought to sense check these estimates further by sourcing revenue data directly from the companies it identified as likely to represent the most significant suppliers of commercial refrigeration products in the UK.<sup>728</sup> The total value of sales represented by this group (including the Foster and Gamko brands owned by ITW) is [REDACTED]. This would imply that Foster's share of supply amongst this group of key competitors is [REDACTED]. The CMA is aware that there are other brands in the market place that are not captured by this group of suppliers. However, the CMA is also of the view that this captures the most significant competitors and other suppliers are likely to be smaller.
- B.36. The three market reports cited above and the revenue data gathered from other suppliers of commercial refrigeration<sup>729</sup> suggest that Foster's share of supply is between [REDACTED].

#### **G. Largest suppliers of commercial refrigeration products in the UK**

- B.37. The intensity of competition amongst suppliers appears to have increased in recent years, with a large number of commercial refrigeration brands in the market.<sup>730</sup>
- B.38. During discussions with other suppliers active in the market as part of the CMA's investigation, Foster was often cited as a market leader and identified as one of the most established brands in the UK. [Supplier] estimated that between them, Foster and [Supplier] had around [REDACTED] of the UK market, with

---

<sup>728</sup> These competitors were identified on the basis of following criteria: (i) the competitors that Foster identified in its 2014 annual plan [REDACTED] (page 23, Refrigeration & Weigh Europe Annual Plans 2014 (FD0625)), (ii) the suppliers of refrigeration products that currently submit data to the industry association CESA (FT0023.1), and (iii) the main international holding companies identified, in conversations with suppliers and in industry reports, as being significant brand owners in the commercial catering sector (namely the [Supplier], [Supplier] and Foster's parent company, ITW). This identified 15 different suppliers responsible for 35 different brands in the UK market. These are: [Supplier], [Supplier], [Supplier], [Supplier], [Supplier], [Supplier], [Supplier], [Supplier], [Supplier], [Supplier], [Supplier], [Supplier], [Supplier], [Supplier] and [Supplier].

<sup>729</sup> For instance [Supplier] identified [Supplier], [Supplier] and Foster to have a particularly strong position in the UK (URN F290005.2), [Supplier] noted that Fosters and [Supplier] are two main brands of refrigeration equipment (URN F250003), [Supplier] held that Foster and [Supplier] are the main players in the commercial refrigeration sector in the UK (URN F200004.1), [Supplier] noted that [Supplier] and Foster are the two most established and long-standing companies in the industry (URN F310004), [Supplier] noted that [Supplier], Foster and [Supplier] are the three main brands (URN F28005.1) and [Supplier] listed Foster, [Supplier], [Supplier] and [Supplier] as its main competitors (URN F320003). See also paragraph B.38

<sup>730</sup> Foster submitted to the CMA that there are approximately 100-plus brands in the market (Part B3.3, page 4 of the letter from Steptoe & Johnson (representing ITW) to the CMA dated 18 September 2014 in response to section 26 notice dated 28 August 2014 (URN FC0008.1)).

Foster's share likely to be [X].<sup>731</sup> Furthermore, on their own website, Foster say that they are the UK market leader.<sup>732</sup> Several resellers also informed the CMA that Foster was perceived as a market leader in commercial refrigeration products.<sup>733</sup>

---

<sup>731</sup> Question 3 of [Supplier]'s response to section 26 notice dated 27 May 2015 (URN F310004). Further examples include: [Supplier] described Foster as a strong trade brand with diverse product range and high market shares, and suggested it made premium products of a high quality (Question 3, page 2 of [Supplier]'s response to Section 26 notice dated 27 May 2015 (URN F280005.1)); [Reseller] described Foster as one of the strongest brands and market leaders in the UK (Question 3 of section 26 notice dated 26 May 2015 (URN F110205.1)); [Supplier] noted that Foster was (along with [Supplier]) a UK manufacturer with a historic commercial name and market position (Question 3 of section 26 notice dated 27 May 2015 (URN F300002)); [Supplier] described Foster as a strong manufacturer (Question 3 of section 26 notice dated 27 May 2015 (URN F270004.1)).

<sup>732</sup> Foster website, [www.fosterrefrigerator.co.uk](http://www.fosterrefrigerator.co.uk) (URN F0047).

