CE/9859-14

# Decision of the Competition and Markets Authority

## Conduct in the modelling sector

## Case CE/9859-14

16 December 2016

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 [✂].

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 Names have been replaced by a general descriptor of the individual's role.

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# 1. INTRODUCTION AND EXECUTIVE SUMMARY

1.1 By this decision (the '**Decision**'), the Competition and Markets Authority (the '**CMA**') has concluded that the persons listed at paragraph 1.2 (each a '**Party**', together the '**Parties**') have infringed the prohibition imposed by section 2(1) (the '**Chapter I prohibition'**) of the Competition Act 1998 (the '**Act**') and/or Article 101 of the Treaty on the Functioning of the European Union ('**TFEU**'). More specifically, the CMA finds that, between at least April 2013 and 23 March 2015 (the '**Relevant Period**'), the Parties infringed the Chapter I prohibition and/or Article 101 TFEU by participating in a single and continuous agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of modelling services in the UK (the '**Infringement**').

1.2 This Decision is addressed to the following persons:

- FM Model Agency Limited (in liquidation) ('**FM Models**');
- Models One Limited, One Worldwide Limited and Models 1 New Co Limited (together '**Models 1**');
- Premier Model Management Limited ('**Premier**');
- Storm Model Management Limited and Storm Models Limited (together '**Storm**');
- Viva Model Management London Limited and Viva Model Management Sarl (together '**Viva**'); and
- The Association of Model Agents Limited (the '**AMA**').

FM Models, Models 1, Premier, Storm and Viva are also each referred to as a '**Model Agency Party**' and together referred to as the '**Model Agency Parties**'.

1.3 By this Decision, the CMA is issuing directions to each of the Parties to cease their participation in the Infringement and imposing financial penalties under section 36 of the Act.

# 2. FACTUAL BACKGROUND

## A. The CMA's investigation

2.1 On 24 March 2015, the CMA opened a formal investigation under the Act, having determined that it had reasonable grounds for suspecting that a number of model agencies (including the Model Agency Parties) and the AMA had infringed the Chapter I prohibition and/or Article 101 TFEU.

2.2 Between 24 and 26 March 2015, the CMA carried out inspections at the premises of each of the Parties under the power of a warrant pursuant to section 28 of the Act. The Parties were selected for section 28 inspections on the basis that the CMA considered that the most pertinent evidence was likely to be found at the AMA and at the premises of each of the Model Agency Parties, given their close involvement with the AMA and the fact that each Model Agency Party had a representative on the AMA Council.

2.3 In the course of the investigation, the CMA has made requests for information and documents to the Parties both under section 26 of the Act and on a voluntary basis. The CMA also acquired information from third parties.

2.4 The CMA held 'state of play' meetings with each of the Parties between 5 and 25 August 2015, and on 7 and 12 September 2016, and provided informal updates throughout the investigation.

2.5 On 25 May 2016, the CMA issued a statement of objections (the '**Statement**') to the Parties. The CMA received written representations on the Statement from all Parties except FM Models. All Parties declined the CMA's invitation to attend an oral hearing to discuss the matters set out in the Statement.

2.6 On 27 September 2016, the CMA issued a draft penalty statement (the '**DPS**'), which gave notice to each of the Parties that, if it were to make a final decision that the Party in question had infringed the Chapter I prohibition and/or Article 101 TFEU, it would require (under section 36 of the Act) the Party to pay a financial penalty of a certain amount. The CMA received written representations on the DPS from and held oral hearings on the DPS with representatives of all of the Parties except FM Models.[1]

[1] The liquidator of FM Models declined the CMA's offer to attend an oral hearing to discuss the matters set out in the DPS.

### *Scoping and prioritisation*

*Conduct investigated*

2.7 This Decision does not contain an exhaustive summary of all of the evidence identified by the CMA of conduct in the Relevant Period which may amount to an infringement of the Chapter I prohibition and/or Article 101 TFEU. For reasons of administrative prioritisation, the CMA's investigation has focused on the evidence concerning behaviour which the CMA considers demonstrates the most blatant and serious violations of competition law in the Relevant Period.[2]

*Duration*

2.8 For reasons of administrative prioritisation, the CMA has decided to take enforcement action only in respect of the most recent period, where the volume of evidence available to the CMA is greatest. A period of two years was deemed appropriate to strike a balance between achieving effective deterrence while making the most efficient use of the CMA's limited resources.

2.9 As a result, the CMA has limited its findings of an infringement to conduct that took place from April 2013 until 23 March 2015 (the day before the CMA launched its formal investigation with inspections under section 28 of the Act).

## B. Industry overview

### *Introduction*

2.10 The CMA considers that the Infringement concerned the supply of modelling services as a whole, that is, including both the services performed by the model (such as appearing in photo shoots as part of an advertising campaign for a fashion label) and the agency services performed by the model agency, in the UK. This is because the contacts between competitors described in Section 3 concerned the total price paid by the customer for a particular modelling assignment (that is, the price including both the fee paid to the model and the fee paid to the model agency).[3]

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[2] For the avoidance of doubt: this Decision contains the entirety of the evidence that the CMA relies upon to make its findings.

[3] See paragraphs 2.19 and 2.20.

2.11 In the UK, models typically use model agencies to procure work on their behalf. Model agencies are responsible for sourcing and booking modelling assignments, billing customers and transferring monies received from the customer to the model. In addition, model agencies invest in developing models' talent by providing training, arranging test photoshoots and preparing portfolios and other printed materials which models need to promote their talent.

2.12 Customers (or casting agents and production companies working on behalf of customers) will approach model agencies when they require a model and the model agencies will enter into contracts on the model's behalf. The customer will then make a payment to the model agency, who retains any fees or related expenses due to it and passes on the remainder of the fee to the model.

2.13 Customers in this sector may be any kind of organisation requiring models for the purpose of advertising its products. Typical examples of customers are clothing retailers, catalogue companies and fashion designers. Typical modelling assignments include having the model's image appear in various different forms of media advertising or walking down the catwalk at fashion shows.

2.14 Customers typically multi-source when sourcing models to fulfil their modelling needs. As such, a customer will often send the same casting request to more than one model agency and, where that customer requires more than one model for a particular shoot, the customer may source models from a number of different model agencies.[4]

2.15 Some customers (typically those requiring a constant supply of models, such as online retailers) may seek to agree with model agencies standardised rates to use across all assignments of a similar type.[5] Where the customer's modelling needs are more infrequent or ad hoc, or where a regular customer has a particular modelling requirement, the customer may instead negotiate a rate for each particular assignment or shoot separately.[6]

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[4] The practice of customers sending the same casting request to a number of model agencies is discussed at paragraph 3.14 and footnote 139 in the context of AMA Alerts. This practice is also seen in the Detailed Customer Examples discussed at Section 3.C: see for example paragraph 3.55 (which demonstrates that the customer [Online Magazine A] sourced models from at least the model agencies Premier, Storm, [Model Agency A], [Model Agency B] and [Model Agency C]).

[5] See for example the [Online Retailer A] example discussed in Section 3.C, in particular paragraphs 3.93 to 3.103.

[6] As seen in many of the casting requests which prompted the AMA Alerts discussed in Section 3.B.

2.16 A request from a customer for a modelling assignment will typically set out the price sought. The fee for a particular modelling assignment will depend on a number of factors, including how established the model is (whether they are a 'new face' or a more experienced model), the nature and location of the assignment, and the usage that the customer requires of the image (with respect to this last category, see further paragraphs 2.21 to 2.23 below).

2.17 A model may reject a modelling assignment, for example if he or she considers that the fee negotiated between the model agency and the customer is too low. In practice, model agencies tend to have a good understanding of the fees that their models can expect and will be likely to accept and try to build a model's profile and value over time. In addition, the desirability of a particular project from a model's perspective may depend on more than just the fee to be paid. For example, for an up and coming model, the opportunity to work with a particular photographer, designer or stylist may be very attractive from a profile-raising perspective, even if the fee is relatively modest.

2.18 When expressing the proposed fee for a particular assignment, the customer may state either a per day (or occasionally per hour) rate or a fixed fee for the assignment.

2.19 Prices for modelling services may be expressed as a single, all-inclusive figure, or they may be expressed as an initial fee (the '**basic modelling fee**') on top of which will be applied an '**additional agency supplement**' (also referred to as 'aas' or simply 'agency').[7] The additional agency supplement is almost invariably charged at a rate of 20%. As such, quotations made in this way may be expressed for example as '£1000 plus agency supplement' or '£1000 + 20%'.[8]

2.20 The additional agency supplement forms one part of the remuneration received by the model agency for its services. In addition, the model agency will typically take a further fee (the '**agency fee'**) which is deducted from the basic modelling fee paid by the customer (the other element of the basic modelling fee being the model's remuneration). The agency fee is calculated as a percentage of the basic modelling fee. The total commission earned by the model agency (the '**agency commission**') is therefore the sum of the

[7] See for example URN4533, which notes both the 'all inclusive' fee and the breakdown between the basic modelling fee and the 'agency'.

[8] In this example, the total price paid by the customer will be £1200.

agency fee and the additional agency supplement.[9] Historically the standard agency commission charged by the Model Agency Parties has ranged between 33 and 37.5 per cent.[10]

***Prices and usage***

2.21 As noted above, a request from a customer for a modelling assignment will typically set out the price being sought together with details of the required 'usage' of the model's image (in terms of geographic reach, range of media channels and/or length of time during which the image will be used). The greater the agreed usage, the more the customer is able to benefit from the modelling image, as the usage determines the extent to which the customer can utilise that image to advertise its product. Conversely, the greater the agreed usage, the more restricted the model is likely to be in terms of working for competitors of the present customer, as the model's image becomes more heavily associated with that customer's products and brand.[11] As a result of these twin factors, the price for modelling services will typically be higher the greater the agreed usage. All else being equal, worldwide usage will generally command a higher rate than if usage is restricted to the UK; usage across a number of digital channels will command a higher rate than usage only in printed media; and the right to use a model's image for one year will cost more than the right to use a model's image for three months.[12]

2.22 In this way, usage is a proxy for the expected value the customer stands to gain from the model's image, so that compensation for usage is a key element of the price.[13] The CMA therefore considers that, when model agencies negotiate and discuss the usage that a customer will receive for a given fee, they are in effect negotiating and discussing prices. When a model agency

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[9] By way of illustration: based on a basic modelling fee of £1000 and assuming an additional agency supplement of 20% and an agency fee of 25%, the remuneration received by the model agency (the agency commission) will be £200 (additional agency supplement) plus £250 (agency fee), in total £450. The remuneration received by the model will be £750.

[10] As explained in paragraph 2.32, top models tend to be subject to significantly lower agency fees than other models.

[11] URN0717, paragraph 12. See also a letter from FM Models ([Director]) to [Company C] dated 17 March 2014 (3 copies: URN5621, URN5627 and URN5635).

[12] This idea is reflected, for example, in the new terms and conditions for booking models which [Online Retailer A] sought to introduce with model agencies in May 2014, discussed at paragraph 3.93 onwards. [✂].

[13] See for example URN4460, in which Models 1 discusses with the customer the various categories of usage involved in the customer's modelling request, and the effect that each usage element has upon the price for the shoot.

agrees to greater usage for the same fee, this amounts to a *de facto* reduction in price per 'unit' of usage, and vice-versa when a customer agrees to lesser usage for the same fee.

2.23 The relevant facts as set out in Section 3 include a number of contacts between competitors that focused on the 'usage' of a model's image, either in general terms or in relation to the modelling fee for a particular modelling assignment.[14] As will be seen in Section 4, the objective behind such contacts between the Parties was to coordinate commercial and pricing behaviour (so as to resist pressure from customers seeking to extract more usage from models' images without a corresponding increase in the fee).

### *Digital technology*

2.24 Many of the contacts between competitors referred to in Section 3 relate to new categories of customer, new marketing tools or new types of media that have emerged as a result of the increasing use of the internet. This includes online retailers (who require a constant stream of models and increasingly demand that models' images are used in a broader geographic area),[15] online advertising,[16] the use of 'click to buy' links in digital magazines (where the reader has the ability to click on a weblink to an e-commerce website where the featured item can be bought)[17] and social media.[18]

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[14] See for example paragraphs 3.32, 3.33, 3.35 to 3.37, 3.39, 3.40, 3.42, 3.44 to 3.47, 3.55 to 3.70, 3.80, 3.88, 3.96, 3.97, 3.102(a), 3.102(b), 3.103, 3.105 to 3.109, 3.111 to 3.117, 3.123, 3.126 to 3.133 and 3.135 to 3.138.

[15] See paragraphs 3.71 to 3.109 relating to the online retailer [Online Retailer A] and paragraphs 3.118 to 3.124 relating to the online retailer [Online Retailer B]. See also paragraphs 3.110 to 3.117 relating to [Retailer A] and paragraphs 3.125 to 3.133 relating to [Retailer B], both of which examples relate to the use of modelling images on the e-commerce websites and other digital marketing channels of these traditional 'bricks and mortar' retailers.

[16] See paragraphs 3.48, 3.104 to 3.109, 3.115 and 3.126.

[17] See paragraphs 3.53 to 3.70 regarding [Online Magazine A] and other customer examples involving click to buy usage. Model agencies consider that images used in online content involving click to buy should attract significantly higher fees than images used in online content which is purely editorial in nature, on the basis that the model image is more closely associated with the commercial aim of selling the featured item and the model should be remunerated accordingly. In general, model agencies have been prepared to charge significantly lower fees where the model's image was to be used for purely editorial content. See for example the emails quoted at paragraphs 3.57, 3.58 and 3.65 regarding fees for [Online Magazine A], which discuss the fees that certain model agencies were prepared to accept in circumstances where click to buy links were used and circumstances where they were not. The minutes of the AMA Council meeting of 25 June 2013 describe click to buy as being *'all part of the digital revolution'* (3 copies: URN2969, URN3500 and URN5336).

[18] See paragraphs 3.45, 3.48 and 3.115.

2.25 Common to all of these examples is the fact that technology has created new opportunities for customers to extract greater usage from a model's image. Much of the evidence pertaining to the Infringement concerned the Parties' objective of coordinating commercial and pricing behaviour so as to maintain price levels in the face of these developments, as well as to avoid setting a precedent of allowing additional usage without a corresponding increase in fees (which could have hampered each of the Model Agency Parties' positions in subsequent negotiations with customers).[19]

## C. The relevant market

### *Introduction*

2.26 When applying the Chapter I prohibition and/or Article 101 TFEU, the CMA is only obliged to define the relevant market where it is not possible, without such a definition, to determine whether the agreement and/or concerted practice is liable to affect trade in the UK and/or between Member States, and whether it has as its object or effect the prevention, restriction or distortion of competition.[20] No such obligation arises in this case because the Infringement involves an agreement and/or concerted practice which, by its very nature, had as its object the prevention, restriction or distortion of competition and was liable to affect trade in the UK and/or between Member States.[21]

2.27 The objective of this Section 2.C therefore is to identify the market or markets affected by the Infringement for the purpose of assessing the appropriate level of any financial penalty (see Sections 5.C and 5.D).[22] The relevant turnover,

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[19] See for example paragraphs 3.20, 3.40, 3.42, 3.55, 3.57, 3.58, 3.70 and 3.119. See also URN4574, in which [Model Agency D] discussed with the AMA General Secretary resisting an attempt by a customer to include digital channels within the usage terms for a modelling shoot, without an increase in the modelling fee: '[customer] *claims that the day rate should include all their digital channels. Of course this is happening organically for all the editorial shoots now, but we don't want to agree on this to start happening for advertorials. Digital advertorial should be looked at as a separate insertion and be double the day-rate really'.* An AMA Alert was subsequently issued to AMA members (2 copies: URN0052 and URN5513). For a definition of an advertorial, see footnote 173. AMA Alerts are discussed in Section 3.B.

[20] Judgment in *Volkswagen AG v Commission*, T-62/98, ECR, EU:T:2000:180, paragraph 230; Judgment in *SPO and Others v Commission*, T-29/92, ECR, EU:T:1995:34, paragraph 74.

[21] See further Sections 4.F, 4.I and 4.J.

[22] The CMA's approach to market definition in this case is without prejudice to the CMA's discretion to adopt a different market definition in any subsequent case in light of the relevant facts and circumstances in that case, including the purposes for which the market is defined.

for penalties purposes, is the turnover derived from sales in the relevant markets affected by the Infringement (the '**Relevant Turnover**').[23]

2.28 The Competition Appeal Tribunal ('**CAT**') and the Court of Appeal have accepted that it is not necessary for the CMA to set out the precise relevant market definition in order to assess the appropriate level of the penalty.[24] Rather, the CMA must be '*satisfied on a reasonable, and properly reasoned basis, of what is the relevant product market affected by the infringement*'.[25] To this end, it is also relevant to consider the '*commercial reality*', insofar as it '*can reasonably be shown that the products so grouped were "affected" by the infringement*'.[26] The CMA considers that this principle also applies when assessing the relevant geographic market.

### *Relevant product market*

2.29 As set out in paragraph 2.10, the CMA considers that the Infringement concerned the supply of modelling services as a whole. The focal product for the market definition exercise is therefore the supply of modelling services as a whole, in the UK. Starting with this focal product, the CMA has considered whether there are reasons to define the relevant market more broadly or more narrowly. Given that the Infringement affects prices for the entire modelling service purchased by the customer (that is, including the services performed by a model and the agency services performed by the model agency), the CMA does not consider it necessary to explore whether model agency services constitute a separate market, distinct from other modelling services.

#### *Top models*

2.30 In assessing the scope of the relevant product market, the CMA has considered whether modelling services involving top models[27] should be treated for the purposes of this case as belonging to a separate relevant market from modelling services involving other types of models.

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[23] *OFT's Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board ('***Penalty Guidance***'), paragraphs 2.7 to 2.9.

[24] *Argos and Littlewoods v OFT* and *JJB Sports v OFT* [2006] ECWA Civ 1318 ('***Argos, Littlewoods and JJB***'), at [169] to [173] and [189] and *Argos and Littlewoods v OFT* [2005] CAT 13, ('***Argos and Littlewoods***') at [178].

[25] *Argos, Littlewoods and JJB*, at [170].

[26] *Argos, Littlewoods and JJB*, at [170]-[173] and [228].

[27] 'Top model' is a term of art used in the modelling industry to describe models that have a notable degree of individual fame and who, as a result, tend to earn much higher fees.

2.31 For top modelling services, the fame of the model plays a part in the decision to contract for their services, thus giving the model a higher degree of market power relative to both the model agency and the customer than for other types of modelling services.

2.32 This is reflected in the fact that top models tend to be subject to significantly lower agency fees than other models (which is evidence of top models' bargaining power vis-à-vis model agencies). In the response to a request under section 26 of the Act made on behalf of Models 1, Premier and Storm in December 2015, it was stated that top models are '*individual elite models whose commission arrangements vary considerably*', and that such models pay much lower agency fees.[28]

2.33 Furthermore, the price differential between fees earned by top models and fees earned by those who are not top models (as well as possibly the status associated with each category of work) is such that customers seeking modelling services other than top modelling services would be unlikely to switch to top modelling services.[29]

2.34 In addition, fees for top modelling services are more likely to be negotiated with the customer on an individual basis, as opposed to, for example, by means of a standard 'fee list' applicable to all models of a certain category[30] (although the fact that a model's fees are individually negotiated does not, in itself, determine whether that model is a top model).

2.35 In view of the above, the CMA considers that top modelling services should be treated for the purposes of this case as belonging to a separate market.

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[28] URN1083. See also the responses provided by the Model Agency Parties (except FM Models, which by that time had gone into liquidation) in response to a request under section 26 of the Act made on 15 February 2016, requesting a list of all top models represented by that model agency in 2014 and the agency fees paid by each of the models: URN6403 (Models 1); URN6399 (Premier); URN6391 (Storm); URN6396 (Viva). Viva has submitted that [industry website] provides an objective way to identify top models, as the rankings are voted for by fashion industry professionals (excluding representatives from model agencies) – see footnote 577.

[29] In a number of the modelling requests reviewed by the CMA, customers emphasised the tight budgets within which they worked, at times accepting that the (low) level of fees offered may result in model agencies only offering 'new faces' for the casting, or even declining to offer any models at all. See for example: URN4246; 2 copies: URN3014 and URN4405; URN6532; URN4730. It seems unlikely that such customers would switch to even more expensive top modelling services.

[30] Such as that used by [Online Retailer A] as discussed at paragraph 3.93 onwards: URN4823 (for all copies of this document, see footnote 263).

2.36 Although the contacts between competitors discussed in Section 3 concerned the supply of a wide range of modelling services,[31] the CMA has not seen any clear evidence that the Infringement also concerned the supply of top modelling services.

2.37 The CMA therefore considers that the turnover of the Model Agency Parties obtained from the supply of top modelling services should not be included in the determination of the Relevant Turnover for the purposes of calculating the financial penalties in this case.[32]

*Other delineations according to model type*

2.38 The CMA has also considered whether the relevant market should be segmented according to other types of models represented by the Model Agency Parties. Potential segmentation might be for example by gender, by size (some model agencies represent 'plus size' models, also referred to as 'curve' models), by age (according to some of the Parties, the term 'classic' is used to refer to models used '*to present a mature image*') or by the level of experience/seniority of models (model agencies tend to distinguish between 'new faces' and other, more experienced models).[33]

2.39 With the exception of top models, however, there is no evidence demonstrating that the Infringement affected certain categories of model but not others. As regards 'classic' and 'curve' models, some of the contacts described in Section 3 concern assignments requiring these categories of modelling services, so that they are directly affected by the Infringement.[34] The CMA therefore considers that, with the exception of top modelling services, the Infringement affected all types of modelling services supplied by the Model Agency Parties.