<sup>733</sup> For example, [Reseller] identified Foster and [Supplier] as the market leaders in refrigeration (see paragraph 35, note of call between CMA and [Reseller] on 27 April 2015, URN F130010) and [Reseller] (owner of the domain name [Reseller]) stated that Foster was one of the UK's 'key brands', along with [Supplier], [Supplier], [Supplier] and [Supplier] (see paragraph 28, page 9 of note of telephone call between CMA and [Reseller] on 27 April 2015 (URN F140005)).



### A. Summary of the investigation

- On 1 April 2014, the CMA took over the functions of the OFT in relation to competition law enforcement.  
[Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller] and [Reseller].  
These calls were with [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], and [Reseller].  
[Supplier], [Supplier], [Supplier], [Supplier], [Supplier], [Supplier], [Supplier], [Supplier], [Supplier], [Supplier],  
[Supplier], [Supplier], [Supplier], [Supplier], [Supplier], [Supplier] and [Supplier].  
[Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller],  
[Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller],  
[Reseller], [Reseller], [Reseller], [Reseller], [Reseller] and [Reseller].

expressed an interest and willingness to enter into settlement discussions with the CMA in relation to the case.

- C.8 On 28 January 2016, the CMA issued a Statement of Objections to ITW, in which it proposed to make a decision that ITW had infringed the Chapter I prohibition of the Act and/or Article 101 TFEU. The purpose of the Statement of Objections was to allow ITW to make representations on the CMA's proposed decision. On 2 February 2016, having received the Statement of Objections, ITW confirmed its continued interest in settlement discussions.
- C.9 The CMA offered the Resellers the opportunity to see a non-confidential version of the Statement of Objections and to provide representations on it. Two Resellers, (namely, [Reseller] and [Reseller]) reviewed the Statement of Objections and submitted representations to the CMA. The CMA considered these representations carefully and made limited revisions to the Statement of Objections. However, the CMA concluded that none of the representations made by the Resellers affected its proposed decision on the Infringements.<sup>739</sup>
- C.10 Following settlement discussions, ITW submitted a signed settlement letter on 18 May 2016. ITW voluntarily, clearly and unequivocally admitted the facts and allegations of infringement as set out in the revised Statement of Objections. As part of settlement, ITW agreed to cooperate in expediting the process for concluding the case. The CMA confirmed that it would settle the case with ITW and that it intended to proceed to issue an infringement decision.<sup>740</sup>
- C.11 Before this Decision was issued, ITW adopted a comprehensive competition law compliance programme.

## **B. Scope of the investigation**

### ***Manufacturers***

- C.12 The CMA has reasonable grounds to suspect that other suppliers of commercial refrigeration products may have adopted restrictions similar to the MAP Policy.<sup>741</sup> The CMA had to consider how to make the best use of its limited resources. The CMA decided to pursue the investigation into Foster's

---

<sup>739</sup> As a candidate for settlement, ITW was entitled to submit limited representations on manifest factual inaccuracies contained in the Statement of Objections. Again, these were carefully considered by the CMA and, where relevant, were reflected in the revised Statement of Objections (paragraph C.10 below) and in this Decision.

<sup>740</sup> This was publicly announced by the CMA on 24 May 2016.

<sup>741</sup> See paragraphs 4.28 and 4.28.1–4.28.4.

arrangements having had regard to the evidence in its possession and the CMA's Prioritisation Principles.<sup>742</sup>

### ***Resellers***

- C.13 The CMA has reasonable grounds to suspect that Foster entered into agreements similar to the Agreements with a number of its resellers. However, the CMA has decided not to establish individual bilateral agreements with each reseller selling or advertising Foster products online. For reasons of administrative efficiency, the CMA considers it reasonable and proportionate to seek to reduce the number of reseller counterparties to agreements with Foster. In order to determine which undertakings should be included or excluded as counterparties to agreements with Foster, the CMA has had regard to the evidence it has in its possession and the CMA's Prioritisation Principles.
- C.14 As a result, the CMA has 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 Foster products in order to demonstrate the existence of an agreement with Foster.

### ***Use of Rule 10(2)***

- C.15 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 101(1) TFEU, the CMA may address its infringement decision to fewer than all the persons who were a party to that agreement.
- C.16 The evidence provided to the CMA demonstrates that Foster introduced the MAP Policy as a standard policy which it communicated to its resellers, including all resellers of Foster 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 ITW only and not to the Reseller counterparties.

---

<sup>742</sup> See *Prioritisation Principles for the CMA*, April 2014. Available at: <https://www.gov.uk/government/publications/cma-prioritisation-principles>