2.40 Therefore, regardless of whether each potential separate segment is part of the same relevant market or constitutes a separate relevant market, the CMA has treated the Model Agency Parties' turnover derived from all modelling

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[31] See paragraph 5.45.

[32] Paragraphs 5.38 to 5.41 describe the approach taken by the CMA to determine whether a model should be characterised as a 'top model' and the model agency turnover associated with that model therefore be excluded from the Relevant Turnover.

[33] See for example URN4356 (discussed further at paragraph 3.57), URN4237 (discussed further at paragraph 3.20) and URN3463 (discussed further at paragraph 3.102(a)). This last document also refers to a further category: 'best sellers'. See further paragraph 5.46.

[34] See paragraph 5.46.

services (excluding turnover derived from top modelling services) as Relevant Turnover for the purposes of the penalty calculation.

***Relevant geographic market***

2.41 The CMA finds that the Infringement concerned modelling services supplied in the UK. For the purposes of determining the Relevant Turnover, the CMA finds that modelling services supplied in the UK comprise those modelling services involving UK-based model agencies and UK-based customers (or UK-based casting agents and production companies working on behalf of customers).[35] The CMA also considers that the Infringement extended over the entire UK territory.[36]

2.42 It is common for UK-based models to take up modelling assignments abroad,[37] and for foreign based models to take up modelling assignments in the UK.[38] An AMA document states '*most British models, about 55% of the total represented by UK model agencies, work, not just in the UK, but also throughout Europe and the USA. A few will also work in South Africa and Japan. Foreign models, about 45% of the total, work globally in similar markets to British models albeit, often, even further afield. All models need to*

[35] Where a UK-based customer (including a UK-based casting agent or production company) makes arrangements with a UK-based agency to fly a model abroad for a modelling assignment, the CMA considers this arrangement to be part of the UK market (and consequently any turnover derived from this activity is considered to be Relevant Turnover).

[36] The usage associated with modelling services supplied by the Model Agency Parties would generally cover (at least) the entire UK territory. See for example URN4564 (discussed further in paragraph 3.126) and URN5982, both of which refer to usage within the UK, without further reference to particular regions within the UK. The UK modelling industry is to a significant degree 'London-centric' so that customers (particularly larger ones such as high street retailers, large online retailers and large consumer goods brands) would tend to source modelling services from London-based agencies even when they are based elsewhere in the UK. For example, the customer [Online Retailer B] (discussed further in paragraphs 3.118 to 3.124) is [✂]-based, but sought models from a number of London-based model agencies.

[37] For example, URN4342 (discussed further at paragraph 3.55) refers to models represented by model agencies [Model Agency A] and [Model Agency C] attending shoots in Ibiza and New York. A casting request received by Models 1 from [customer] required travel to Buenos Aires and Budapest (URN4374); another for [customer] required travel to either Palma or Berlin (URN6526, URN6525); and a third for [customer] required travel to the US (URN6523).

[38] As demonstrated, for example, by the fact that the AMA Council meeting on 10 March 2014 discussed booking requirements for foreign-based models (2 copies: URN2964 and URN4035)

*work globally in order to a) maximise their earnings and b) continuously improve their portfolios'.*[39]

2.43 However, while individual models may work in different countries, the extent to which UK-based customers would be prepared to switch to modelling services supplied by model agencies based abroad is unclear.[40] The CMA considers that there are some factors that may limit the ability of foreign-based model agencies to compete effectively with UK-based agencies for modelling services supplied in the UK, such as a lack of local knowledge and expertise regarding collecting fees (particularly where payment is overdue) and deducting certain taxes (such as the Foreign Entertainers Tax ('**FET**')) in the UK[41] and the ability to offer visa sponsorship for models coming from outside the European Union.[42]

2.44 In view of the above, the CMA finds, for the purposes of this case, that the relevant geographic market is the UK.

## D. The CMA's approach to assessing liability

### *Identification of the appropriate legal entity*

2.45 In determining who is liable for an infringement, and, therefore, subject to any financial penalty which the CMA may impose, it is necessary to identify the

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[39] Document titled '*Understanding the models' and model agents' perspectives'* dated 3 October 2011 (URN1211).

[40] See however URN5010, which concerns [Online Retailer A] exploring the possibility of sourcing models from Danish model agencies for photoshoots in London. The CMA also notes the statement made as part of the 16 June 2015 submission from the legal advisers representing Models 1, Premier, Storm and the AMA that some UK-based clients may cast or book models from model agencies based outside the UK (URN0722). Paragraphs 4.136 and 4.137 consider the cross-border economic activities performed by the Model Agency Parties in the Relevant Period.

[41] For example, at the AMA Council meeting on 22 January 2014, Models 1 ([Director A]) discussed meeting the FET unit of HMRC to clarify queries that its new procedures had raised for AMA members (5 copies: URN2965, URN3501, URN3855, URN4624 and URN5552). At the AMA Council meeting on 10 June 2014, FM Models ([Director]) discussed legal requirements concerning reporting models' earnings to HMRC (5 copies: URN2963, URN3853, URN4848, URN5712 and URN5715).

[42] See the minutes of the AMA Council meeting on 10 March 2014 (2 copies: URN2964 and URN4035), which noted that a *'non-EU model in possession of working papers must be booked through the model's sponsor – ie the model's UK agent*'. The acronym 'COS' used in documents such as the AMA Council meeting minutes of 29 October 2013 (3 copies: URN2967, URN5461 and URN5463) stands for 'certificate of sponsorship'.

legal or natural persons who form part of the undertaking involved in the infringement.

2.46 For each Party which the CMA finds has infringed the Chapter I prohibition and/or Article 101 TFEU, the CMA has first identified the legal entity directly involved in the Infringement. It has then determined whether liability for the Infringement should be shared with another legal entity, in which case each legal entity's liability will be joint and several.

2.47 The conduct of a subsidiary undertaking[43] may be imputed to its parent company where, although having a separate legal personality, the subsidiary did not decide independently upon its conduct on the market, but carried out, in all material respects, the instructions of its parent company.[44] Where a subsidiary is wholly owned by its parent company, the CMA is entitled to presume (subject to rebuttal by the parent company) that the parent exercises decisive influence over the commercial policy of the subsidiary.[45] It is for the parent company in question to rebut the presumption by adducing sufficient evidence to demonstrate that the subsidiary company acts independently on the market.[46]

2.48 Where a parent company exercises decisive influence over the conduct of the subsidiary, the conduct of a subsidiary may be imputed to its parent company (with joint and several liability for the subsidiary and its parent). In such circumstances, the parent company and its subsidiary form a single economic unit and, therefore, the same undertaking, for the purpose of applying the Chapter I prohibition and Article 101 TFEU.[47]

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[43] Judgment in *Akzo Nobel v Commission,* C-97/08 P, ECR, EU:C:2009:536 ('***Akzo Nobel***'), paragraph 55.
[44] Judgment in *ICI v Commission,* C-48/69, ECR, EU:C:1972:70 ('***ICI***'), paragraphs 132 and 133; *Akzo Nobel*, paragraph 58.
[45] *Akzo Nobel*, paragraphs 60 and 61; Judgment in *Alliance One International and Others v Commission*, T-24/05, EU:T:2010:453 ('***Alliance One***'), paragraphs 126-130. The GC has indicated, among other things, that neither the fact that the subsidiary operates independently in specific aspects of its policy on the marketing of the products concerned by the infringement, nor the lack of any direct involvement in, or knowledge of the facts alleged to constitute, the infringement by directors of the parent company, are sufficient, of themselves, to rebut the presumption. Judgment in *Total SA and Elf Aquitaine SA v Commission*, T-190/06, ECR, EU:T:2011:378, paragraph 64; Judgment in *Arkema France SA v Commission*, T-189/06, ECR, EU:T:2011:377, paragraph 65.
[46] Judgment in *Alstom v Commission,* T-517/09, EU:T:2014:999 ('***Alstom***'), paragraph 55; *Akzo Nobel*, paragraph 61; *Alliance One*, paragraph 131.
[47] *Alstom*, paragraph 55; *Akzo Nobel*, paragraph 59.

2.49 Where a Party which was directly involved in an infringement was owned by natural persons during the Relevant Period, liability for the infringement will not extend to those individuals.

2.50 As regards ownership of an infringing subsidiary company by two or more separate parents in succession, if the CMA elects to attribute joint and several liability to each parent together with the subsidiary, liability will be attributed to each parent on the basis of the principle of decisive influence as set out above, and in accordance with each parent's period of ownership of the subsidiary during the period of the infringement.[48] The CMA may elect, however, to attribute liability to the subsidiary only.[49]

## E. Model Agency Parties

### *FM Models*

2.51 The CMA considers that FM Model Agency Limited was directly involved in the Infringement.

2.52 FM Model Agency Limited is a private limited company registered at Companies House on 21 November 2003 under company number 04972138.[50] During the Relevant Period its principal activity was as a model agency.

2.53 During the Relevant Period, FM Model Agency Limited had only two directors, [Director] and [director], who were also the sole shareholders, each holding 50% of the shares of the company.[51]

2.54 On 1 July 2015 FM Model Agency Limited was acquired by La Financiere PVC Limited, a private limited company wholly owned by PVC Holding

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[48] Judgment in *Siemens AG Oesterreich and Others v Commission*, joined cases T-122/07 to T-124/07, ECR, EU:T:2011:70, paragraphs 139 and 141 to 144.
[49] Judgment in *Sasol v Commission*, T-541/08, EU:T:2014:628, paragraphs 182 and 183; Judgment in *Raiffeisen Zentralbank Österreich and Others* v *Commission*, joined cases T-259/02 to T-264/02 and T-271/02, ECR, EU:T:2006:396, paragraph 331.
[50] FAME – company report of FM Model Agency Limited, 20 May 2016 (URN6620). FAME is a database maintained by Bureau Van Dijk, containing information and business intelligence relating to companies in the UK and Ireland.
[51] FM Model Agency Limited Annual Return made up to 13 January 2015 and FM Model Agency Limited Annual Return made up to 13 January 2014, both as filed at Companies House; FAME – director report for FM Model Agency Limited, 20 May 2016 (URN6621), which states that [Director] and [director] were both appointed as directors on 2 December 2003.

SPRL.[52] On the same date, [Director] and [director] were replaced by a sole director, [director].[53]

2.55 On 6 January 2016 FM Model Agency Limited was placed into liquidation[54] and [liquidator] and [liquidator] of Mazars were appointed as its liquidators.[55] The CMA understands that, as at the date of this Decision, FM Model Agency Limited remains in existence.

2.56 This Decision is therefore addressed to FM Model Agency Limited (in liquidation).

***Models 1***

2.57 The CMA considers that Models One Limited was directly involved in the Infringement.

2.58 Models One Limited is a private limited company registered at Companies House on 3 December 1998 under company number 03678510.[56] Its principal activity is that of a model agency.

2.59 [director], [Director B] and [Director A] were directors of Models One Limited throughout the Relevant Period.[57] In addition, [director] and [director] were directors until 4 June 2013, and [director] became a director on 1 June 2013 and remained in post through the remainder of the Relevant Period.[58]

2.60 Throughout the Relevant Period, all shares in Models One Limited were held by One Worldwide Limited,[59] a private limited company registered at

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[52] La Financiere PVC Limited Certificate of Incorporation dated 16 June 2015, as filed at Companies House. This states its company number as 9641766.
[53] FAME – director report for FM Model Agency Limited, 20 May 2016 (URN6621).
[54] Statement of Company's Affairs (form S95/99) dated 6 January 2016, as filed at Companies House.
[55] Notice of appointment of liquidator dated 11 January 2016, as filed at Companies House.
[56] FAME – company report for Models One Limited, 20 May 2016 (URN6622).
[57] FAME – director report for Models One Limited, 20 May 2016 (URN6623).
[58] Models One Limited – termination of appointment of director ([director]) dated 12 June 2013 and Models One Limited – termination of appointment of director ([director]) dated 12 June 2013, both as filed at Companies House; FAME – director report for Models One Limited, 20 May 2016 (URN6623).
[59] Models One Limited Annual Return made up to 3 December 2015; Models One Limited Annual Return made up to 3 December 2014; Models One Limited Annual Return made up to 3 December 2013, all as filed at Companies House.

Companies House on 26 September 2008 under company number 06708789.[60]

2.61 Until 4 June 2013, [director] (50%), Atlantic Models LLC (40%), [Director B] (4%), [Director A] (4%) and [director] (2%) were the shareholders of One Worldwide Limited.[61]

2.62 On 4 June 2013, all shares in One Worldwide Limited were acquired by Models 1 New Co Limited,[62] a private limited company registered at Companies House on 8 April 2013 under company number 08478812.[63] Models 1 New Co Limited therefore became the ultimate parent company of Models One Limited. The shareholders and directors of Models 1 New Co Limited are [Director A] (25%), [Director B] (25%), [director] (25%), [director] (13.5%) and [shareholder] (11.5%) (the last being a shareholder but not a director).[64]

2.63 The CMA considers that One Worldwide Limited, as 100% owner of Models One Limited, can be presumed to have exercised decisive influence over Models One Limited during the Relevant Period and therefore to form part of the same economic entity.

2.64 The CMA considers that, from 4 June 2013, with its acquisition of 100% of the shares in One Worldwide Limited and Models One Limited, Models 1 New Co Limited can be presumed to have exercised decisive influence over the commercial policy of both companies and therefore to form part of the same economic entity. The major shareholders of Models 1 New Co Limited are [Director A], [Director B] and [director], who were also directors of Models One Limited throughout the Relevant Period.[65]

2.65 The CMA considers that Models One Limited, One Worldwide Limited and Models 1 New Co Limited are therefore jointly and severally liable for Models One Limited's participation in the Infringement and for the payment of the financial penalty imposed by the CMA in respect of the Infringement (Models

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[60] FAME – company report for One Worldwide Limited, 20 May 2016 (URN6624).
[61] One Worldwide Limited Annual Return made up to 26 September 2013, as filed at Companies House.
[62] One Worldwide Limited Annual Return made up to 26 September 2013, as filed at Companies House.
[63] FAME – company report for Models 1 New Co Limited, 20 May 2016 (URN6625).
[64] FAME – company report for Models 1 New Co Limited, 20 May 2016 (URN6625).
[65] Models 1 New Co Limited Abbreviated accounts for year ended 31 December 2014, as filed at Companies House; FAME – director report for Models One Limited, 20 May 2016 (URN6623).

1 New Co Limited being liable only for the period in which it was the sole ultimate parent company of Models One Limited).

2.66 This Decision is therefore addressed to Models One Limited, One Worldwide Limited and Models 1 New Co Limited.

***Premier***

2.67 The CMA considers that Premier Model Management Limited was directly involved in the Infringement.

2.68 Premier Model Management Limited is a private limited company registered at Companies House on 11 June 1991 under company number 02619150.[66] Its principal activity is that of a model agency.

2.69 Throughout the Relevant Period, Premier Model Management Limited's directors[67] and only shareholders were [director] and [Director], each owning 50% of the shares in the company.[68]

2.70 The CMA considers that Premier Model Management Limited is liable for the Infringement and is liable for the payment of the financial penalty imposed by the CMA in respect of the Infringement.

2.71 This Decision is therefore addressed to Premier Model Management Limited.

***Storm***

2.72 The CMA considers that Storm Model Management Limited was directly involved in the Infringement.

2.73 Storm Model Management Limited is a private limited company registered at Companies House on 8 June 1987 under company number 02138622.[69] Its principal activity is that of a model agency.

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[66] FAME – company report for Premier Model Management Limited, 20 May 2016 (URN6626).
[67] FAME – director report for Premier Model Management Limited, 20 May 2016 (URN6627). No other directors served during the Relevant Period.
[68] Premier Model Management Limited Annual Return made up to 11 June 2015; Premier Model Management Limited Annual Return made up to 11 June 2014; Premier Model Management Limited Annual Return made up to 11 June 2013, all as filed at Companies House.
[69] FAME – company report for Storm Model Management Limited, 20 May 2016 (URN6628).

2.74 Throughout the Relevant Period, the directors of Storm Model Management Limited were [Director] and [director].[70] [director] was a director until 3 June 2013, and has not been replaced.[71]

2.75 Storm Model Management Limited has one subsidiary, Storm Artists Management Limited. The CMA does not have any evidence that this company was directly involved in the Infringement.

2.76 Until 1 June 2013, Storm Model Management Limited's shareholders were Core MG UK Holdings Limited (51%), [director] (39%) and [Director] (10%).[72]

2.77 Since 1 June 2013, the sole shareholder and parent company of Storm Model Management Limited has been Storm Models Limited.[73] Storm Models Limited is a private limited company registered at Companies House on 17 April 2013 under company number 08493453.[74] Its principal activity is that of a holding company, but it also provides marketing services.[75] Its only directors and shareholders since its incorporation have been [director] (80%) and [Director] (20%).[76]

2.78 The CMA considers that, from 1 June 2013, Storm Models Limited, as 100% owner of Storm Model Management Limited, can be presumed to have exercised decisive influence over the commercial policy of Storm Model Management Limited and therefore to form part of the same economic entity. From 1 June 2013, with Storm Models Limited's acquisition of Storm Model Management Limited, the same two directors make up the Board of Directors of both companies.[77]

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[70] FAME – director report for Storm Model Management Limited, 20 May 2016 (URN6629).
[71] Storm Model Management Limited – termination of appointment of director ([director]) dated 27 June 2013, as filed at Companies House; FAME – director report for Storm Model Management Limited, 20 May 2016 (URN6629).
[72] Storm Model Management Limited Annual Return made up to 30 June 2013, as filed at Companies House. The CMA notes that Core MG UK Holdings Limited's Report and Financial Statements for the year ending 31 December 2013 (as filed at Companies House) state that the company sold its shareholding in Storm Model Management Limited on 4 June 2013, rather than 1 June 2013.
[73] Storm Model Management Limited Annual Return made up to 30 June 2015; Storm Model Management Limited Annual Return made up to 30 June 2014; Storm Model Management Limited Annual Return made up to 30 June 2013, all as filed at Companies House.
[74] FAME – company report for Storm Models Limited, 20 May 2016 (URN6630).
[75] Storm Models Limited Annual report and unaudited financial statements for the year ended 31 December 2014, page 1, as filed at Companies House.
[76] Storm Models Limited Annual Return made up to 30 April 2015; Storm Models Limited Annual Return made up to 30 April 2014, both as filed at Companies House.
[77] FAME – company report for Storm Models Limited, 20 May 2016 (URN6630); FAME – company report for Storm Model Management Limited, 20 May 2016 (URN6628).

2.79 The CMA considers that Storm Model Management Limited and Storm Models Limited are therefore jointly and severally liable for Storm Model Management Limited's participation in the Infringement (Storm Models Limited being liable only for the period in which it was the sole parent company of Storm Model Management Limited). Accordingly, they are jointly and severally liable for the payment of any financial penalty imposed by the CMA in respect of the Infringement.

2.80 This Decision is therefore addressed to Storm Model Management Limited and Storm Models Limited.

***Viva***

2.81 The CMA considers that Viva Model Management London Limited ('**Viva London'**) was directly involved in the Infringement.

2.82 Viva London is a private limited company registered at Companies House on 30 September 2003 under company number 04915750.[78] Its principal activity is that of a model agency.

2.83 During the Relevant Period, Viva's company directors were [Director B], [Director A], [director], [director] (appointed on 18 April 2013) and [director] (until 12 April 2013).[79]

2.84 The sole shareholder of Viva London during the Relevant Period was (and remains) the French company, Viva Model Management Sarl ('**Viva Sarl**'), which was (and is) also the ultimate parent company.[80] According to Viva London's financial statements, the ultimate controlling party is [Director B].[81]

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[78] FAME – company report for Viva Model Management London Limited, 20 May 2016 (URN6631).
[79] Viva Model Management London Limited Annual Return made up to 30 September 2015; Viva Model Management London Limited Annual Return made up to 30 September 2014; Viva Model Management London Limited Annual Return made up to 30 September 2013; Viva Model Management London Limited appointment of director ([director]) dated 18 April 2013; Viva Model Management London Limited termination of appointment of director ([director]) dated 15 April 2013, all as filed at Companies House.
[80] Viva Model Management London Limited Annual Return 30 September 2015; Viva Model Management London Limited Annual Return 30 September 2014; Viva Model Management London Limited Annual Return 30 September 2013, all as filed at Companies House.
[81] Abbreviated Accounts for the year ended 31 December 2014 for Viva Model Management London Limited, page 5; Viva Model Management London Limited Abbreviated accounts for the year ended 31 December 2013, page 5, both as filed at Companies House.

2.85 The CMA considers that Viva Sarl, as 100% owner of Viva London, can be presumed to have exercised decisive influence over the commercial policy of Viva London throughout the Relevant Period and therefore to form part of the same economic entity. The CMA also notes that the ultimate controlling party of Viva Sarl, [Director B], was also a director of Viva London throughout the Relevant Period.[82]

2.86 Viva has provided no evidence to refute this presumption and has, in fact, confirmed that there are further indications which confirm the presumption and that show that Viva London did not enjoy complete autonomy on the market.

2.87 Viva has submitted[83] that [✂]. Viva submitted that [✂]. Moreover, Viva submitted that [Director B] was not involved in any aspect of the Infringement.

2.88 The existence of a single economic entity does not presuppose the exercise of decisive influence over the day-to-day management of the subsidiary's operation, nor the commercial policy in the strict sense (for example pricing strategy), but rather over the general strategy which defines its business operations.[84] Consequently, a parent company may be held liable as part of the undertaking committing an infringement even if it has not influenced its subsidiary's policy in the specific area in which the infringement occurred.[85]

2.89 As regards Viva London, as well as being the controlling party of Viva Sarl and a director of Viva London, [✂]. Viva has also noted in its representations the importance of [Director A] being aware of, and upholding, the image, reputation and management style of the Viva group when conducting business;[86] and also that certain strategic decisions were discussed with [Director B], [✂].[87]

2.90 For these reasons, Viva has not shown that Viva London decided independently on its own conduct on the market. Indeed, the evidence submitted by Viva and described in paragraph 2.89 shows that Viva Sarl

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[82] FAME – company report for Viva Model Management London Limited, 20 May 2016 (URN6631).
[83] URN6892, paragraphs 12.1 to 12.6; URN7161, paragraphs 4, 6 and 7; URN7173, pages 8, 11, 12, 33 to 37.
[84] See *Akzo Nobel*, paragraphs 63 to 65, 82 and 83.
[85] See *Akzo Nobel*, paragraph 83.
[86] *'…she* [Director A] *has been working for seven years* [✂]*. So I guess if she was a new person and one that never worked for the company, maybe my influence would be done and my involvement would be in a different level. But as she has been for seven years understanding what is the philosophy of Viva, which is for me the most important is the way we are managing and the way that we are looking after our models, so it is because* [Director A] *worked with me* [✂] *for seven years and I trust her to run and be the director of Viva London*.' URN7173 pages 33 and 36.
[87] URN7173, page 11; URN7161, paragraph 10.

exercises decisive influence over Viva London. The CMA considers that Viva London and Viva Sarl are therefore jointly and severally liable for Viva London's participation in the Infringement. Accordingly, both companies are jointly and severally liable for the payment of any financial penalty imposed by the CMA in respect of the Infringement.

2.91 This Decision is therefore addressed to Viva Model Management London Limited and Viva Model Management Sarl.

## F. The Association of Model Agents

2.92 The AMA, established in 1974, is a trade association for model agents. At the start of the CMA's investigation, the AMA had one employee ([AMA General Secretary]). Until July 2015, the AMA was based at the business premises of FM Models.[88]

2.93 The AMA's objectives, as stated in its Memorandum of Association, are: to promote and develop the reputation and prestige of model agents and models; to promote the interests and image of the profession; to collaborate with other bodies concerned with the fashion and modelling world; to protect the interests of the individual model; and to provide a centre in London for the collation of information relating to models, model agents and others connected with the modelling or fashion world.[89]

2.94 At the start of the investigation, the AMA had 17 members (all model agencies, including most of the larger and most prestigious UK model agencies).[90] Since the CMA publicly launched its investigation in March 2015, at least eight model agencies have left the AMA.[91] Paragraphs 4.142 to 4.145 discuss the evidence concerning the market position and importance of the AMA members.

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[88] In July 2015, FM Models was sold to La Financiere PVC Limited and since then the AMA's business address [✂]. As discussed in paragraph 2.55, FM Models has since been placed into liquidation.

[89] AMA Memorandum of Association dated 11 March 1974, paragraph 3, as filed at Companies House.

[90] [Model Agency I], [Model Agency J], [a model agency], [a model agency], [Model Agency D], FM Models, [Model Agency H], Models 1, [a model agency], [Model Agency D], [Model Agency G], Premier, [Model Agency F], [Model Agency B], Storm, Viva and [Model Agency A] (URN0940 and URN0942), and URN7089 (a screenshot of [industry website] which lists the UK's premium listing model agencies).

[91] URN0940; URN0942; URN1022.

2.95 The AMA's net assets were £16,216 in the financial year ending March 2015.[92] The liability of each of its members is limited to £10.[93]

2.96 In light of the AMA's role in the Infringement (see Section 3.D and paragraphs 4.37 to 4.39), this decision is also addressed to the AMA.

***The AMA Council***

2.97 As prescribed by the AMA's Articles of Association, the business of the AMA is managed by a Council composed of representatives from its member agencies, which is empowered to '*exercise all such powers of the Association, and do on behalf of the Association all such acts as may be exercised and done by the Association* […]'.[94] The Council members are responsible for approving all applications for membership to the AMA.[95]

2.98 New members may be added to the AMA Council on appointment by the existing Council members, with any officer so appointed being subject to reappointment by way of a vote of the members at the next Annual General Meeting ('**AGM**').[96] At each AGM, one third of the AMA Council members are required to retire from their posts and to seek reappointment by way of vote of the members.[97]

2.99 From April 2013 until March 2015 the AMA Council members were as follows:[98]

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[92] AMA Abbreviated Balance Sheet as at 31 March 2015, as filed at Companies House.
[93] AMA Memorandum of Association dated 11 March 1974, paragraphs 7 to 8, as filed at Companies House.
[94] AMA Articles of Association dated 11 March 1974, paragraphs 42 to 44, as filed at Companies House.
[95] AMA Articles of Association dated 11 March 1974, paragraphs 5 to 9, as filed at Companies House.
[96] AMA Articles of Association dated 11 March 1974, paragraphs 40 to 42, as filed at Companies House.
[97] AMA Articles of Association dated 11 March 1974, paragraphs 49 to 54, as filed at Companies House.
[98] Dates of appointment and resignation have been taken from Companies House and are based on information extracted from the AMA Annual Returns. The AMA Articles of Association state that the AMA Council will comprise between five and nine members (paragraph 40), although the evidence reviewed by the CMA (including that which pre-dates the Relevant Period) shows that the AMA Council has typically had five members.

| Individual | Model agency | Role on AMA Council |
|---|---|---|
| [Director] | FM Models | Chairperson ([✂])[99] |
| [Director A] | Models 1 | Member ([✂]) |
| [Director] | Premier | Member ([✂]) |
| [Director] | Storm | Member ([✂]) |
| [Director A] | Viva | Member ([✂]) |

2.100 The annual reviews presented by the AMA Chairman at each AMA AGM frequently cited the significant amount of time devoted by the AMA Council members to AMA business.[100] As discussed further at paragraphs 2.104 to 2.108, the AMA Council members met regularly to discuss matters affecting models and model agencies and were closely involved in producing and promoting guidance documents for AMA members. As evidenced in the relevant facts in Section 3, the AMA Council members communicated frequently via email and attended meetings with customers on behalf of the AMA. AMA Council members were also very active in seeking to recruit new AMA members and fellow council members, citing the importance of getting on board larger agencies and those with an international presence.[101]

2.101 Section 3D and paragraph 4.40 set out the relevant facts and the CMA's conclusions regarding the way in which the AMA and the AMA Council served as a vehicle for the Model Agency Parties to help meet their wider aim of coordinating the Model Agency Parties' own commercial and pricing behaviour and, through the regular and systematic circulation of AMA Alerts, that of the broader AMA membership.

***The AMA's activities***

2.102 Documents which set out the benefits of AMA membership or which discuss its recruitment efforts provide insight into how the AMA perceived its purpose

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[99] [✂].

[100] Minutes of AMA AGM, 15 November 2006 (3 copies: URN2436, URN2886 and URN3743); Minutes of AMA AGM, 11 November 2009 (3 copies: URN1119, URN3056 and URN3551); Minutes of AMA AGM, 7 November 2012 (4 copies: URN1741, URN1814, URN3076 and URN4007); Minutes of AMA AGM, 25 November 2014 (3 copies: URN2958, URN5920 and URN5929).

[101] URN2358; URN6212; URN4593.

and function. In particular, the AMA is portrayed as a forum for model agencies to share information, including in relation to fees and other terms and conditions for modelling assignments:

- An email from the AMA General Secretary to a prospective member, [a model agency], in May 2013 described the AMA as the '*gold standard for the bona fide model industry*'. It explained how the AMA held regular meetings, amongst others, with bookers[102] '*to keep them informed of the ever changing digital world where models' images are exploited for little financial gain*'. The email noted: '*you will find that membership of the AMA provides a good source for sharing information between members; problem clients, usage of models' images on social media etc*'.[103]

- An email from Premier ([Director]) to FM Models ([Director]) in December 2013, copied to Models 1 ([Director A]), Storm ([Director]), Viva ([Director A]) and the AMA General Secretary, stressed the importance of assisting [Model Agency E] with its application for membership of the AMA. Premier's email stated: '*it is of course a bit crazy that I, or other members, are talking to them regarding* [Retailer B] *and* [Online Retailer A] and [Stakeholder A] – *they are benefiting from free information at the moment. As they are a large agency we surely need to speed up the process and get them into the AMA'.*[104]

2.103 The AMA also carried out activities to assist members with the legal and regulatory requirements of the modelling industry, such as advising on visa sponsorship for non-EU models and FET, and making representations on behalf of model agencies in response to industry-relevant government consultations.[105]

### *AMA meetings and communications*

2.104 The AMA regularly held the following internal meetings, for which – with the exception of bookers meetings – minutes were usually produced by the AMA General Secretary:

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[102] A booker is a manager at a modelling agency that works on behalf of models to source and negotiate modelling assignments.
[103] URN5280. Regarding the reference to the '*ever changing digital world',* see paragraphs 2.24 and 2.25.
[104] URN4593. Regarding the discussions taking place at this time regarding [Online Retailer A], see paragraphs 3.80 to 3.103.
[105] See for example URN5280; URN2958; URN5920; URN5929; URN1119; URN3056; URN3551.

- AMA AGMs (open to all AMA members):[106] these meetings typically opened with a report from the AMA Chairman, summarising the work of the AMA in the previous year, followed by other items of business, generally introduced by an AMA Council member. The practice of circulating AMA Alerts, discussed further in Section 3.B, was reported on at each AMA AGM.[107] In addition, some of the other contacts between competitors described in the Detailed Customer Examples at Section 3.C also involved discussions at AMA AGMs.

- AMA Council meetings held quarterly (attended by the AMA Council members and the AMA General Secretary):[108] a number of discussions took place at the AMA Council meetings relating to the subject of AMA Alerts. A number of the contacts between competitors described in the Detailed Customer Examples at Section 3.C also involved discussions at AMA Council meetings.

- AMA Bookers meetings (open to all AMA members, with typically one junior and one senior booker invited to attend from each AMA member): these were convened on an ad-hoc basis to discuss what were perceived to be common challenges facing the industry.[109] Bookers meetings covered a broad range of topics, with a strong emphasis on 'new' media formats and usage categories that bookers might be confronted with when accepting model bookings.[110] Based on the

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[106] For the minutes of the AMA AGMs held during the Relevant Period, see: Minutes of AMA AGM, 12 November 2013 (2 copies: URN2966 and URN5473) and Minutes of AMA AGM, 25 November 2014 (3 copies: URN2958, URN5920 and URN5929).

[107] See paragraph 3.6.

[108] From March 2014, brief notes of the matters discussed at these meetings were circulated to members (although full minutes of the meeting were not): see 2 copies: URN5615 and URN6639; 4 copies: URN0096, URN2961, URN4173 and URN5717; 3 copies: URN0185, URN2959 and URN5862; 2 copies: URN3850 and URN5986. This practice was agreed at an AMA Council meeting in October 2013 (3 copies: URN2967, URN5461 and URN5463) and communicated to members at the 2013 AGM (2 copies: URN2966 and URN5473). For the minutes of the Council meetings held during the Relevant Period, see 2 copies: URN1828 and URN2970; 3 copies: URN2969, URN3500 and URN5336; 3 copies: URN2127, URN2994 and URN6197; 3 copies: URN2967, URN5461 and URN5463; 5 copies: URN2965, URN3501, URN3855, URN4624 and URN5552; 2 copies: URN2964 and URN4035; 5 copies: URN2963, URN3853, URN4848, URN5712 and URN5715; 5 copies: URN2960, URN3941, URN3979, URN4972 and URN5849; and URN5137.

[109] A draft note to members in March 2014 reported that all members except two had been present at a bookers meeting that month, evidencing that these meetings were typically well attended (URN5632).

[110] For example, in 2007 a bookers meeting was convened *'to discuss the rapidly changing climate of TV commercials'* (URN1436) and in 2014 *'to keep bookers up to speed with the ever increasing*

evidence reviewed by the CMA, almost all topics suggested for discussion at bookers meetings in the Relevant Period related to the use of models' images on the internet or other digital platforms.[111]

### *AMA publications and guidelines*

2.105 In addition, through the work of the AMA Council, the AMA has at various times produced guidance documents for use by its members, including the Editorial Rate Chart ('*a list of recommended fees for newspaper and magazines*'), the Contract Magazine Rate Chart ('*recommended fees for publications which are contracted out rather than produced in-house*'), the AMA White Book ('*a general guide to recommended fees for the different areas of work booked by agents for their models*')[112] and fee guidelines for internet and e-commerce usage.[113]

*The White Book*

2.106 The White Book, at least two editions of which were published, one in 2001 and another in 2004, contained information on recommended and/or minimum prices for various types of work, together with recommendations as to the factors that bookers should bear in mind when quoting for different aspects of work (particularly in terms of the usage demanded).[114] The fact that multiple

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*developments in technology and client's use of social media'* (2 copies: URN0119 and URN5607). See also paragraphs 2.24 and 2.25.

[111] For example, online magazines, videos and e-commerce were suggested as topics to be discussed at a bookers meeting to take place in January 2013 (4 copies: URN1741, URN1814, URN3076 and URN4007), cookie-driven advertising was suggested in January 2014 (5 copies: URN2965, URN3501, URN3855, URN4624 and URN5552 – see also the discussion at paragraphs 3.104 to 3.109) and models' endorsement of products on social media in January 2015 (URN5137).

[112] The quoted descriptions of these documents are taken from an undated document headed 'MEMBERS ONLY' taken from Storm, which opens: *'over the years AMA Council members have put in many hours of work in order to meet clients and government departments to renegotiate fees and to facilitate the work of UK model agents. Various agreements and* other *useful documents have emerged:* [lists documents and descriptions]' (URN3899).

[113] These documents appear to have been produced by the AMA prior to the start of the Relevant Period. However, despite their age, multiple copies of each of these documents were found at a number of the Model Agency Parties' premises during the CMA's inspections, suggesting that they may still be used as reference documents for those Model Agency Parties. The White Book and the internet and e-commerce rate guidelines are discussed further in the paragraphs which follow.

[114] The second (2004) edition (also referred to as the Pink Book) made amendments to certain rates, updated the internet usage section and inserted the word *'minimum'* before any specific fees: see for example URN3176. An email from Premier ([Director]) in May 2012 suggested that a further edition be produced: '*I think it is time we did another pink book because bookers need a point of reference*

copies of the document were found by the CMA, largely at bookers' working areas, at FM Models, Models 1 and Premier (as well as one copy at the AMA)[115] suggests that it may still be in use by those model agencies as reference documents.

2.107 While the preamble to the White Book stated that it was not a price list, the document provided the reader with guideline fees for various categories of usage expressed either as a multiple of the 'day rate' or as a specific figure. For example, '*the rate for packaging is an additional fee of up to twice the day rate depending on the length of usage required*' and '*catalogue fees vary a great deal and it is not possible to cite an "appropriate" fee. £*[✂] *per day is suggested as an absolute minimum*'.[116]

*Internet and e-commerce rate guidelines*

2.108 The CMA also identified two documents which provided fee guidelines specifically relating to various internet and e-commerce usage categories:

- Copies of an undated document titled '*Internet and e-commerce rates*' were taken from each of the Model Agency Parties as well as the AMA.[117] The document was discussed at an AMA Council meeting on 12 May 2010 attended by at least Models 1, Premier and Storm.[118] It contained a series of tables setting out guideline rates for use of model images on various digital platforms (such as the customer's webpage, social media sites, e-commerce and 'viral' advertising). A print out of an

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*And minimum guidelines. Otherwise they all just guess and there is no estimation in what they are giving away'* (URN2174).

[115] Copies were taken from the following locations: three copies from FM Models (model bookers' working area and boardroom: URN3120, URN2902 and URN2905); seven copies from Models 1 (Women's Division bookers' area, Men's Division bookers' area and New Faces/social media desks: URN3248, URN3243, URN3176, URN3244, URN3359, URN3324 and URN3200); five copies from Premier (accounts room and main bookers' area: URN3564, URN3565 (partial copy), URN3473, URN3496 and URN6234); and one copy from the AMA (lounge and kitchen area: URN1790).

[116] See, for example, URN3248 (for a full list of copies, see footnote 115).

[117] One copy was taken from each of FM Models (URN3128), Storm (URN6224) and Viva (URN6228), two copies were taken from the AMA (URN2257 and URN2253) and three copies were taken from each of Models 1 (URN3352, URN3207 and URN3308) and Premier (URN3480, URN3489 and URN6235).

[118] 3 copies: URN1261, URN3067 and URN3865. The minutes of the AMA Council meeting on 12 May 2010 noted: '[Director A, Models 1] *and* [Director, Storm] *presented to the meeting a document relating to Internet and e-commerce rates. This was discussed and it was felt that bookers would find it easier to understand if some examples of a job were included'.* The minutes record that Premier ([Director]) made a number contributions during the meeting, confirming it was also in attendance.

email from the AMA General Secretary in June 2010 notes that this document was circulated to AMA members.[119]

- Copies of a further undated document headed '*E-commerce – Guidelines'* were taken from each of FM Models, Models 1 and Premier, as well as from the AMA.[120] This document set out further guidelines on rates specifically in relation to e-commerce, expressed either as a specific fee or as a percentage uplift to be applied to the agreed fee:

*'E-COMMERCE - GUIDELINES*

*Model fees for day-to-day bookings for online fashion retail:*

*Day Rate: £*[✂] *(recognisable)*
*£*[✂] *(recognisable - brand new model)*
*£*[✂] *(non- recognisable)*

[…]

*SOCIAL MEDIA E-COMMERCE:*

*Look for at least an incremental* [✂]*% but aim much higher*

*OVERSEAS E-COMMERCE:*

*Extra Usage fees will be based on the day rates above, with an additional* [✂]*% per group of countries as follows:*

| | |
|---|---|
| *Europe:* | + [✂]*%* |
| *Asia (including Oceana):* | *an additional* [✂]*%* |
| *The Americas:* | *an additional* [✂]*%* |
| *Worldwide:* | *an additional* [✂]*% on agreed day rate.* |

[…]

*B-roll*

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[119] URN2252. The printout is annotated with the comment *'emailed mbrs + internet bkrs 17th June 17.15pm'*.

[120] Copies of this document (or slight variations of it) were taken as follows: one copy from each of FM Models (URN2978) and Models 1 (URN3308), two copies from Premier (URN3477 and URN3488) and thirteen copies from the AMA (URN0586, URN0701, URN0702, URN0703, URN0706, URN1279, URN1780, URN1781, URN1782, URN1808 (partial), URN1809 URN6308 and URN6645 (partial)).

*Try to get an extra* [✂]*%. B-Roll serves as a kind of TV advertisement. Otherwise, why do it? Further, it is much more involving and engaging for customers. It sells!'*

2.109 While the date of production of the two documents described in paragraph 2.108 is unclear, the CMA has identified two exchanges that occurred within the Relevant Period which either reflect the guidance contained within these documents, or discuss the fees to be charged for further, 'new' categories of digital usage:

- On 31 March 2014, [a model agency] ([director]) emailed the AMA General Secretary asking whether the AMA had '*ever issued any suggested usage rates for social media'*. On 2 April 2014, the AMA General Secretary responded that *'a minimum of* [✂]*% on the original fee is recommended'* (coinciding with the suggestion in the '*E-commerce – Guidelines'* document to *'Look for an increment of at least* [✂]*%*').[121]

- On 20 January 2015, at an AMA Council meeting attended by at least FM Models ([Director]), Models 1 ([Director A]), Storm ([Director]) and Viva ([Director A]), the attendees discussed the threshold over which model agencies should charge customers when a model tagged themselves in a customer's photoshoot on social media. The minutes of the meeting, circulated by the AMA General Secretary to all of the Model Agency Parties, noted that '*1000 hits were seen as a minimum above which we should be charging the client a fee. This would be on the agenda of a bookers' meeting*'.[122]

[121] URN5642.

[122] URN5137. The attendance of FM Models ([Director]), Models 1 ([Director A]), Storm ([Director]) and Viva ([Director A]) is confirmed by the fact that the minutes record that each of these Model Agency Parties made contributions at various points during the meeting. The minutes of the meeting were circulated to all Council members (URN6221).

# 3. CONDUCT OF THE PARTIES

## A. Introduction

3.1 The CMA's investigation uncovered numerous and repeated contacts between competitors regarding prices for modelling services.[123] These contacts took different forms and related to various customers and/or types of media and usage.

3.2 The relevant facts concerning the conduct of the Parties have been set out as follows:

- Section 3.B (paragraphs 3.4 to 3.51) sets out the relevant facts concerning contacts between competitors by means of AMA Alerts;
- Section 3.C (paragraphs 3.52 to 3.138) sets out the relevant facts concerning examples of more protracted and detailed contacts between competitors relating to a specific customer or usage type (referred to as the '**Detailed Customer Examples**');
- Section 3.D (paragraphs 3.139 and 3.140) sets out the relevant facts concerning the role played by the AMA in the contacts between competitors described in Sections 3.B and 3.C;
- Section 3.E (paragraphs 3.141 and 3.142) sets out the relevant facts concerning the role played by the AMA Council and AMA Council members in the contacts between competitors described in Sections 3.B and 3.C.

3.3 The two elements of the Infringement described in Sections 3.B and 3.C complemented and supported each other in that they interacted to contribute to the desired anti-competitive object (see paragraph 4.64). In particular, in some of the Detailed Customer Examples discussed in Section 3.C, AMA Alerts were one of the tools for facilitating coordination, and on occasion an AMA Alert was the product of, or led to, more extensive discussions amongst the Parties regarding the fees for a particular customer or usage type. As set out in Section 4.E, the CMA considers that both elements formed part of a single and continuous infringement.

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[123] Including contacts regarding usage. As explained at paragraph 2.22, the CMA considers that, when model agencies negotiate and discuss the usage a customer will get for a given fee, they are in effect negotiating and discussing prices.

## B. Contacts between competitors by means of AMA Alerts

### *Introduction*

3.4 Since at least 2001, the AMA has had the practice of circulating memos to members commenting on the fees and other terms and conditions being offered by a particular customer for a modelling assignment.[124] By the start of the Relevant Period, the issuing of such memos – by then referred to as 'AMA Alerts' – was a regular and well-established practice, as evidenced in the following paragraphs.

3.5 While the AMA Alerts system was largely operated on a day-to-day basis by the AMA General Secretary, the AMA Council played an important role in maintaining, promoting and overseeing this practice.

3.6 As early as 2005, reporting on the AMA Alerts system has been a regular feature of the annual reviews presented by the AMA Chairman at each AMA AGM, a practice which continued at least until 2014.[125] At the 2012 AMA AGM, the minutes recorded that the *'Chairman asked the meeting if they felt the alerts were helpful and should continue, the response was positive'*.[126]

3.7 During the Relevant Period, the Model Agency Parties played an important role in the AMA Alert process. As discussed further in the paragraphs which follow, in aggregate the members of the AMA Council have, at different times during the Relevant Period, assisted with the drafting of an AMA Alert (Models 1 and Storm),[127] jointly discussed the subject of an AMA Alert on email or at AMA Council meetings (all Model Agency Parties),[128] been copied on

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[124] In the past these communications may have been described as 'notes' to members, 'newsletters' or 'fee alerts'. See for example URN1681 (urgent fax to members), URN1707 (newsletter), URN1400 (note to all members) and URN2883 (AMA fee alert). In the past it was more common for AMA Alerts to quote specific fees: see footnote 138.

[125] Minutes of AMA AGM, 22 November 2005 (2 copies: URN2054 and URN3736); Minutes of AMA AGM, 15 November 2006 (3 copies: URN2436, URN2886 and URN3743); Minutes of AMA AGM 20 October 2010 (2 copies: URN1121 and URN3054); Minutes of AMA AGM, 2 November 2011 (URN1120); Minutes of AMA AGM, 7 November 2012 (4 copies: URN1741, URN1814, URN3076 and URN4007); Minutes of AMA AGM, 12 November 2013 (2 copies: URN2966 and URN5473); Minutes of AMA AGM, 25 November 2014 (3 copies: URN2958, URN5920 and URN5929). At each of the AGMs held during the Relevant Period, the AMA Chairman cited the number of AMA Alerts issued during the previous year.

[126] Minutes of AMA AGM, 7 November 2012 (4 copies: URN1741, URN1814, URN3076 and URN4007).

[127] See paragraphs 3.28 to 3.33.

[128] See paragraphs 3.19 to 3.22.

requests to issue an AMA Alert made by another AMA Council member (all Model Agency Parties)[129] and, on one occasion, encouraged the inclusion of certain key information (namely the name of the relevant customer) in AMA Alerts (Premier).[130]

3.8 Furthermore, the issuing of an AMA Alert was just one component of the Model Agency Parties' wider aim of coordinating both their own commercial and pricing behaviour, and the commercial and pricing behaviour of the broader AMA membership. This is seen in the Detailed Customer Examples described in paragraphs 3.55 to 3.67 ([Online Magazine A]) and 3.110 to 3.117 ([Retailer A]), where in both cases the issuing of an AMA Alert was accompanied by more extensive and prolonged contacts between competitors regarding the fees and usage terms being offered by the customer. It is also seen in other examples identified by the CMA in which one of the Model Agency Parties suggested that the subject of an AMA Alert be discussed in further detail at an AMA Council meeting and/or a bookers meeting.[131]

3.9 During the Relevant Period,[132] AMA Alerts were circulated on a regular basis to the Model Agency Parties and other AMA member model agencies by the AMA General Secretary.[133] These AMA Alerts took the form of emails which commented on the fees and other terms and conditions being offered by a

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[129] See paragraph 3.23.

[130] See paragraph 3.15.

[131] For example, following an AMA Alert on 14 August 2013 alerting members to the practice of newspaper customers shooting several different stories for a single day rate (URN5391), Storm ([Director]) emailed the AMA General Secretary suggesting that the matter be discussed at an AMA Council meeting (URN5395). The minutes of the AMA Council meeting on 3 September 2013 (attended by FM Models ([Director]), Models 1 ([Director A]) and Storm ([Director])) recorded that the matter was discussed and that it was agreed *'to remind members that this* [shooting several different stories for different issues of the Newspaper] *was an extra usage, an additional fee should be negotiated or a higher day rate'.* A handwritten note on a hardcopy of these minutes, stating *'Final sent Council 5.9.13 4pm NOT* [Director A, Viva]*',* demonstrates, in the CMA's view, that these minutes were subsequently circulated to each of the Model Agency Parties with the exception of Viva ([Director A]) (URN2127). See further examples at URN5445 and URN2131.

[132] The earliest AMA Alert identified by the CMA during the Relevant Period is dated 9 April 2013 (URN5257), sent following a request from FM Models earlier the same day (URN4051). The latest AMA Alert identified by the CMA during the Relevant Period is dated 17 March 2015 (URN6049), sent following a request from Models 1 earlier the same day (URN5243).

[133] All AMA Alerts reviewed by the CMA issued between July 2014 and the end of the Relevant Period were circulated to all AMA members (including the Model Agency Parties). Prior to July 2014, one or more members were occasionally omitted from the distribution list of the AMA Alerts. Nevertheless, the Model Agency Parties were recipients of all AMA Alerts circulated during the Relevant Period which fall within the scope of the CMA's investigation (see paragraph 3.9 regarding the AMA Alerts which fall within this scope).

particular customer for a modelling assignment, based on information provided to the AMA General Secretary by a model agency. While a minority of AMA Alerts addressed other matters, such as late-paying customers and rogue model agencies, the CMA's findings are only concerned with those AMA Alerts that related to the fees and/or usage terms of a modelling assignment.[134] The CMA has identified at least 123 AMA Alerts of this type sent during the Relevant Period, a full list of which is provided at Annex A.

3.10 This Section 3.B regarding contacts between competitors by means of AMA Alerts is structured under the following headings:

- Wording of AMA Alerts (paragraphs 3.11 to 3.16)
- Instigation of AMA Alerts (paragraphs 3.17 to 3.24)
- Issuing of AMA Alerts (paragraphs 3.25 to 3.33)
- Purpose of AMA Alerts (paragraphs 3.34 to 3.51)

***Wording of AMA Alerts***

3.11 The following is an example of a typical AMA Alert:[135]

> '[retailer]
>
> *We have been informed that the above company is drastically reducing the rate for unrecognisable shoots. The proposed reduced rate is NOT appropriate. Some members have indicated they are not accepting this.'* [emphasis in the original].

3.12 The template wording to be used in AMA Alerts is set out in a document produced by the AMA General Secretary, which is her general 'crib sheet' for AMA working practices:[136]

> *'AMA Alerts: Members inform the AMA if they feel a specific casting/shoot is not paying an appropriate fee.* [AMA General Secretary] *issues alerts to members informing them of details of the job - but not the client name or*

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[134] Further, as stated in paragraph 2.7, this Decision does not contain an exhaustive summary of all of the evidence of conduct involving the Parties in the Relevant Period which may amount to an infringement of the Chapter I prohibition or Article 101 TFEU. [✂].

[135] URN5622.

[136] 2 copies: URN6254 and URN6258. The document is undated, however, it has the file name 'AMA Client info – March 2014'. It was created on 19 March 2014 and last modified on 11 August 2014.

*specific details of fees proposed. The fee proposed is NOT appropriate. Also inform them that some members not accepting the casting/shoot.'*

3.13 The phrases *'NOT appropriate'* and *'some members not accepting the casting/shoot'* were used in the majority of AMA Alerts. Typically, fees were said to be 'not appropriate' where they were considered not sufficient, in many cases by reference to the proposed usage of the model image.[137]

3.14 In the great majority of cases, AMA Alerts did not specify the fee proposed by the customer.[138] Nevertheless, as customers often sent the same casting request to a number of model agencies,[139] those model agencies who had recently received a casting request from the customer listed in the AMA Alert may consequently already have had sight of the fee that had been offered by the customer, such that they could readily deduce the fee being described in the AMA Alert as 'not appropriate'.[140] (See further Section 4.F for the CMA's legal assessment as to the anti-competitive object of the AMA Alerts).

3.15 Contrary to the instructions in the crib sheet however, the great majority of AMA Alerts reviewed by the CMA did name the client/customer. One email chain sent on 15 April 2013 suggested that this was an important feature of the AMA Alerts. When an AMA Alert circulated on that day did not refer to a specific customer but instead referred generically to '*an online production*

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[137] As explained in paragraph 2.21, the modelling fee is typically higher the greater the agreed usage of the image (for example, in terms of geographic reach or range of media channels).

[138] Historically, it was more common for AMA Alerts to quote the fee that had been offered by the customer that was deemed too low: see for example URN1641 and URN2753. For the limited number of examples during the Relevant Period in which the AMA Alert stated the amount of the 'appropriate' fee to be expected, see paragraph 3.37.

[139] The CMA has identified five examples in which more than one model agency alerted the AMA General Secretary regarding the same modelling shoot: URN4290 and URN4289 ([customer]), URN4776 and URN4778 ([customer]), URN4727 and URN5629 ([customer]), URN6535 and URN4987 ([two customers]) and URN5124 and URN5125 ([two customers]). In addition, as discussed at paragraph 3.27 below, on occasion a model agency would respond to an AMA Alert indicating that it was also not accepting the proposed fee (suggesting that it was aware of the casting and of the fee proposed).

[140] The evidence shows that the model agency typically forwarded to the AMA General Secretary the email outlining the casting/shoot shortly after its receipt, and that the issuing of an AMA Alert followed soon afterwards. For example the details for a [customer] casting were received by Premier at 10:13 and forwarded by Premier to the AMA General Secretary at 10:17 (URN4616). The resulting AMA Alert was issued at 11:06 the same day (2 copies: URN0043 and URN5540).

*company*', Premier ([Director]) queried '*Why can't we name them? No notice will be taken without the name*'.[141]

3.16 AMA Alerts were intended to be confidential and the expectation was that a customer who was the subject of an AMA Alert should not be made aware of its existence.[142] This position was set out in an email sent by the AMA General Secretary to AMA members on 29 November 2012 with the subject line *'AMA Alert – guidelines'*[143] and in two AMA Alerts circulated on 14 and 15 May 2013, which closed with:[144]

> *'AMA DOCUMENTS ARE CONFIDENTIAL AND ARE NOT FOR DISTRIBUTION OUTSIDE THE AMA'* [emphasis in the original]

### *Instigation of AMA Alerts*

3.17 The issuing of an AMA Alert typically followed receipt by the AMA General Secretary of an email from a model agency forwarding details of a casting/modelling shoot and stating that it was not accepting the rate or that the fees were too low, and sometimes explicitly requesting that that information be circulated.[145]

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[141] URN6520. This email was sent to the AMA General Secretary and all recipients of the AMA Alert. In a subsequent response to the same recipients, [Model Agency F] agreed with Premier's statement. The discussion which led to the issuing of the AMA Alert in question is discussed further at paragraphs 3.20 to 3.22.

[142] The CMA has identified one occasion in which the model agency instigating the AMA Alert ([Model Agency B]) copied the AMA on its response to the customer stating that it would not be accepting the particular casting, thereby alerting the customer that this information was being shared with at least the AMA (URN5240). In all other examples reviewed by the CMA, the casting information or request for an AMA alert was sent to the AMA General Secretary without any apparent awareness on the part of the customer.

[143] URN0169. See also URN3091 which appears to be a draft of this email, titled '[Director, FM Models]*/AMA – draft AMA alert guide lines'*. This email to members was prompted by an email from Models 1 ([Director B]) to the AMA General Secretary on 28 November 2012, complaining that an AMA Alert had been sent or quoted to a casting director. Models 1 added: *'It completely defeats the object of sharing information if this is going to get back to the client* […] *Please could you remind members and their teams that we share information to make us stronger but they cannot quote "The AMA says we can't accept this" and certainly not forward an email alert on.'* (URN3093).

[144] URN5295; URN5298. See also extract from URN3093 quoted at footnote 143 above.

[145] It was primarily the model agencies' bookers who sent requests to the AMA General Secretary, but model agency directors also made requests and were occasionally either involved in requests sent by their bookers or at least kept informed.

3.18 During the Relevant Period, the following model agencies were the most frequent instigators[146] of AMA Alerts:[147]

- Models 1: 60 instigations
- Storm: 31 instigations
- Premier: 13 instigations
- FM Models: 6 instigations

3.19 On occasion, an AMA Alert was requested following an email being circulated between a number of the Model Agency Parties regarding the fees or usage for a particular shoot. For example:[148]

**Example** – [Company A], 15 April 2013

3.20 On 15 April 2013, Storm ([Director]) emailed Models 1 ([Director A]), Premier ([Director]) and Viva ([Director A]) regarding fees for unrecognisable models used by [Company A]. In the email, Storm suggested a minimum price in relation to the shoot, thereby signalling its own (at least provisional) pricing intentions, and invited comments in relation to that shoot and invited comments from other recipients:[149]

> '[Company A] *are casting for half day unrecognisable at £*[✂] *incl,. We feel the minimum should be £*[✂]*, although I know our New Faces have,*

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[146] On five occasions identified by the CMA during the Relevant Period, two model agencies separately requested an AMA Alert be generated with respect to the same modelling shoot: see footnote 139. In one further example, one model agency (Premier) followed up on a request already made to the AMA General Secretary by another agency ([Model Agency B]), adding its own encouragement for the issuing of an AMA Alert (URN6521; URN5264: see further footnote 154). In instances where both requests reached the AMA General Secretary before the relevant AMA Alert was issued (which occurred in four of the six occasions), both model agencies have been counted as an instigator of the AMA Alert.

[147] The CMA has identified evidence concerning the instigation of all but one of the AMA Alerts listed in Annex A. The CMA is aware however that requests for AMA Alerts may also have been made to the AMA General Secretary by phone (or in person), rather than over email. It is also possible that there were further requests made via email of which the CMA is not sighted (because, for example, copies of such emails were not contained in the electronic evidence taken from the AMA or the hardcopy evidence taken from the AMA and the Model Agency Parties). Annex A therefore does not necessarily provide a complete picture as to which model agencies were responsible for instigating each of the relevant AMA Alerts issued in the Relevant Period.

[148] See also the emails quoted at paragraphs 3.55 and 3.56 regarding [Online Magazine A].

[149] URN4237.

*on occasion, taken less. The problem with* [Company A] *is that they will approach every client who does unrecognisable e-commerce to say that they can get the best price. Where are you guys on this?'*

3.21 Later that morning, Storm ([Director]) forwarded the above email to the AMA General Secretary, copying Models 1 ([Director A]), Premier ([Director]) and Viva ([Director A]). Storm's covering email noted that those copied on the email agreed with Storm's suggestion of a minimum fee of £[✂]:[150]

*'Please see below re* [Company A]. ***There seems to be general consensus that £***[✂] ***should be the minimum*** *but could you send a note round to say that what's on offer is unacceptable?'* [emphasis added]

3.22 That afternoon, the AMA General Secretary issued an AMA Alert. The CMA infers that this AMA Alert relates to the [Company A] casting discussed in paragraphs 3.20 to 3.21, given both the timing of the AMA Alert and the fact that it refers to an assignment for an *'unrecognisable'* shoot for an unnamed '*on-line production company*':[151]

*'UNRECOGNISABLE – ON-LINE*

*We have been informed that an on-line production company is booking models 'unrecognisable' for a fee which is not appropriate. Please advise your bookers to negotiate.'*

3.23 In addition to those examples listed in paragraphs 3.19 to 3.22 and footnote 148, on at least four occasions in which one of the Model Agency Parties instigated an AMA Alert, the request for the AMA Alert was also copied to the other Model Agency Parties (or a number of them).[152]

3.24 On two occasions identified by the CMA, Premier ([Director]) acted as a go-between for another model agency, either requesting an AMA Alert based on

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[150] URN4237.

[151] URN5262. As noted in paragraph 3.15 above, following circulation of the AMA Alert, Premier ([Director]) queried in an email to all recipients of the AMA Alert, *'Why can't we name them? No notice will be taken without the name'* (URN6520).

[152] URN5002 (concerning [online retailer]) was sent by Premier and was copied to all of the other Model Agency Parties; URN5982 (concerning [customer]) was sent by Premier and copied to all of the other Model Agency Parties; URN4404 (concerning [customer]) was sent by Premier and was copied to all of the other Model Agency Parties; URN4528 (concerning [customer]) was sent by Models 1 ([Director A]) and was copied to all of the other Model Agency Parties with the exception of Viva.

information received by Premier from another model agency[153] or following-up with the AMA General Secretary on another model agency's request for an AMA Alert.[154] In one further example, Premier ([Director]) requested an AMA Alert based on information provided by one of Premier's own bookers, but added that *'other agents have contacted me* [about the same casting]'.[155]

***Issuing of AMA Alerts***

3.25 Following receipt of an 'instigating' email from a model agency, an AMA Alert was circulated by the AMA General Secretary based on the information that had been provided to her.

3.26 The majority of AMA Alerts were sent out within a few hours after the request email from the customer had been received by the relevant model agency.[156] The timeliness of the circulation of AMA Alerts maximised their ability to influence the commercial behaviour of other model agencies. Customers often required a quick turnaround for responses to their model-sourcing requests,[157] so for an AMA Alert to be effective, it needed to reach other model agencies before they replied to similar requests.

3.27 The CMA has not identified any reservations or objections being raised by the Model Agency Parties regarding the contents of AMA Alerts during the Relevant Period. Indeed, the support for, and attention paid to, the AMA Alerts by the Model Agency Parties and other AMA members is demonstrated by acknowledgements received by the AMA General Secretary following

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[153] URN4404. This is one of the examples listed in footnote 152. In this example, Premier ([Director]) received from [Model Agency A] an email exchange between [Model Agency A] and [customer]. In the exchange, [Model Agency A] confirmed to the customer that it would not be suggesting any models for an upcoming fashion shoot, on the basis that [customer] was looking for models to work for free. Premier ([Director]) forwarded the exchange to FM Models ([Director]), Models 1 ([Director A]), Storm ([Director]), Viva ([Director A]) and the AMA General Secretary, requesting that an AMA Alert be issued.

[154] URN5264. In this example, [Model Agency B] emailed Premier ([Director]), flagging an upcoming casting for [customer], for which no modelling fee was being offered. Premier forwarded the email to the AMA General Secretary, with the covering message '[booker] [Model Agency B] *sent this to me I think she asked you for an alert?'*.

[155] URN5982.

[156] See footnote 140.

[157] Customers frequently requested responses from model agencies within a day of their request, see for example URN4999 (request sent 16:50, response required by 10:00 the following morning); URN5057 (request sent 10:07, response required same day); URN5110 (request sent 12:41, response required as soon as possible the same day); URN4567 (request sent at 10:19 for a casting being held the same day between 11:00 and 17:00).

circulation of an AMA Alert.[158] At times, these messages showed further whether the recipients were minded to follow the advice contained in the AMA Alerts, stating for example: '*Yes not accepting the proposed fee*'[159] and (in response to an AMA Alert stating *'Several members have indicated they are not accepting this casting'*): '*And I'm one of them!*'.[160]

3.28 On two occasions identified by the CMA, the AMA Alert was drafted with assistance from one of the Model Agency Parties.

**Example** – [Online Magazine A], 27 June 2013

3.29 In two emails on 27 June 2013, the AMA General Secretary sought comments from FM Models ([Director]) on the draft wording for an AMA Alert regarding [Online Magazine A] requested by Premier ([Director]) earlier that day (see further paragraph 3.55). The emails concluded:[161]

> *'I see* [Director, Premier] *did mention £*[✂] *in her first email yesterday. So should we say: 'this is an extra usage and a fee of in the region of £*[✂] *should be expected. ???'*

3.30 An hour later, FM Models ([Director]) responded, suggesting that the wording be softened from *'£*[✂] *should be expected'* to *'might be expected'*.[162] That afternoon, the AMA General Secretary issued the AMA Alert, incorporating this suggested revision.[163]

**Example** – [retailer], 17-18 June 2013

3.31 On 17 June 2013, the AMA General Secretary sought instructions from Storm ([Director]), copying FM Models ([Director]), regarding a casting brief for [retailer] which she had received from one of Storm's bookers several days earlier.[164]

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[158] See for example URN4529; URN4349 ([Model Agency A]); URN5699.
[159] URN4056 ([Model Agency G]).
[160] URN4729 (FM Models). See also URN6524 (in which [Model Agency G] responded '*Yes agree*').
[161] URN4347.
[162] URN4347.
[163] URN4087.
[164] URN4321.

3.32 Storm ([Director]) replied ten minutes later, copying FM Models ([Director]), explaining the issue raised by the Storm booker in more detail and concluding:[165]

> *'So is it not possible to tell members that they need to be careful because the fee is a low e-com rate but the usage is a full on-line campaign?'*

3.33 The following day, the AMA General Secretary issued an AMA Alert, adopting almost verbatim the wording suggested by Storm ([Director]).[166]

***Purpose of AMA Alerts***

3.34 As further discussed in Section 4.F, the CMA finds that AMA Alerts were intended to align the conduct of recipient model agencies by encouraging them to reject the fee proposed by the customer to which the AMA Alert referred and to negotiate higher fees (both as regards the specific fee proposed and for future similar negotiations). Whilst the vast majority of AMA Alerts did not reveal specific prices, by signalling to all AMA members[167] that the fees proposed by customers were '*not appropriate*' and, in some cases, urging members to *'resist'* them (additional wording used in some AMA Alerts),[168] the AMA Alerts were clearly intended to make it easier for model agencies to resist downward pressure on prices in negotiations with customers and to restrict price competition between model agencies.[169]

3.35 This aim of encouraging and enabling AMA member model agencies to resist downward pressure on prices (including where the price was considered to be

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[165] URN4321.

[166] URN5330. In particular, see the second sentence of the AMA Alert, which reads *'We would like to point out that the fee proposed is a low e-com rate but you will see that the usage is a full on-line advertising campaign'*.

[167] See footnote 133.

[168] In addition to the example quoted in paragraph 3.35, see further: URN5379; URN5389; URN5398; and 2 copies: URN0104 and URN5681.

[169] This aim was expressly stated in one email sent by the AMA General Secretary to AMA members in August 2011, which stated '*AMA FEE ALERTS. If a client offers silly money for a job tell the AMA: we will alert your colleagues. We are receiving information less frequently do please help us to resist the downward pressure on model fees'.* (URN3081). It was also reflected in the report delivered by the AMA Chairman at the 2006 AMA AGM, in which he noted that *'since January 2006 the Secretary had issued 50-60 fee alerts which had been extremely effective in maintaining fees levels'* (3 copies: URN2436, URN2886 and URN3743).

low in view of the high usage required) was clear on the face of some of the AMA Alerts:[170]

> *'*[retailer]
>
> […] *Please look at this carefully the fee proposed for the usage requested is not appropriate and far lower than this company normally pay.* ***Please resist*** *- some members have indicated they are not accepting this.'* [emphasis added]

3.36 Some AMA Alerts went further than this, referring (in general terms) to the steps being taken by other model agencies to negotiate with the customer to increase the fee that was deemed too low:[171]

> *'*[magazine]
>
> […] *The proposed fee (inclusive) is NOT appropriate* […]*. Some members have indicated they are negotiating hard for an improved fee before accepting this casting.'* [emphasis added]

3.37 On two occasions identified by the CMA, an AMA Alert circulated in the Relevant Period specifically stated the level of the revised, increased fee that might be appropriate in place of the fee offered by the customer. For example:[172]

> *'*[magazine] - *ADVERTORIAL*
>
> *There is a casting for an advertorial*[173] [brand] *jewellery shoot for the above magazine.* […] *The fee proposed for this shoot is not appropriate; some members have indicated they are not accepting this.'*

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[170] 2 copies: URN0118 and URN5608.

[171] URN5440. Another AMA Alert stated that *'some members have indicated they are not accepting this casting – but are negotiating'* (2 copies: URN0198 and URN5930). For AMA Alerts which expressly encouraged the recipients to *'*negotiate', see further: URN5262; URN5384; 2 copies: URN0054 and URN5513.

[172] URN5417. In addition to the example quoted in this paragraph, see also the AMA Alert circulated in respect of [Online Magazine A], quoted at paragraph 3.56.

[173] An advertorial is an advertisement giving information about a product in the style of an editorial article.

*'Further to our email below one member felt that the minimum acceptable fee would be £*[✂] *plus aas*[174] *and subsequently had to turn the job down.'*

3.38 The objective of a model agency's request was also sometimes set out explicitly in the email that instigated the AMA Alert. For example, *'can we try and persuade the others to turn this* [fee] *down'*[175] or '*I have said absolutely not and insist on another day rate to cover it. Please ask all members to say the same'*.[176]

3.39 In a further example, Models 1 ([booker]) requested an AMA Alert after complaining that other (unnamed) model agencies were failing to challenge customers who were demanding greater usage without increasing fees, which Models 1 stated was having a detrimental effect on its ability to negotiate higher fees. The request followed receipt by Models 1 of confirmation from [magazine] that it would not be paying an additional rate for each of a number of brands featured in an upcoming advertorial,[177] despite Models 1's assertion that the standard fee should apply to one-brand advertorial only:[178]

*'We are increasingly struggling with advertorial rates/usage. At which point most publishing houses say they will not book with us.* […] *Could you put an alert out asking everyone to query advertorial usage, brands are getting away with more and more usage these days and I feel Models 1 are getting a reputation as being the bad guys as we question everything where others may not.'*

3.40 The idea that accepting a lower fee may result in lower price levels in the future was also communicated in one AMA Alert circulated on 10 July 2013:[179]

'[retailer]

[…] *Please look at this carefully – the usage is all print media. The fee proposed is not appropriate and we understand that higher fees have been achieved in the past. If agents accept the proposed rate for this*

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[174] 'Aas' stands for additional agency supplement: see further paragraph 2.19.
[175] URN5000 (Models 1).
[176] URN4673 (Models 1). For further examples see URN1599 (Storm); URN4426 (Models 1); URN5110 ([Model Agency G]).
[177] For a definition of an advertorial, see footnote 173.
[178] URN5445. An AMA Alert was issued in response to this request: see URN5444.
[179] URN5359.

*amount of usage it will make it harder to achieve appropriate fees in the future.'* [emphasis added]

3.41 In an email from Models 1 ([Director B]) to the AMA General Secretary on 1 July 2013, Models 1 stressed the importance of the AMA Alerts process and asked that AMA members be reminded of this:[180]

*'I wonder if it is worth sending out a reminder to all members about the importance of the alert process. The last few all seem to have originated from Models 1 and when we have declined certain proposals we have been told we are the only agency doing so (which is fine, we decline jobs because we think they are not appropriate not because everyone else is). One casting director even said she agreed with our refusal but could only negotiate harder with her client if she could show that several agents were not allowing their models to attend her casting. Owners and senior bookers are not aware of what every booker is accepting or not and although some castings seem like a decent amount of money they are not when you look at the usage that is required.'*

3.42 The next day, the following AMA Alert was circulated by the AMA General Secretary, which communicated the concerns Models 1 had raised regarding the impact that accepting a lower price had on the level of fees:[181]

*'AMA ALERTS*

*A member recently declined to send models to a Casting Director with a low budget. The Casting Director said she quite agreed but, unless several agencies also declined, she could not negotiate better fees with her client.*

*Be warned: the level of fees is determined by the lowest that your bookers will accept. Please scrutinise for hidden usages; please pay attention to AMA alerts; please notify the AMA if and when necessary.'*

3.43 Finally, the CMA has identified two instances in which one of the Model Agency Parties provided updates to the AMA General Secretary as regards price negotiations with the customer after the issuing of an AMA Alert, reporting in each case that the customer had increased its proposed fee following circulation of the AMA Alert.

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[180] 2 copies: URN3008 and URN5352. The AMA General Secretary responded that she would discuss the request with FM Models ([Director]) the following day.
[181] URN5354.

**Example** – [magazine]/[retailer], 3-6 October 2014

3.44 On 3 October 2014 (Friday), Models 1 ([booker]) forwarded to the AMA General Secretary an email exchange with [Company B] regarding a photo shoot for [retailer] and [magazine]. In the exchange [Company B] confirmed that the fee (£[✂]) being offered by [Company B] was inclusive of digital usage (that is, use of the model's image on digital platforms such as the customer's websites), despite Models 1's assertion that the offered rate was only *'an advertorial rate'*.[182] In its covering email to the AMA General Secretary, Models 1 stated:[183]

> *'I'm really really annoyed about the below, can we try and persuade others to turn this down?'*

3.45 Within an hour, the AMA General Secretary issued an AMA Alert:[184]

> *'There is a casting for* [magazine]*; the client is* [retailer]*. We recommend you consider this carefully you will see that the usage includes* [retailer] *social media and digital. The proposed fee is an advertorial rate and is not appropriate for the usage involved. Some members have indicated they are not accepting this booking.'*

3.46 On 6 October 2014 (Monday), Models 1 ([booker]) forwarded to the AMA General Secretary a further email exchange with [Company B], which confirmed that [Company B] was now prepared to offer a higher rate of £[✂]. In its covering email to the AMA General Secretary, Models 1 noted *'Still not nearly enough money – we are saying no'.*[185]

3.47 An hour later, the AMA General Secretary sent a follow-up email to the AMA Alert sent on 3 October 2014:[186]

> *'Further to the email below we understand that* [magazine] *have reviewed the budget and have increased the proposed fee; it is still NOT appropriate. Some members have indicated that they are not accepting this booking.'*

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[182] For a definition of an advertorial, see footnote 173. See paragraph 2.21 regarding the fact that model agencies expected that greater usage of a model's image should command a greater fee.
[183] URN5000.
[184] URN5877.
[185] URN5880.
[186] 2 copies: URN0193 and URN5881.

**Example** – [Retailer B]/[Company C], 18-21 June 2013

3.48 On 18 June 2013, a booker from Models 1 ([booker]) forwarded to the AMA General Secretary an email from [Company C] containing casting details for a modelling shoot for [Retailer B]. Models 1 noted *'We are not accepting this from* [Company C]*. Can you email everyone please…'.* The casting brief contained the following details:[187]

*'Can I get some suggestions for* [Retailer B] *Female hat model.*

- *London Casting- Tues 24th 2- 6pm (add below)*
- *Female*
- *Mid – long hair*
- *Recognisable*
- *£*[✂] *Inc agency*
- *12 months ecommerce, online advertising, marketing emails, social media, blog, in store POS, PR and local marketing printed materials*

*We have a very tight budget for this brief. If you don't have any girls to fit this price range please can you send me the best options you have so I can put forward to the client.'*

3.49 An hour and a half later, the AMA General Secretary issued the following AMA Alert:[188]

'[Retailer B]

[Retailer B] *are looking for a female hat model; the inclusive fee proposed is not appropriate. Some members have indicated they are not accepting this casting.'*

3.50 On 21 June 2013, a booker from Storm ([booker]) forwarded to the AMA General Secretary an updated version of the [Retailer B] casting brief sent to the AMA General Secretary on 18 June 2013 by Models 1. The specifications for the casting were unchanged, but for an added request that the model have a defined face and look slightly older than the model the customer had

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[187] URN4333.
[188] URN5330.

previously used. The fee had, however, increased from *'£[✂] plus agency'* to *'£[✂] plus agency'* and the casting director now asked for ***'urgent suggestions'*** for models (emphasis in the original).[189]

3.51 Appearing to acknowledge the AMA Alert sent on 18 June 2013, Storm noted in its covering email:[190]

*'Just thought I'd flag this again. Still not enough…'*

## C. Detailed Customer Examples

3.52 This Section 3.C sets out the relevant facts concerning examples during the Relevant Period[191] of more protracted and detailed contact between competitors relating to a specific customer or usage type. It includes contacts concerning the following matters:

- [Online Magazine A] and other customer examples involving 'click to buy' usage (paragraphs 3.53 to 3.70)
- the customer [Online Retailer A] (paragraphs 3.71 to 3.109)
- the customer [Retailer A] (paragraphs 3.110 to 3.117)
- the customer [Online Retailer B] (paragraphs 3.118 to 3.124)
- the customer [Retailer B] (paragraphs 3.125 to 3.133)
- the customer [Online Magazine B] (paragraphs 3.134 to 3.138)

### *Customer [Online Magazine A] and other customer examples involving 'click to buy' usage*

3.53 This sub-section sets out the relevant facts concerning discussions between competitors regarding the fees charged for the use of model images in online content involving 'click to buy' (as defined at paragraph 2.24).[192]

3.54 The modelling fees charged for click to buy usage was a recurring theme in communications between the Parties during the Relevant Period, arising in

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[189] URN4337.

[190] URN4337.

[191] The evidence cited in the Detailed Customer Examples spans the period June 2013 to October 2014.

[192] As noted in paragraph 3.8, the [Online Magazine A] example described in this sub-section also involves the issuing of an AMA Alert.

relation to a number of customers. The following paragraphs deal primarily with exchanges relating to [Online Magazine A], with additional evidence provided in respect of customers [Retailer C] and [online magazine shop]. The CMA considers that the Parties shared confidential, commercially sensitive information (including future pricing information) regarding the fees and usage terms for [Online Magazine A], [Retailer C] and [online magazine shop]. Further, the CMA considers that, as regards [Online Magazine A], the Model Agency Parties agreed to fix minimum prices and to a common approach to pricing in respect of a particular category of usage, namely, click to buy.

*Customer* [Online Magazine A]

3.55 On 26 June 2013, Premier ([Director]) emailed FM Models ([Director]), Models 1 ([Director A]), Storm ([Director]), Viva ([Director A]) and the AMA General Secretary regarding the fees for [Online Magazine A] involving click to buy. In the email, Premier requested that an AMA Alert be sent to AMA members to stress that fees for [Online Magazine A] '*should be no less than £*[✂] *+ and upwards'*. Premier invited comments from the addressees of the email on this suggested rate of £[✂], exclaiming '*We have to stop this as it will spread like MEASLES!'*. Premier also disclosed information concerning the approach being taken by other model agencies in relation to [Online Magazine A], including the rates charged by the model agencies Storm, [Model Agency C] and [Model Agency A]:[193]

> *'Got a bit of an issue with this magazine – can you all please have a look on line at* [✂]
>
> *They have worked on one story with Storm and told the booker it was not Click to Buy so the job was taken for an editorial rate. But when the booker clicked on it whilst I was on the phone it was definitely click to buy.*
>
> [Model Agency A] *took a job for a trip to Ibiza (rate*[✂] *per day) which is not out yet but it will be click to buy.*
>
> [director] *from* [Model Agency C] *reckons she gets £*[✂] *+ as she just booked a girl for 2 days (but I think it was for their ad campaign I am checking on this) so she got £*[✂] *plus flight from NY and hotel for 2 days.*
>
> [Model Agency B] *have not yet taken a job as they were worried about the click to buy but had not actually looked at it.*

[193] URN4342.

*When you find the fashion in the magazine a black square comes up on the left of the picture with a diamond. That takes you to buy the product.*

*On the beauty page it takes you to* [beauty brand] *…..*

*Please can you put an **alert** out and stress the rate for this magazine should be no less than £*[✂] *+ and upwards.*

*If you think this rate is wrong please reply and any other observations would be good. We have to stop this as it will spread like MEASLES!'*
[emphasis in the original]

3.56 The next day (27 June 2013) and following Premier's request, an AMA Alert was circulated to AMA members, quoting the £[✂] figure suggested in Premier's email:[194]

'[Online Magazine A]

*This is a new digital glossy magazine please get your bookers to look at this on* [✂]*. You will see there is a click to buy facility for their readers: this is an extra usage and a fee in the region of £*[✂] *might be expected.*

*Please alert your bookers.'*

3.57 On 28 June 2013, an email exchange between FM Models ([Director]), Models 1 ([Director A]), Premier ([Director]), Storm ([Director]), Viva ([Director A]) and the AMA General Secretary discussed the appropriate level of future fees, both specific to [Online Magazine A] and more generally for click to buy usage. In this exchange, Models 1, Premier and Viva each stated the specific fees that they considered should be charged to [Online Magazine A]. Premier also stated that it had spoken to a number of other model agencies regarding [Online Magazine A], including in relation to at least two of these ([Model Agency C] and [Model Agency B]) specifically discussing fee levels:[195]

— Premier ([Director]):

'*Just to let you know I spoke to* [Model Agency C] […] *What they have agreed to is this They have just let them shoot another girl for £*[✂] *per*

[194] URN4087. This AMA Alert was drafted in consultation with FM Models ([Director]): see paragraphs 3.29 to 3.30.
[195] URN4356.

*day On the proviso that they have no Click to Buy. They have told the editor if they find Click to Buy is used they will charge £*[✂]

*On this particular girl.*

*I then had a discussion with* [booker, Model Agency C][196] *re a general fee for this Click to Buy. I wanted a minimum of £*[✂] *but she said as they did not sell their own product it should be £*[✂] *new Face & £*[✂] *unless it is a really special girl then you should negotiate.*

*Please can I have your thoughts on this as a fee starting point.*

[…]

*I have spoken originally to Storm,* [Model Agency B]*,* [Model Agency A] *& Models 1 &* [Model Agency C] *and if we can get an idea of fees that I can put to* [contact] *and* [Contact A] [Online Magazine A] *that would be good.* [Model Agency B] *feel beauty going on click to say* [beauty brand] *should be more? Thoughts please. I will contact* [Model Agency E] *&* [Model Agency H] *next week and other agencies as we really have to all sing out of the same hymn sheet. we cannot get this one wrong as I think it will be the first of many.*

*Please reply to me!!!'*

— Models 1 ([Director A]):

*'I agree with the principle that a click to a generic website does not constitute a click to buy and that's obviously better. However, are they really even going to be able to afford substantial fees? I would have though a print day rate would be more appropriate with a guaranteed review in a year's time, linked to their performance/growth.*

*As to a generic Click to buy rate, I think £*[✂] *is practical but, obviously, if we can get it, £*[✂] *would be ideal. That said, if it's a retailer/ecommerce site, we would expect about an additional 2 X day rate and that works out around £*[✂]*. It all depends, also, on the status and size of the brand. I hope this makes sense!'*

[196] Based on Premier's statement earlier in this email that she was discussing the issue with [Model Agency C], and based on the fact that the recipients of a subsequent email discussed at paragraph 3.58 (URN5351) includes a '[booker]' at [Model Agency C], it appears likely that the [booker] named in this email was a representative of [Model Agency C].

— Viva ([Director A]):

*'Hmm, I worry about the idea of giving them a year's 'grace' period. As proved* [✂]*, a guaranteed review in a year's time might not necessarily secure anything.*

*My feeling is that it would be better to go for a higher baseline rate at the beginning for any 'Click to Buy'. £*[✂]*….'*

— Premier ([Director]):

*'I absolutely agree a year's grace sets the rate for ever it never goes up.'*

3.58 On 1 July 2013, Premier ([Director]) sent an email to Models 1 ([Director A] and [Director B]), Storm ([Director]) and Viva ([Director A]), as well as to individuals at [Model Agency H], [Model Agency A], [Model Agency C] and [Model Agency B], containing detailed information about the fees which Premier intended to seek from [Online Magazine A].[197] The email was subsequently forwarded by the AMA General Secretary to FM Models ([Director]).[198] The CMA considers that the email demonstrates that the fees for [Online Magazine A] had been the subject of discussion between Premier and the model agencies copied in Premier's email. Premier expressed concern that 'all magazines' would be adopting the click to buy business model in the future and noted that model agencies should be aware that, in such cases, the shoot was likely to have a commercial rather than editorial nature:[199]

*'Subject: to the agents i spoke to regarding* [Online Magazine A]

[✂]

*As we have all been trying to understand what happens with this magazine and the 'Click to buy' they operate, I am putting down the outcome of everyone's conversation, Premier will be trying to attain the following agreement.*

*Editorial day rate of* ***£***[✂]*with* ***no*** *'Click to buy'*

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[197] URN5351.

[198] URN5351.

[199] See footnote 17 regarding model agencies' attitudes towards charging for modelling assignments of a commercial as opposed to editorial nature.

*If the page does end up with a 'click to buy' we will charge* ***£***[✂] *+ for a new face and* ***£***[✂] ***+*** *for a main board model.*

*Some agencies have negotiated for a high end girl the editorial rate and* ***if 'click to buy' is used on the page a fee of £***[✂]***+***

*Premier have not yet discussed these rates with the client but we are having a meeting with them in a week.*

*We are about to take a booking so we will inform them that should it be a click to buy page we will charge a further fee of £*[✂] *+.*

*At the moment they are saying it will go* ***to a generic site of the brand*** *and therefor as these brands are so high end there will be no click to buy as they don't have that facility. I think this is most likely not going to be the case and we will be invoicing as most high end brands want you to go into their site to buy the garment direct.*

*Please can you all get your bookers to look at the magazine and see how it works as this is obviously where all magazines will go for revenue, and we should be aware that a shoot is most likely a commercial rather than an editorial venture.*

*If you have any thoughts on this do please let me know.'* [emphasis in the original]

3.59 In a series of emails with [Online Magazine A] on 12 July 2013, Premier ([Director]) made it clear to the customer that it expected to charge an additional fee in the event that click to buy links were used. Premier also signalled that model agencies had discussed amongst themselves the issue of charging for click to buy usage. The email chain was subsequently forwarded to Models 1 ([Director B]), Storm ([Director]), Viva ([Director A]) and the AMA General Secretary, together with [Model Agency E], [Model Agency H], [Model Agency C], [Model Agency B] and [Model Agency A]:[200]

— Premier ([Director]):

*'We are having a lot of problems with this and to be clear.*

[200] URN5362.

*If the site is just a website with no ecommerce we are happy. If it goes with a click to an ecommerce page to buy the product we consider this a commercial action and is not editorial so then we require an extra fee.'*

— [Online Magazine A] ([contact]):

*'We are just providing the click through to buy rather than selling the item ourselves.*

*I as under the impression that you had agreed that if the link went to the generic brand web page that would be ok?'*

— Premier ([Director]):

*'Not that I am aware of, we did one story and put on the confirmation any click to buy would incur a fee. Unfortunately this really needs a long discussion as all agents in London are very uncomfortable with this. So let's wait to see how our meeting goes as this really needs clarity. All AMA agents and others who are not members are not at ease with this at all.'*

3.60 Following a meeting between [Online Magazine A] and Premier on 16 July 2013, Premier agreed to arrange a meeting between [Online Magazine A] and a wider group of model agencies.[201] This meeting took place on 13 August 2013 and was attended by Premier ([booker]) and also possibly by Storm ([Director]) and Models 1 ([Director B]),[202] in addition to representatives from [Model Agency A], [Model Agency E], [Model Agency H] and [Model Agency B].[203]

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[201] URN5363; URN4111. Ahead of this meeting, both [Model Agency D] (on 18 July 2013, URN4103) and [Model Agency C] (30 July 2013, URN4406) provided Premier with updates on their discussions with [Online Magazine A]. Both emails either copied, or were subsequently forwarded to, a number of model agencies, including, for the [Model Agency D] email, FM Models, Models 1, Storm and Viva, and for the next email, Models 1 and Storm.

[202] An email from [Online Magazine A] on 28 August 2013, listing the attendees of the 13 August meeting, did not include Models 1 and Storm amongst the attendees (URN4465). However, Models 1 confirmed to Premier that it would attend the meeting (URN4111; URN4412), as did Storm (URN4409; URN4111) (although Storm later stated that it may not be able to attend: URN4437). Models 1 and Storm were in any case copied into the email chain described at paragraphs 3.64 to 3.65 below (URN4466), in which model agencies discussed coordinating their response to [Online Magazine A]'s price list.

[203] URN4465. While Viva did not attend the meeting with [Online Magazine A], an email from Viva ([booker]) to the AMA General Secretary on 26 July 2013 demonstrates that Viva was aware that the fees charged by [Online Magazine A] for click to buy usage were being discussed between model agencies around this time. Viva's email concerned the fees for [online retailer] for editorial content

3.61 Several weeks later, on 28 August 2013, Viva ([booker]) emailed the AMA General Secretary to seek confirmation as to what had been discussed at the 13 August 2013 meeting with [Online Magazine A]:[204]

> *'I've just questioned the editorial rate for* [Online Magazine A] £[✂]*, as there are credit links for the clothes used. I had the following email back from* [Contact A] *at* [Online Magazine A]*. Please can you confirm that this was agreed by the AMA and members?*
>
> […]
>
> *Hi* [booker, Viva]
>
> *Thanks for your email to my* [colleague].
>
> *It's regrettable that you didn't attend the meeting that we had between several model agents recently. The meeting was organised by* [Director] *from Premier and representatives from AMA agencies:* [Model Agency C]*,* [Model Agency H]*, Premiere,* [Model Agency B]*,* [Model Agency A] *and* [Model Agency E] *were all in attendance.*
>
> *In this meeting it was discussed at length, exactly how are not e-commerce, a fact that these agencies have now agreed with.* […]
>
> *We realised that we are a pioneering force in our approach to online editorial and that it is hard for you because your only frame of reference is to compare us with sites like* [two online retailers] *where there really is e-commerce and they use their 'editorial' images very heavily across their site and in mailouts and social media etc.* […]
>
> [Contact A,Online Magazine A]*'*

3.62 The AMA General Secretary forwarded Viva's email to Models 1 ([Director A]), Premier ([Director]), Storm ([Director]) and Viva ([Director A]), copying FM

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involving click to buy usage, and listed both the fee offered by [online retailer] and the fee which Viva had proposed in return: '*I've had a request from* [online retailer] *for an 'online editorial' paying* £[✂]*. Similar to* [Online Magazine A] *which I know has been discussed recently at meetings, you can see from their site that the editorials have a click-to-buy on the images* […] *I've quoted* £[✂] *as a minimum, where the images have this click-to-buy option.'* (URN4400).

[204] URN4465.

Models ([Director]), asking Premier to confirm what agreement had been reached at the [Online Magazine A] meeting.[205]

3.63 Premier in turn requested an update from [Model Agency E] ([booker]), who stated that no agreement was reached in the meeting:[206]

> *'Unfortunately we couldn't come to any final agreements in the meeting.*
>
> *They refused to speak about rates in front of everyone as the publishing director kept banging on about a cartel…so they basically explained their point of view and we explained ours.*
>
> *After the meeting they sent us their proposed rates and then we all individually had to go back to them.*
>
> *I sent them what I said I would in our group email, let me know if you need me to forward it again.*
>
> *I haven't heard anything back from them agreeing to it or not but I had a brief yesterday and it said no credit links on it so for now I think we are going along with no links and waiting to hear.*
>
> *Did you guys hear anything back from them?* […]*'*

3.64 The CMA considers that certain emails subsequently forwarded by Premier to the AMA General Secretary[207] demonstrate that, following the 13 August meeting, [Online Magazine A] distributed separately to each model agency a fee list (or 'rate card'). The CMA also concludes that, notwithstanding [Online Magazine A]'s reported refusal to discuss fees at this meeting on the grounds that a number of model agencies were present, model agency representatives subsequently discussed in detail the rate card that had been distributed by [Online Magazine A] separately to each of them following the meeting.

3.65 This discussion took place later in the day on 13 August 2013 and was initiated by an email sent by [Model Agency A] ([Director A]) to Models 1 ([Director B]), Premier ([Director] and [booker]) and Storm ([Director]), as well as representatives from [Model Agency E], [Model Agency A], [Model Agency H] and [Model Agency B]. The email quoted the fee list that had been

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[205] URN4465.

[206] URN4465. In her email to [Model Agency D] seeking this information, [Director] (Premier) explained that she had not attended the meeting with [Online Magazine A] and that her colleague [booker] (who, as explained in paragraph 3.60, had attended the meeting) was away.

[207] URN4466; URN4469; URN4468.

circulated by [Online Magazine A] and, beside each rate, set out [Model Agency A] views on that rate (shown in the email in red font, and represented below by underlined text):[208]

*'Hi All*

*Good to see you today.*

*I wanted to let you know our stance on the attached rates card.*

*Obviously I don't know if you have been sent the same and are free to accept whatever you wish, but we feel the below rates compensate the model fairly for the 'grey' area we are all facing now.* […]

***Standard Digital Editorial Rate without credit links: £***[✂] ***+ agency –*** *We will accept this as a MINIMUM fee and will suggest girls at higher rates* […]

***Standard Digital Editorial Rate with credit links: £***[✂] ***+ agency -*** *We will not accept this. We propose a MINIMUM rate for our girls at £*[✂] *for any editorial content with 'click to buy' features.* […]

*N.B. Editorial shoot trips rates are calculated on a per-shoot basis rather than per day - <u>We will not accept this. Rate should be per day, not per shoot!</u>*

***The New Face Editorial Rate without credit links: £***[✂] ***+ agency -*** *We feel this should be £*[✂] *minimum due to the usage and their full name & agency should be credited in the title, not just at the bottom* […]

***The New Face Editorial Rate with credit links: £***[✂] ***+ agency -*** *We will not accept this. We propose a MINIMUM rate for our girls at £*[✂] *for ANY editorial content with 'click to buy' features regardless if the model is a new face or not.* […]*'* [emphasis in the original]

3.66 In a series of emails which followed (to which Models 1, Premier and Storm were all copied, together with the other recipients of [Model Agency A] email), Premier, [Model Agency E], [Model Agency H] and [Model Agency B] provided their own comments on the rates, implying they were largely in agreement

[208] URN4466.

with the fees proposed by [Model Agency A] ([Director A]).[209] On 14 August 2013, [Model Agency E] ([booker]) concluded the email chain with:[210]

> *'My points were mostly the same as* [Director A, Model Agency A] *and most people seem to be in agreement so we are going to go back to them with these rates.'*

3.67 On 2 September 2013, the rate card issued by [Online Magazine A] to [Model Agency A] and [Model Agency A] initial responses (discussed in paragraph 3.65) were forwarded by the AMA General Secretary to Models 1 ([Director A]) and Storm ([Director]), copying FM Models ([Director]).[211] The documents were then discussed at an AMA Council meeting on 3 September 2013, attended by FM Models ([Director]), Models 1 ([Director A]) and Storm ([Director]).[212] The minutes of the meeting recorded that it was the AMA Council's intention to obtain further information on the matter so that it could advise AMA members accordingly.[213]

*Other customer examples concerning 'click to buy' usage*

3.68 The fees for content involving click to buy were also discussed in respect of:[214]

- the customer [Retailer C] in October and November 2013, initially on email between FM Models, Models 1, Premier and Storm and subsequently at an AMA AGM; and
- the customer [online magazine shop] in November 2013 in an email chain copied to all of the Model Agency Parties and the AMA General Secretary.

3.69 On 14 October 2013, Storm ([Director]) emailed FM Models ([Director]), Models 1 ([Director A]) and Premier ([Director]), together with the AMA General Secretary, proposing that the use of click to buy links by [Retailer C] meant that a higher fee was required than the £[✂] being offered by the

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[209] URN4469 (Premier, [Model Agency D] and [Model Agency H]); URN4468 ([Model Agency B]).
[210] URN4469.
[211] URN5429.
[212] 3 copies: URN2127, URN2994 and URN6197. The minutes recorded that apologies were received from Premier ([Director]) and Viva ([Director A]).
[213] 3 copies: URN2127, URN2994 and URN6197.
[214] In its representations on the Statement, Viva explained that [Director A] [✂] at the time of these two exchanges, and not monitoring her emails (URN6892).

customer. In a response sent on 16 October 2013, Premier ([Director]) reported on negotiations between Premier and [Retailer C] regarding the standard of model that Premier was prepared to supply at the rates offered by the customer.[215] The matter was discussed at an AMA Council meeting on 29 October 2013 attended by FM Models, Models 1, Premier and Storm,[216] and was introduced by Storm ([Director]) for discussion at the AMA AGM on 12 November 2013.[217] At the AMA AGM, it was suggested that information regarding usage (including that associated with click to buy) *'must be shared'* between model agencies, and that it was important to *'get everyone on board'*:

— Storm ([Director]), 14 October 2013:[218]

'[✂]

[…] *each photo is a click-through to a page where you can buy the featured garments – admittedly not from the image itself but from e-com images which appear below the main image.* […]

*Either way, this element means it has to be worth more than the* £[✂] *they want to pay!!'*

— Premier ([Director]), 16 October 2013:[219]

*'I agree it is a disease and most bookers are not looking for it. mine have been working with* [Retailer C] *for ages and never looked for the clicks, we just had a meeting with them about their rates and we did not get too far other than sending them pix of girls they couldn't have on their rates! (Good ploy?!) they say they are trying to get their management to see sense but in the end we are going to all have to get heavy which probably means a bookers meeting to get them to understand why.'*

— AMA AGM Minutes, 12 November 2013:[220]

'[Director, Storm] […] *explained that if you scrolled down on* [Retailer C] *website the image becomes a Look Book and then 'click to buy'. It was felt*

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[215] URN4514. This email chain also discussed a separate issue regarding certain customers seeking to impose their own terms and conditions for booking models.
[216] 3 copies: URN2967, URN5461 and URN5463.
[217] 2 copies: URN2966 and URN5473. From the list of apologies and the minutes of that meeting, the CMA infers that all Model Agency Parties were present at that AGM.
[218] URN4514.
[219] URN4514.
[220] 2 copies: URN2966 and URN5473.

*that bookers did not sufficiently investigate intended usages.* [Director, Premier] *reported meeting* [Retailer C] *recently; she was now issuing invoices for any extra usage not agreed at the time of booking. These were important issues and information with regard to usage must be shared. It was felt that the circulation of Council minutes would help. Non-member agents did not help the situation and we should try to get everyone on board.'*

3.70 On 13 and 14 November 2013, Premier ([Director]) sent two emails to FM Models ([Director]), Models 1 ([Director A]), Storm ([Director]) and Viva ([Director A]), together with the AMA General Secretary, with the subject line [online magazine shop] *do we all know about this?*'. In these emails, Premier noted that [online magazine shop] was using click to buy links and that other magazines would follow, concluding *'we should get on this and create the boundaries'*.[221] Taking into account previous exchanges between the Parties regarding charging for click to buy usage, as described in the preceding paragraphs, the CMA infers that Premier's statement concerned creating boundaries with respect to the fees charged for this usage type:[222]

— Premier ([Director]), 13 November 2013:

*'Some of these pix are being taken from backstage and look books to sell/.click thru to buy Just another problem to tackle.'*

— Models 1 ([Director A]), 14 November 2013:

*'No!'*

— Premier ([Director]), 14 November 2013:

*'Btw. I just took on* [booker] *who was* [✂]*. He said they have had many meetings about a shop and all the magazines will be doing this soon. So we should get on this and create the boundaries.'*

— AMA General Secretary, 14 November 2013:

*'Thanks* [Director, Premier] - *will make a note of this.'*

[221] URN6068.
[222] URN6068.

***Customer [Online Retailer A]***

3.71 This sub-section sets out the relevant facts concerning discussions between competitors regarding the terms and conditions, including in particular the fees on which [Online Retailer A] booked models for online content. During the Relevant Period, these discussions related primarily to the introduction by [Online Retailer A] in May 2014 of new terms and conditions (including fees) for its modelling requirements generally (paragraphs 3.80 to 3.103). In addition, there was a particular exchange in January 2014 regarding fees specifically for use of model images in online advertising (paragraphs 3.104 to 3.109). The CMA considers that the Parties shared confidential, commercially sensitive information (including future pricing information) regarding the fees and usage terms for [Online Retailer A] modelling assignments. Further, the CMA considers that the Model Agency Parties agreed to fix minimum prices and to a common approach to pricing in respect of a particular usage category, namely fees for the use of model images in online advertising.

*Background (pre-Relevant Period)*

3.72 Evidence of the Parties' engagement with [Online Retailer A] spans the period 2006 to 2014. The CMA is only making findings in relation to events that occurred during the Relevant Period (which, with respect to [Online Retailer A], specifically concerns events between June 2013 and September 2014). Given the long history of contacts with [Online Retailer A], and solely for the purpose of providing context to events during the Relevant Period, the following paragraphs provide a brief overview of the evidence prior to March 2013.

3.73 Between 2006 and 2008, model fees were agreed between the AMA and [Online Retailer A] in the course of meetings and correspondence.[223]

3.74 In October 2009, Premier ([Director]) alerted FM Models ([Director]), Models 1 ([Director A]), Storm ([Director]), [Model Agency A] (at the time represented on the AMA Council by [Director B]) and the AMA General Secretary that [Online Retailer A] intended to reduce model fees.[224] Directed by FM Models

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[223] Fees were agreed with [Online Retailer A] (URN2371) following a meeting in November 2006, attended on behalf of the AMA by Premier ([Director]) and Storm ([Director]) (3 copies: URN2436, URN2886 and URN3743). Revised fees for 2008 were agreed with [Online Retailer A] via correspondence with the AMA General Secretary in December 2007 (URN1151; 2 copies: URN3134 and URN3563).

[224] URN6259. This information was passed to Premier by [Model Agency F].

([Director]), the AMA General Secretary emailed AMA members to ask whether other model agencies had also been informed of this reduction.[225] In a series of emails, FM Models ([Director]), Models 1 ([Director A]), Premier ([Director]), Storm ([Director]), [Model Agency A] ([Director B]) and the AMA General Secretary discussed [Online Retailer A]'s proposal, with Premier in particular sharing information on the commercial positions being adopted towards [Online Retailer A] by Premier and by the model agencies [Model Agency F] and [Model Agency B].[226]

3.75 On 29 October 2009, [Online Retailer A] sent a group email to a number of model agencies, setting out its new fee structure effective from 1 November 2009. This included a standard 'daily fashion rate' of £[✂], rising to £[✂] for 'special bookings'.[227]

3.76 In a series of emails which followed, copying some or all of the recipients of [Online Retailer A]'s email of 29 October 2009, FM Models ([booker]), Models 1 ([Director A]), Premier ([Director]) and Storm ([booker]), as well as [Model Agency A] ([Director A] and [Director B]), discussed collectively resisting [Online Retailer A]'s proposed fees.[228] The CMA considers that the contributions made by Premier ([Director]) (who added 'VERY PRIVATE' to the email subject line) and Models 1 ([Director A]) (who addressed his email only to FM Models, Premier, Storm, and the AMA General Secretary, and advised a *'careful'* approach) demonstrated a desire to maintain secrecy over the discussions and to avoid any appearance of collusion:

— Premier ([Director]):[229]

*'**Subject:** RE:* [Online Retailer A] *new rates? VERY PRIVATE*

*Here is Premier's position - we are not going to reply at the moment. We are going to give 2nds. I think we should all discuss this at the AGM on Nov 11th. It will be like a go slow won't it? Lets see if everyone is in*

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[225] URN6259; URN2516. A printed copy of the AMA General Secretary's email to members asking whether they had been informed of the fee reduction shows a handwritten note, listing 'yes' or 'no' beside each model agency's name (URN2516).

[226] URN6259; URN6260; URN2519; URN2518; URN2529. In the midst of these discussions, FM Models ([Director]) forwarded to the AMA General Secretary on 14 October 2009 the draft wording of an email to send to [Online Retailer A], expressing dismay at [Online Retailer A]'s proposed fee decrease. He added the instructions *'please email it to* [Contact A], [Online Retailer A] *from yourself – not me – I'm anxious not to lose a very good client!'* (URN2522).

[227] URN2530.

[228] URN2530; URN2532; URN2533; URN2534.

[229] URN2533.

*agreement that they are not wishing to have a rate decrease imposed on them.* […] *Because of the economic situation some agents may feel they cannot say no however if we just gave 2nds for a while we could test their resolve? Any thoughts on this?'*

— Models 1 ([Director A]):[230]

*'I think a word in someone's ear would be sensible. We cannot "all stand together" it could/would be seen as collusion. I know this is a whole new territory for the AMA but we should be careful. Fortunately, they approached us!'*

3.77 In late 2010, model fees for 2011/2012 (effective from 1 April 2011) were discussed with [Online Retailer A] in a meeting attended on behalf of the AMA by Models 1 ([Director A]), Storm ([Director]) and [Model Agency A] ([Director B]). Following the meeting, [Online Retailer A] proposed an increase in model rates of 15% to reflect added international rights and social media usage (such that the 'standard' rate of £[✂] referred to in [Online Retailer A]'s email of 29 October 2009 would increase to £[✂]).[231]

3.78 These revised fees were discussed at two AMA Council meetings on 12 January 2011[232] and 15 February 2011[233] (both attended by at least FM Models, Models 1, Premier and Storm) and on email chains between all or some of the AMA Council members at the time.[234] The outcome of these discussions was conveyed to [Online Retailer A] by letter on 8 March 2011, in which the AMA proposed a percentage uplift of 120% (rather than [Online Retailer A]'s proposed 15%) to reflect the additional usage.[235]

3.79 On 16 March 2011, a further meeting was arranged with [Online Retailer A] to discuss this proposal, attended on behalf of the AMA by Models 1 ([Director A]), Premier ([Director]) and Storm ([Director]), together with [Model Agency A] ([Director B]). Following the meeting, [Online Retailer A] wrote to the attendees of the meeting, with a revised proposal of a 20% increase in fees

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[230] URN2534.

[231] URN1864 (first email in chain).

[232] 2 copies: URN1259 and 3075.

[233] 2 copies: URN1153 and URN3843 (partial copy).

[234] URN2277; URN2278; URN2279; URN3844.

[235] 2 copies: URN1156 and URN3842. The proposal to increase rates by 30% for usage in each of three new territories and a further 30% for social media usage was agreed at a mini-Council meeting attended by FM Models ([Director]), Models 1 ([Director A]), Premier ([Director]) and Storm ([Director]) on 15 February 2011 (2 copies: URN1153 and URN3843 (partial copy)).

(raising the standard rate to £[✂]), with a guarantee of a further 10% increase in 2012.[236] Before the matter could be discussed further between [Online Retailer A] and the AMA, [Online Retailer A] contacted model agencies directly on 7 April 2011 to confirm this increased fee for 2011/2012.[237] Further attempts by the AMA in 2011 to agree a mechanism for determining future fee revisions were rejected by [Online Retailer A].[238] An attempt by the AMA in January 2012 to engage with [Online Retailer A] regarding fees also appears to have gone unanswered.[239]

*Relevant Period – Fees and other terms and conditions for modelling assignments*

3.80 On 25 June 2013, at an AMA Council meeting attended by FM Models ([Director]), Models 1 ([Director A]), Premier ([Director]), Storm ([Director]) and Viva ([Director A]), it was agreed *'to arrange a meeting* [Contact A] *at* [Online Retailer A] *to discuss an increase of fees for 2013/2014'.*[240]

3.81 At the same AMA Council meeting, Premier ([Director]) raised an '*on-going payment problem'* with [Online Retailer A] regarding *'invoicing for extra time if a model's image remains in use'*.[241] The issue was explained further in an email from Premier to [Online Retailer A] on 26 June 2013, in which Premier complained about model images shot for [Online Retailer A] being used in third party magazines without consent. Premier forwarded the email to FM Models ([Director]), Models 1 ([Director A]), Storm ([Director]) and Viva ([Director A]), as well as the AMA General Secretary, noting in its covering email that Premier was now charging [Online Retailer A] a day rate for this extra usage.[242]

3.82 On 26 June 2013, the AMA General Secretary emailed [Online Retailer A] ([Contact A]), requesting a meeting to discuss fees.[243] [Online Retailer A]

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[236] URN1525.
[237] URN3841.
[238] URN1144; URN1154; URN1155; URN1862.
[239] URN1157; URN1146. The CMA has not identified a response from [Online Retailer A] to either letter. However, an email submitted as part of the 16 June 2015 submission from the legal advisers representing Models 1, Premier, Storm and the AMA demonstrates that [Online Retailer A] wrote to a number of model agencies and the AMA on 30 March 2012 to confirm that it would be increasing the standard rate to £[✂] in the financial year 2012-2013 (URN0725, page 52).
[240] 3 copies: URN2969, URN3500 and URN5336.
[241] 3 copies: URN2969, URN3500 and URN5336.
[242] URN4339.
[243] URN4352.

declined to meet with the AMA, noting that [Online Retailer A]'s fees would remain static in 2013/2014.[244]

3.83 On 3 July 2013, a further request from the AMA to discuss fees with [Online Retailer A] was again rebuffed.[245] In its response to the AMA General Secretary, copied to all of the Model Agency Parties, [Online Retailer A] stated:[246]

> *'We will not be increasing the model rate for the next 12 months. This is non negotiable. I completely respect the wishes of the individual agencies as to whether they continue to work with us or not on this basis. I would obviously hope that model agencies appreciate our support also. I consider us to be a loyal, regular and honest client looks after their models when they are with us.'*

3.84 [Online Retailer A]'s response was discussed in two email chains on 3 July 2013 between FM Models ([Director]), Models 1 ([Director A]), Premier ([Director]), Storm ([Director]) and Viva ([Director A]), together with the AMA General Secretary. In these email chains, the Model Agency Parties discussed the possibility of taking a concerted approach to withhold the supply of models to [Online Retailer A] (albeit they appear to dismiss a strategy of withholding supply across the entirety of the market for modelling services):

Email chain 1[247]

— Viva ([Director A]):

*'Maybe the only way* [✂] *is if we do stop 'supporting' them to the extent that they have grown accustomed to? If we all make a concerted stand. If the level of model reduces unless they increase their rate somewhat?'*

— Premier ([Director]):

*'Haha! THAT will never happen'*

Email chain 2[248]

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[244] URN4352.
[245] URN4367.
[246] URN4367.
[247] URN4367.
[248] URN4371; URN4370.

— AMA General Secretary (drafted by FM Models ([Director])):[249]

*'It is clear that* [Online Retailer A] *are confident that individual agencies will not want to rock the boat.*

*They are right. What to do?'*

— Storm ([Director]):

*'Neither* [contact] *nor* [contact] *are at* [Online Retailer A] *but we don't want to lose the principle of the annual review – even if there is no movement on rates.'*

— Premier ([Director]):

*'Well I would strike! BUT would everyone support every agent? If one agency breaks a strike then we lose credibility, We could strike during August for 1 month?'*

3.85 On 14 November 2013, FM Models ([Director]) wrote to [Online Retailer A] ([Contact B]), signing as AMA Chairman, requesting that [Online Retailer A] consider reinstating annual fee reviews with the AMA.[250] In emails sent to the AMA General Secretary on 19 and 23 January 2014 (both of which were subsequently forwarded first to FM Models and later to all of the other Model Agency Parties), [Online Retailer A] again rejected the request to meet with the AMA, framing its objection on the grounds of EU competition law and explaining that *'Discussing a standard pricing structure between AMA & actively trading & competing members &* [Online Retailer A] *could be explained as breaching anti-competition law'*.[251]

3.86 [Online Retailer A]'s response was discussed at an AMA Council meeting attended by all of the Model Agency Parties and the AMA General Secretary on 21 January 2014[252] and on email between FM Models ([Director]), Models

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[249] A draft of this email was sent by FM Models ([Director]) to the AMA General Secretary at 15:57 on 3 July 2013 (URN4369). The email was circulated by the AMA General Secretary to the Model Agency Parties at 16:41 the same day.

[250] URN4531. The fact that [Director] (FM Models) may have been acting in his capacity as Chairman of the AMA does not affect the CMA's findings. The fact that members of an association of undertakings are acting through the association does not affect the way in which the Chapter I prohibition and Article 101 TFEU applies to their activities; their position is no different than if they were acting in the same manner outside the forum of such an association.

[251] URN5556; URN4638.

[252] 5 copies: URN2965, URN3501, URN3855, URN4624 and URN5552.

1 ([Director A]), Premier ([Director]), Storm ([Director]), Viva ([Director A]) and the AMA General Secretary on 28 January 2014.[253]

3.87 In February 2014, [Online Retailer A] contacted model agencies on an individual basis to arrange meetings to discuss rates and usage.[254] During this period, the AMA General Secretary (under the direction of [Director] of FM Models) spoke to a large number of members regarding their meetings with [Online Retailer A], including the fee proposals put forward and how model agencies proposed to respond to them, and that this information was subsequently circulated or discussed as follows.

3.88 On 28 February 2014, the AMA General Secretary forwarded to FM Models ([Director]) an email received from [Model Agency G] ([director]) reporting on its meeting with [Online Retailer A].[255] [Model Agency G] reported that [Online Retailer A] had proposed to drop fees by 30% and extend image rights to six months. [Model Agency G] sought a response from the AMA before replying to [Online Retailer A], stating *'I hope to hear from you by mid week otherwise im going to have to negotiate something as I have lots of models in* [Online Retailer A] *working so I have to come back to them at some stage!'.*

3.89 In her covering email to FM Models ([Director]), the AMA General Secretary asked *'Shall I let him know we are talking to other members???'*. FM Models ([Director]) responded *'Could tell him we are gathering info so we can take a view…'.*[256]

3.90 The same day, the AMA General Secretary contacted a large number of other model agencies to enquire whether they too had met, or were due to meet, with [Online Retailer A].[257] In an email sent that afternoon to FM Models ([Director]), the AMA General Secretary confirmed that she would prepare notes of these conversations to discuss with FM Models ([Director]) the following week.[258]

3.91 The notes of the conversations recorded that at least one model agency had said that it intended to stop supplying models to [Online Retailer A] ('[Model Agency B]*:* […] *Won't get her girls – not sure about the men'*) and that another

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[253] URN4638.
[254] URN4668.
[255] URN4690.
[256] URN4690.
[257] URN1554.
[258] URN6220.

was resisting the new fees ('[director, Model Agency D] […] *(tried to get out of it – fees & everything)*').[259]

3.92 The minutes of the AMA Council meeting on 10 March 2014 (attended by all of the Model Agency Parties) record *'Individual members had been invited to meet* [Online Retailer A]*'s Procurement Officer where they had been informed that* [Online Retailer A] *intended to reduce model fees by 30%'* and that *'There were still several members as yet to attend meetings with* [Online Retailer A] *and we would continue to monitor the situation and keep members informed'*.[260] The CMA infers from this that at least some of the information obtained from AMA members by the AMA General Secretary was reported back to AMA Council members.

3.93 On 23 May 2014, Premier ([Director]) received an email from [Online Retailer A] ([Contact C]) with the subject line *'revised model rates, usage and contract'*.[261] The email thanked Premier for attending a meeting with [Online Retailer A] and noted that [Online Retailer A] had now met with a large number of other model agencies. In the email, [Online Retailer A] outlined *'how we want to take model rates and usage forward'*. In its covering email, [Online Retailer A] noted:[262]

> *'To keep things fair, again based on your feedback, all agencies work from the same contract with the same usage rates, in order to prevent models switching agencies.'*

3.94 Attached to the email were [Online Retailer A]'s new terms and conditions which set out, in Schedule 1, a rate card listing a range of fees according to the experience of the model, type of work and shoot length. An extract from the rate card is set out below:[263]

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[259] URN1554; URN1557.

[260] 2 copies: URN2964 and URN4035.

[261] 2 copies: URN3452 (partial) and URN4821. Hardcopy documents taken from Storm (URN3692) and FM Models (URN3103) show that these Model Agency Parties also received emails from [Online Retailer A] on 23 May 2014 containing the same information as the email sent to Premier (albeit with personalised information relating to which of the model agency's individual models fell into each rate category).

[262] URN4821.

[263] 9 copies: URN3104 (partial), URN3105 (partial), URN3459 (partial), URN3461 (partial), URN3693 (partial), URN3694 (partial), URN3965, URN3983 and URN4823.

3.95 On 24 May 2014, Premier ([Director]) forwarded [Online Retailer A]'s email to FM Models ([Director]), Models 1 ([Director A]) and Viva ([Director A]), together with the AMA General Secretary.[264] Several minutes later, Premier ([Director]) separately forwarded the same email to [Model Agency E].[265] In response, [Model Agency E] informed Premier that it would not be supplying models to [Online Retailer A] based on the revised rates:[266]

— Premier ([Director]):

*'Have you read this. It's terrible.'*

— [Model Agency E] ([director]):

*'We wont be working with* [Online Retailer A] *any longer with these rates that is my final position*

*From June i asked them to confirm if they want me to cancel all* [Model Agency E] *girls and boys .*

*I am prepared to lose that business.'*

3.96 On 30 May 2014, Storm ([Director]) emailed the AMA General Secretary, copying Models 1 ([Director A]) and Premier ([Director]).[267] The email was subsequently forwarded by the AMA General Secretary to FM Models ([Director]) and Viva ([Director A]).[268] Storm's email contained the text of a note to be sent to AMA members, setting out the key issues raised by the new [Online Retailer A] terms and conditions, together with the covering message *'As discussed. It may be best to have this sent out to Agency owners by post with a covering note, in order to minimise the risk of it being forwarded to* [Online Retailer A]*'*.[269]

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[264] URN4821. The email was also sent to [booker] at Premier. The CMA infers that this was an error, and that the intended recipient was [Director] of Storm.
[265] URN4819.
[266] URN4819. The response from [Model Agency E] was subsequently forwarded by Premier to the AMA General Secretary.
[267] URN3454.
[268] URN5697; URN6062.
[269] A note to AMA members dated 12 June 2014 stated *'Directors/Partners had been alerted to the seriousness of* [Online Retailer A]*'s recent proposals'* (4 copies: URN0096, URN2961, URN4173 and URN5717), demonstrating, in the CMA's view, that this note was sent to members.

3.97 This note included, amongst others, issues relating to image usage rights ([✂]) and rates ([✂]).[270]

3.98 On 3 June 2014, [Online Retailer A] ([Contact C]) sent an email to a large number of model agencies, requesting feedback on the [Online Retailer A] terms and conditions. She noted that, based on feedback from model agencies, [Online Retailer A] had kept rates and usage the same for all model agencies and that these elements were not open to negotiation. She invited comments on other aspects of the contract, adding:[271]

> *'Also a kind request to, based on European anti-competition law, keep your feedback between your company and* [Online Retailer A] *and not share with all'*

3.99 On 10 June 2014, [Online Retailer A] was discussed at an AMA Council meeting attended by all of the Model Agency Parties. At the meeting, the Model Agency Parties discussed presenting a coordinated response to [Online Retailer A] on behalf of all AMA members:[272]

> *'There followed a long discussion. It was felt that we should not 'jump' on this important issue.* [Online Retailer A] *could not operate without a constant supply of models* […] *It was felt that members should be advised that the AMA would be responding to* [Online Retailer A] *on their behalf.'*

3.100 On 16 June 2014, Models 1 ([Director A]) shared with FM Models ([Director]), Premier ([Director]), Storm ([Director]), Viva ([Director A]) and the AMA General Secretary a draft letter to be sent to [Online Retailer A] on behalf of the AMA, which Models 1 suggested '*should definitely go to members with the advice that they should individually go back to* [Online Retailer A] *to make their own case on rates'*.[273] While the letter stated that it was not commenting on specific fees proposed by [Online Retailer A] on advice from its lawyers, the letter did nevertheless comment on [Online Retailer A]'s proposed rate freeze:[274]

> *'We fully understand the issues of perceived collusion and, with the advice of our lawyers, we are not commenting on the fees you propose, other*

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[270] URN3454; 4 copies: URN0096, URN2961, URN4173 and URN5717.
[271] URN3457.
[272] 5 copies: URN2963, URN3853, URN4848, URN5712 and URN5715.
[273] URN4865; URN4866 (attachment to URN4865: for all copies of this document, see footnote 274). In the same email chain, copied to all of the Model Agency Parties, the AMA General Secretary thanked Models 1 ([Director A]) for the draft letter and confirmed *'everyone is very happy with it*'.
[274] 7 copies: URN0355, URN3464, URN3691, URN3970, URN4866, URN5726 and URN5728.

*that in an historic context, and we accept that each agent must negotiate individual fees for themselves and on behalf of their respective models.*

*The last fee increase was in March 2012 since when, broadly speaking, your turnover has increased from* [✂]. *You are proposing a rate freeze until June 2016.*

*It is not possible to accurately measure the impact of the rate cuts you are making but, assuming it to be around* [✂]*%, in the light of your growth internationally* [✂] *and your social media presence extends to Google +, Twitter, Facebook, Pinterest, Instagram, YouTube, Tumblr, most of which can be linked back to your ecommerce site, it hardly seems fair.'*

3.101 On 17 June 2014, having received sign-off from Models 1 ([Director A]), the AMA General Secretary sent the letter to [Online Retailer A] in her name and subsequently forwarded it to AMA members.[275]

3.102 Despite the statement made by Models 1 that members should be advised to *'individually go back to* [Online Retailer A] *to make their own case on rates'* (see paragraph 3.100 above), the CMA considers that the Model Agency Parties continued to share further confidential, commercially sensitive information (including future pricing information) regarding their or other model agencies' negotiations with [Online Retailer A] on pricing and usage terms during the second half of 2014. For example:

*(a)* On 21 July 2014, Premier ([Director]) emailed Models 1 ([Director A]) to relay a conversation which Premier had had with [Model Agency E] regarding specific fees that [Model Agency E] was willing or not willing to accept from [Online Retailer A].[276]

*'He* [a representative of [Model Agency E]] *told them* [Online Retailer A] *he wanted £*[✂] *+ per day for the Best sellers (he said to me he would go to £*[✂]*) £*[✂] *for lingerie, £*[✂] *- £*[✂] *for standard girls and £*[✂] *for New Faces. He would only accept one test day and it could not be put up on line it was for internal approval situations only, they also want to do un*

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[275] URN4870; URN5725; URN5726 (attachment to URN5725); 4 copies: URN0097 (partial copy), URN2952 (partial copy), URN4872 and URN5727 (partial copy); URN5728 (attachment to URN5727). [Online Retailer A] responded to this letter on 26 June 2014, reiterating that it would not engage with the AMA: *'As communicated before, we deem it inappropriate to engage with the AMA directly with respect to contract negotiations. We see all content of the contract as commercial, not just the fees, and on that basis we see collective engagement through you as a potential risk area from an anti-competition perspective.'* (URN4881).

[276] URN3463.

*rec* [NB: unrecognisable] *for £*[✂] *he said he would not submit girls for that. He would not agree the £*[✂] *per picture if they wanted to go over the usage time it had to be the day rate again, He would not accept the exclusive to* [Online Retailer A] *and he would not accept the half fee for being ill. Basically who would not agree to their T & C's.'*

*(b)* On 21 August 2014, Models 1 ([Director A]) forwarded to Storm ([Director]) an email which Models 1 had sent to [Online Retailer A], setting out Models 1's position on [Online Retailer A]'s terms and conditions, including comments on [Online Retailer A]'s proposed fees for bookings of less than half a day and the proposed usage conditions.[277]

*(c)* On 16 September 2014, an AMA Council meeting attended by FM Models ([Director]), Premier ([Director]), Storm ([Director]) and Viva ([Director A]) discussed the *'starter rate'* in the [Online Retailer A] terms and conditions, and agreed amongst themselves they could not accept the proposed *'starter rate'*.[278] The draft minutes stated:[279]

'[Online Retailer A] *had requested meetings with members of the AMA: following these meetings members had been sent the final amendments to the* [Online Retailer A] *Agreement/ T&C/Booking Form (title); they were now being asked to sign the amended document. There followed a good discussion on the points that members should not (? cannot) accept, eg. Exclusivity, No show, Starter Rate, Location Shoot. The question was raised, had any member signed the* [Online Retailer A] *agreement? It was decided to speak to some members to get views on the current* [Online Retailer A] *situation.* [Director, FM Models] *pointed out that the booking form referred to a specific job and variations could be made for a particular model or situation.'*

3.103 The fact that commercially sensitive information (including future pricing information) was disclosed and discussed at the AMA Council meeting of 16

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[277] URN3922. On usage, the letter stated: *'We discussed usage at our meeting. You have doubled the usage period and it is global. This, in itself, is considerable, especially when we include social media etc. However, models are being used by you for e-commerce and, as such, this is acceptable. However, they are not being paid to market your brand generically. We feel strongly that this should be recognised and any kind of display advertising, web or otherwise, should not be part of the usage'.*

[278] 5 copies: URN2960, URN3941, URN3979, URN4972 and URN5849.

[279] URN5849. These draft minutes were sent by the AMA General Secretary to FM Model ([Director]) for review (URN5848). In the final version of these minutes, the phrase *'the points that members should (? cannot) accept'* was softened by FM Models ([Director]) to *'the points that concerned member'* (URN4972).

September 2014 is corroborated by an email sent between two colleagues at Premier ([Director] to [booker]) on the same day as the Council meeting. The email relayed *'The things we talked about on* [Online Retailer A] *stuff. At the AMA'*, which included *'*[Director] [presumably [Director] of Storm] *will not agree to the £*[✂] *per pic for the shots they want to use after the use has run out'* and *'No Brand Advertising for* [Online Retailer A] *or anyone else'*.[280]

*Relevant Period – Fees for online advertising*

3.104 In addition to the contacts described in paragraphs 3.80 to 3.103 above regarding the fees and other terms and conditions offered by [Online Retailer A] for its general modelling needs, the Model Agency Parties also discussed amongst themselves the fees charged to [Online Retailer A] for a particular usage category, namely online, cookie-driven advertising.[281] During these discussions the Model Agency Parties agreed that they should charge an extra day rate for the use of modelling images in online advertising by [Online Retailer A].

3.105 At an AMA Council meeting at 10:00 on 21 January 2014 attended by all of the Model Agency Parties and the AMA General Secretary, Premier ([Director]) *'raised the issue of* [Online Retailer A]*'s extending usage of the images with cookies'* and disclosed confidential, commercially sensitive information regarding its future pricing intentions by stating that Premier *'was planning to ask for a further day rate for this*'.[282]

3.106 An internal FM Models email sent by [Director] to a colleague dated 30 January 2014 reported on the discussion that took place at the 21 January 2014 AMA Council meeting, stating that a '*consensus'* had been reached at the meeting that the additional online advertising usage should attract an additional day rate:[283]

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[280] URN3460. In its written representations on the Statement, Viva confirmed that [✂] (URN6892).
[281] Cookies are computer files which record information regarding a web-user's visit to a particular website. Information gathered by cookies may be used by advertising companies to target advertisements to the user's presumed preferences. For example, if a cookie on a user's computer records that that the user has visited a particular clothing website, an advertiser may use this information to select advertisements for the user that relate to the same or a similar clothing retailer.
[282] 5 copies: URN2965, URN3501, URN3855, URN4624 and URN5552. The time of the meeting is recorded on the agenda for that meeting (3 copies: URN1462, URN3502 and URN3856).
[283] URN5569. In his reply to [Director] (FM Models), [booker] (FM Models) stated: '*I personally feel that the rate should be higher than just adding an extra day rate but I will let you know how I get on at my meeting'.*

*'Update re your meet with* [Online Retailer A]*:*

[…]

*One thing that came up at a recent AMA Council meeting was their increasing use of cookies* […]*. The consensus was that this* [additional usage] *should merit an extra day rate. There is a bookers' meeting at FM on Wed to talk about this kind of stuff.'*

3.107 Soon after the Council meeting, Premier emailed [Online Retailer A] complaining that model images intended for use on [Online Retailer A]'s e-commerce site were also being used in [Online Retailer A] advertising campaigns.[284] In the email sent by Premier ([Director]) to [Online Retailer A] ([Contact A]) at 16:32 on 21 January 2014, Premier stated that it expected to receive an additional day rate from [Online Retailer A] for this additional usage:[285]

*'I wonder if you have got anywhere with this off site advertising that* [booker, Premier] *flagged up with* [contact,Online Retailer A] *last year. As we have not heard anything back could you please let me know your thoughts as we obviously will need a new rate for this advertising which is not in our use agreements. I was thinking day rate again for a period to be negotiated.'*

3.108 Premier ([Director]) subsequently forwarded this email to Models 1 ([Director A]) and Storm ([Director]) at 17:16 on the same day, thereby repeating the disclosure of Premier's pricing intentions on this subject to two of Premier's competitors.

3.109 Following the discussion at the AMA Council meeting on 21 January 2014, and the email exchange between Premier and [Online Retailer A] reported at paragraph 3.106, the matter was further discussed at the AMA Council meeting on 10 March 2014 attended by all of the Model Agency Parties. The

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[284] An internal Premier email forwarded by Premier ([Director]) to the AMA General Secretary on 15 January 2014 (URN5544) demonstrates that Premier was experiencing a similar issue with the customer [retailer] and had suggested that this too be discussed at the 21 January 2014 AMA Council meeting. The internal Premier email stated *'*[retailer] *are using ecommerce images for advertising line too – like* [Online Retailer A] […] *If we are going after* [Online Retailer A] *usage we need to do the same with* [retailer]*'.* The covering email from Premier ([Director]) to the AMA General Secretary stated *'More for the council meeting*', to which the AMA General Secretary responded *'Thanks* [Director, Premier] – *will add to the agenda'*.

[285] URN3695.

minutes of that meeting record that Premier had reported that it was *'invoicing for cookies and other usages and finding that payments were available'*.[286]

***Customer [Retailer A]***

3.110 This sub-section sets out the relevant facts concerning discussions between competitors regarding the modelling fees and usage terms which [Retailer A] sought to introduce for e-commerce shoots in October 2014. The CMA considers that Premier ([Director]) circulated to the Model Agency Parties and the AMA General Secretary confidential, commercially sensitive information (including future pricing information) and proposed that an AMA Alert be issued to AMA members. Premier also discussed [Retailer A]'s fees and usage terms with the Model Agency Parties and at least two other model agencies.

3.111 On 6 October 2014, Premier ([Director]) forwarded to FM Models ([Director]), Models 1 ([Director A]), Storm ([Director]), Viva ([Director A]) and the AMA General Secretary an email chain containing two emails.[287] The first email in the chain was an email from [Model Agency E] ([booker]) with the subject line '[Retailer A] *usage!*'. The second email in the chain was an internal Premier email regarding fees being charged by [Retailer A].

3.112 The internal Premier email read:[288]

> *'are now using recognizable models for £*[✂] *but they are asking all this usage in the fee.*
>
> *It is of course unacceptable so please decline any bookings if they want this use.'*

3.113 In the covering email to FM Models, Models 1, Storm, Viva and the AMA General Secretary, enclosing this email chain, Premier ([Director])

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[286] 2 copies: URN2964 and URN4035.

[287] URN5002.

[288] URN5002. The internal Premier email is sent from [Director] to '-bookers'. While the full email address of '-bookers' is not visible on this email, other emails sent by [Director] to '-bookers' show that '-bookers' was a Premier email account: [✂] (URN6210).

commented on the practices of both [Retailer A] and [online retailer] and suggested that an AMA Alert be generated:[289]

> *'Maybe it would be good to bring this to agents attention* – [online retailer] *(they are* [✂] *as well) – is as bad as* [Retailer A] *and bookers are accepting it.*
>
> *Can we alert this?'*

3.114 Two and a half hours after receiving Premier's email, the AMA General Secretary issued an AMA Alert to members regarding [online retailer] and [Retailer A]:[290]

> '[online retailer]
>
> *We understand that the above, which is now operating* [✂] *is booking recognisable models for a fee which is NOT appropriate for the usage involved.*
>
> […]
>
> [Retailer A]
>
> *We have also been informed that the above company is booking recognisable models for a fee which is NOT appropriate to include all USAGE!*
>
> *Please alert your bookers to the above.'*

3.115 Within two hours of the alert, the [booker] at [Model Agency E] emailed the AMA General Secretary with information on [Retailer A]'s proposed fee and usage terms. The CMA infers from the timing and content of this email that [Model Agency E]'s email was triggered by its receipt of the AMA Alert described in paragraph 3.114:[291]

> *'We are currently trying to figure out rates with* [Retailer A] *as they are asking for excessive usage for their ecom shoots. See below..*
>
> […]

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[289] URN5002. Premier's covering email contained fee and usage information relating to a modelling shoot to be held on 3 September. The AMA Alert sent later the same day (2 copies: URN0161 and URN5878) shows that this information related to [online retailer], rather than to [Retailer A].
[290] 2 copies: URN0161 and URN5878.
[291] URN5005.

*As discussed in our meeting last week the following usage is what we're getting from the majority of our agencies –*

[Retailer A] *USAGE – GLOBAL ONLINE AND 3RD PARTY*

*GLOBAL ONLINE USAGE BREAK DOWN:*

*1) Display advertising*

*Web banner advertising (frame ad, pop up, floating ad, expanding ad, trick banners, interstitial ads)*

*2) Social Media*

*Twitter, Facebook, Instagram, youtube etc (per tweet/pic/video)*

*3)* […]

*If you could give me a breakdown of what you can do for the current rate of £*[✂]*; And also a cost for the above total usage if you can't include everything for our rate.'*

3.116 On 27 October 2014, [booker] at [Model Agency E] emailed Premier ([Director]) with the same [Retailer A] usage information sent to the AMA General Secretary on 6 October 2014. The same day, Premier forwarded this information to FM Models ([Director]), Models 1 ([Director A]), Storm ([Director]) and Viva ([Director A]). In the covering email, Premier ([Director]) again signalled its intention not to accept the terms being offered by [Retailer A]:[292]

*'Have any of you had* [Retailer A] *in to discuss this? Their rate is £*[✂] *they have now included 3rd party* […] *And all of the below listed in this email from* [Model Agency E] *who have had a meeting with them.*

*They are saying everyone is in agreement I am sure this is not true, I assume no one has noticed the extra use which is in the 3rd party use, it has suddenly just appeared in their briefs.*

*We have a meeting on Wednesday.*

*Please let me know.'*

[292] URN3466.

3.117 The same day, Premier ([Director]) forwarded the email discussed in paragraph 3.116 to a booker at [Model Agency H], querying [Model Agency H] acceptance of the rate offered by [Retailer A] and asking whether [Model Agency H] was aware of the usage required:[293]

> *'This is the usage that is included in the £*[✂] *fee in the below email.* [Retailer A] *seem to think you have no problem with it.*
>
> *However, not sure if you have seen this extensive use. Which Includes* [retailers]*. In other countries plus a load of advertising. Please let me know your comments.'*

***Customer [Online Retailer B]***

3.118 This sub-section sets out the relevant facts concerning information sharing by the Parties regarding fees paid or proposed by [Online Retailer B] in June 2014. In this example, the CMA considers that, prompted by an email from Storm to the Model Agency Parties and the AMA General Secretary, the AMA General Secretary sought information from AMA members about the fees and other terms and conditions AMA members were receiving from [Online Retailer B]. Subsequently, the AMA General Secretary disclosed the information (which included confidential, commercially sensitive information, including future pricing information) received from AMA members (including some of the Model Agency Parties), first to FM Models and thereafter to all of the Model Agency Parties.

3.119 At 17:48 on 13 June 2014, Storm ([Director]) sent an email to FM Models ([Director]), Models 1 ([Director A]), Premier ([Director]), Viva ([Director A]) and the AMA General Secretary, querying the fees being offered by [Online Retailer B] for e-commerce assignments. Storm stated that it understood that fees being offered for [Online Retailer B] were £[✂] (Storm corrected this figure a few minutes later to £[✂] inclusive) and suggested that other model agencies should not be accepting this rate:[294]

> *'BTW, what's the state of play with* [Online Retailer B]*?*
>
> *I understand they are only offering £*[✂] *for e-com….it's something we should be on top of at the same time as* [Online Retailer A]*; it sets an*

[293] URN0145.
[294] URN5720.

*awful precedent if agencies are accepting this. Particularly in light of their latest results:*

*Sales increased* [✂]*, pre-tax profits were up nearly 4x* [✂]*.*

*Sales for the first quarter of the new financial year are already up another* [✂]*%*

[…]

*A quick correction - the* [Online Retailer B] *rate is* £[✂] ***inclusive****'* [emphasis in the original]

3.120 On the next business day, the AMA General Secretary sent an email to AMA members stating that '*the AMA council is currently discussing* [Online Retailer B] *as well as* [Online Retailer A]*'* and asking whether agencies had agreed to [Online Retailer B]'s terms and conditions and requesting details of the model rates which model agencies were receiving from [Online Retailer B].[295] The CMA infers from the timing and content of the email that the AMA General Secretary's request to AMA members was triggered by Storm's email described in paragraph 3.119.

3.121 The AMA General Secretary received responses from all of the Model Agency Parties with the exception of FM Models, as well as from at least four other model agencies ([Model Agency I], [Model Agency H], [Model Agency J] and [Model Agency G]).[296] While the responses received from Premier, Viva, [Model Agency H] and [Model Agency G] commented in general terms that the rates varied, or that they had not taken any bookings from [Online Retailer B], the responses received from Models 1 and Storm, as well as those from [Model Agency J] and [Model Agency I], included information on specific fees which those model agencies had received from or been quoted by [Online Retailer B].

3.122 On 23 June 2014, the AMA General Secretary emailed FM Models ([Director]) with a summary of the responses received from [Model Agency I], Models 1,

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[295] URN4869. [Online Retailer B] sought to introduce new terms and conditions in December 2013. These terms and conditions were the subject of discussion between the Model Agency Parties (or a selection of them) on several occasions, both on email (including in URN4572; URN4575; URN4576; URN4577; URN5567; URN4639; URN4605) and at an AMA Council meeting on 21 January 2014 (5 copies: URN2965, URN3501, URN3855, URN4624 and URN5552).

[296] URN4867 (Storm); URN4863; URN4869 (Models 1); URN4862 (Viva); URN4868 ([Model Agency I]); URN4864 ([Model Agency G]); URN4175 (Premier); 2 copies: URN0093 and URN4177 ([Model Agency H]); URN4876 ([Model Agency J]).

Premier, [Model Agency H], Storm, [Model Agency J] and FM Models.[297] On 25 June 2014, FM Models ([Director]) returned a slightly edited version of this summary to the AMA General Secretary, including with it a new entry from FM Models (stating only that FM Models had no confirmed bookings from [Online Retailer B]).[298]

3.123 On the same day, the AMA General Secretary emailed the updated summary to Storm ([Director]), copying FM Models ([Director]), Models 1 ([Director A]), Premier ([Director]) and Viva ([Director A]):[299]

> '[Director, Storm]*: Further to your email of June 13th – this appears to be the situation. Please let us know your thoughts.* [AMA General Secretary]
>
> [Model Agency I]– £[✂] *for e-com. TV: 4 weeks usage £*[✂]*. Sign below for e-com shoots – but they also sign our conf booking form.*
>
> *Models 1: Best rate £*[✂] *for half-day. Haven't agreed T&C*
>
> *Models 1 Men: £*[✂] *for 3 months online only*
>
> *Premier: Rates vary depending on usage – we negotiate – do not do low rates shoots*
>
> [Model Agency H]*: Have not really been booking with them* [booker] *has been talking to them – no bookings as yet – their rate is really low.*
>
> *Storm: Last offered £*[✂] *- have not worked with them as a result.*
>
> [Model Agency J]*: £*[✂] *- £*[✂] *depending on the job. Have not agreed T&C*
>
> *FM: No bookings confirmed yet'*

3.124 In two emails sent on 25 June 2014 to FM Models ([Director]), Models 1 ([Director A]), Premier ([Director]), Viva ([Director A]) and the AMA General Secretary, Storm ([Director]) remarked that model agencies appeared to be

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[297] URN4178.
[298] URN4877.
[299] URN4878.

receiving different rates from [Online Retailer B], and suggested a meeting between [Online Retailer B] and the AMA.[300] The second email read:[301]

*'Do we think it's worth writing to them again to see if they will meet the AMA?*

*If they aren't getting the models they want, perhaps they will.*

*There is a broad spectrum of fees being paid.'*

***Customer [Retailer B]***

3.125 This sub-section sets out the relevant facts concerning discussions between competitors relating to the fees charged by [Retailer B]. The CMA considers that FM Models, Models 1, Premier and Storm both exchanged confidential, commercially sensitive information (including future pricing information) and agreed to fix minimum prices and to a common approach to future pricing in response to new usage terms sought by [Retailer B] for e-commerce and other digital uses in December 2013.[302]

3.126 On 4 December 2013, Premier ([Director]) forwarded to FM Models ([Director]), Models 1 ([Director A]), Storm ([Director]) and the AMA General Secretary an email chain sent between Premier and [Company D] ([contact]), working on behalf of [Retailer B].[303] The email chain contained information sent by [Company D] to Premier regarding proposed changes to [Retailer B]'s usage terms for model images, including changes to the time period, territories and channels (such as digital signage and internet banner advertising) across which model images could be used.

3.127 Premier forwarded its response to [Company D] to FM Models, Models 1 and Storm as part of the above email chain. By doing so, Premier signalled to FM Models, Models 1 and Storm its intention to ask for a higher fee in view of the extra usage being required. Premier's response to [Company D] read:[304]

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[300] URN4878; URN4879. The fee quoted by Storm in response to the AMA General Secretary's enquiry was lower than the fees quoted by [Model Agency I], Models 1 and [Model Agency J].
[301] URN4879.
[302] There is no evidence of involvement by Viva in these contacts.
[303] URN4564.
[304] URN4564.

*'Thank you for your email regarding the new extra usage, I note that you have not mentioned a new fee for all this extra activity. Would you like me to break the costs down for you and then we could discuss this?'*

3.128 Later the same day, [Company D] replied to Premier, stating that there would be no additional fee for the revised usage and that *'Most of the other agencies have agreed to the amended terms'.* Premier forwarded this reply to FM Models ([Director]), Models 1 ([Director A]), Storm ([Director]) and the AMA General Secretary, together with representatives from model agencies [Model Agency E] ([booker]) and [Model Agency H] ([booker]), stating:[305]

*'!!! dont think this is true……?'*

3.129 Several minutes later, [Model Agency E] ([booker]) responded to Premier's email, copying FM Models ([Director]), Models 1 ([Director A]) and Storm ([Director]) together with the other recipients of Premier's email:[306]

*'We haven't agreed to anything so far. I asked if they were offering more money to reflect the change in usage and how long they would be expecting to use the unrecognisable images for and I haven't had an answer as of yet.'*

3.130 On 17 December 2013, Premier ([Director]) forwarded to FM Models ([Director]), Models 1 ([Director A] and [Director B]), Storm ([Director]) and the AMA General Secretary an email chain received from [Model Agency E] ([booker]), regarding [Model Agency E] further communication with [Company D].[307] The first email in the chain, from [Model Agency E] to Premier, read:

*'Just to keep you in the loop I had a chat with* [contact] @ [Company D] *re the* [Retailer B] *usage* [✂]*, but he told me to put my points in writing so he can forward it on. Below is what I am sending to him, just so you are aware. Not sure if it's along the same lines as what others are doing but we feel it's a fair deal here at* [Model Agency E] *for the girls they currently work with if they agree.'*

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[305] URN4565.

[306] URN4565.

[307] URN4592. The covering email from Premier ([Director]) added only the message: '*Still not back at the office. I received this from* [Model Agency E] *FYI'.*

3.131 As part of the same chain forwarded to FM Models ([Director]), Models 1 ([Director A] and [Director B]) and Storm ([Director]), was an email from [Model Agency E] to [Company D]:[308]

> *'As discussed, I wanted to confirm that unfortunately* [Model Agency E] *are not able to accept the new proposed usage from* [Retailer B] *without an increase in the rates.*
>
> *When looking through this new proposed usage it is basically the same as the* [✂]*, where they pay between £*[✂] *- £*[✂] *plus* [✂]*% per girl - please see this usage attached.*
>
> […]
>
> *Even if* [Retailer B] *protest that they won't be utilising all of this new usage, we cannot sign off all of these rights for nothing, so we would either need* [Retailer B] *to remove all of the extra usage and stick to the existing usage and rates (*[✂]*) or in order for* [Retailer B] *to continue to work with the girls that they currently use (*[…]*) under the new usage we would propose the following:*
>
> *1 - Keep the time frame of the usage to 6 months and remove the unrecognisable usage after this time. as we never agree to any usage in perpetuity, even if it's unrecognisable*
>
> *2 - Restructure the existing fees and increase them by £*[✂] *plus* [✂]*% per day, so the new rate structure for the above girls would be:*
>
> [✂]
>
> *For any other girls in the future if they were the same level as* […] *etc then we would stick to these rates, if they were of a higher level then we would need to negotiate more money.'*

3.132 The same day, Models 1 ([Director B]) responded to Premier's email, copying FM Models ([Director]), a colleague at Models 1 ([Director A]), Storm ([Director]) and the AMA General Secretary, summing up their agreement that additional usage should attract a higher price:[309]

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[308] URN4592.
[309] URN4592.

*'I think we are all agreed that to have the new usage they need to increase the fees and to keep their existing fees they need to restrict the usage.'*

3.133 Later in the afternoon of 17 December 2013, the AMA General Secretary emailed [Company D] ([contact]), copying FM Models ([Director]), Models 1 ([Director A]), Premier ([Director]) and Storm ([Director]). The CMA infers from the content and timing of this email that the AMA General Secretary's email to [Company D] was triggered by the emails sent by Premier and Models 1 as described in paragraphs 3.130 to 3.132:[310]

*'You will be aware that members are expressing concern about the recent proposed* [Retailer B] *usage changes. I gather you will be discussing this with* [Retailer B] *soon – we would be grateful for an update.'*

***Customer [Online Magazine B]***

3.134 This sub-section sets out the relevant facts concerning discussions between competitors regarding fees offered by [Online Magazine B] (the online magazine of [Online Retailer C]) in January 2014. The CMA considers that, in this example, Premier ([Director]) shared with the other Model Agency Parties and the AMA General Secretary confidential, commercially sensitive future pricing information provided to Premier by another model agency, following which Premier ([Director]) and Viva ([Director A]) discussed the fees offered by [Online Magazine B], and agreed to fix minimum prices and to a common approach to pricing, and to refuse to supply modelling services at a particular price.

3.135 The use of click to buy by [Online Magazine B] was discussed at an AMA Council meeting on 21 January 2014, attended by FM Models ([Director]), Models 1 ([Director A]), Premier ([Director] ), Storm ([Director]) and Viva ([Director A]):[311]

*'10.* [Online Magazine B] *(*[Online Retailer C]*)*

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[310] URN5519. The evidence reviewed by the CMA does not reveal any reply from [Company D] to this email.

[311] 5 copies: URN2965, URN3501, URN3855, URN4624 and URN5552. The inclusion of [Online Magazine B] as an agenda item was requested by Storm ([Director]), in an email to the Model Agency Parties and the AMA General Secretary in which Storm stated that '*The issue is that they sell clothes from the editorial but they don't pay a proper rate'* (URN5534).

*This was another 'click to buy' issue raised by* [Director, Storm]*. He had experienced problems booking a New York girl for this magazine; the NY agents see this as catalogue not editorial and charge accordingly.*[312] *High-end girls would not accept these bookings.* [Director, Premier] *had spoken to them with regard to this and got the impression that agents were not changing their policy and were 'toughing' it out.*

*It was decided to try to do some research with members as to their approach with regard to this issue.'*

3.136 The following day, on 22 January 2014, Premier ([Director]) emailed FM Models ([Director]), Models 1 ([Director A]), Storm ([Director]), Viva ([Director A]) and the AMA General Secretary following a discussion with an unnamed New York agency. Premier's email contained information on the fee and usage terms that had been quoted to the New York agency by [Online Magazine B] for the use of video footage of a modelling shoot, and asked the recipients for their comments on supplying models to [Online Magazine B].[313]

3.137 In the email exchange which followed between Premier ([Director]) and Viva ([Director A]), of which the remaining Model Agency Parties and the AMA General Secretary were recipients, Viva ([Director A]) stated that [Online Magazine B]'s rates *'should be increased substantially'*. Further, Premier ([Director]) suggested, and Viva ([Director A] explicitly expressed its agreement, that agencies should refuse to supply models for particular usage types (namely click to buy) at the rate being offered by [Online Magazine B]:[314]

— Premier ([Director]), 16:17:

*'A booker from a large NY agent just called me asking what we were going to do regarding* [Online Magazine B] *as they have just asked if they can use a video of a job shot last year in there* [Online Retailer C brand] *for $*[✂]*.*

*He was laughing but wanted to know why we let our models do* [Online Magazine B]*.*

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[312] Regarding the distinction that model agencies made between fees for 'editorial' content and fees for commercial content (such as a shopping catalogue), see footnote 17. There is no evidence seen by the CMA to demonstrate that the suggested *'research with members'* was carried out.
[313] URN4626.
[314] URN4626.

*See the usage below and please keep this very private as I promised I would not email it but it is too long so I took all relevant clues out!*

*We did not really get to a great conclusion yesterday I felt we were a bit wishy washy?*

*Please come back with your thoughts.'*

— Viva ([Director A]), 16:22:

*'*[✂]*. I think their rates should be increased substantially if they want to continue to use a good level of girl.'*

— Premier ([Director]), 16:26:

*'Well we won't give them girls now purely because they ask for girls out of their reach as the level of photographers is not that major and NY would just say why? but with the 'Click to Buy' we should all say a big fat NO even for medium girls.'*

— Viva ([Director A]), 16:29:

*'Agreed from the Viva jury'*

3.138 On 23 January 2014, Models 1 ([Director B]) responded to Viva's email of 16:22, copying FM Models ([Director]), a colleague at Models 1 ([Director A]), Storm ([Director]), Viva ([Director A]) and the AMA General Secretary.[315] Models 1 ([Director B]) reported on conversations with [Online Magazine B] regarding whether the assignment was editorial or commercial in nature (which had consequences for the fee payable),[316] offered to meet with the customer on behalf of the AMA to discuss this matter and suggested that the Model Agency Parties should not supply models while the assignment remained classed (and remunerated) as editorial:

*'I have had endless conversations with* [contact, Online Retailer C] *pointing out that it is not editorial it is commercial but we get nowhere. They keep getting girls so at this point it is working for them.*

*Most of the bigger girls they have shot with have only done it as part of PR activity for a campaign I think, there can be no other reason.*

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[315] URN4629.

[316] Regarding the distinction that model agencies made between fees for 'editorial' content and fees for commercial content, see footnote 17.

*I would be happy to meet with them on behalf of the AMA and go higher than* [contact, Online Retailer C] *because it is clearly not editorial and we shouldn't allow the girls to do it.'*

## D. The role of the AMA

3.139 The CMA considers that the AMA played an essential role in the contacts described in Sections 3.B and 3.C, both passively and, in many instances, actively, and that its conduct was separate from that of the Model Agency Parties.[317]

3.140 In particular, the CMA makes the following findings of fact concerning the conduct of the AMA:

*(a)* On a regular basis throughout the Relevant Period, the AMA General Secretary received confidential, commercially sensitive, future pricing information from model agencies regarding their intention not to accept a particular modelling assignment, on the basis that the model agency considered the fee offered to be too low or the scope of usage too wide.[318]

*(b)* On the basis of such information, the AMA General Secretary issued at least 123 relevant AMA Alerts to AMA members, communicating to the recipients that certain of their competitors were not accepting a particular casting (in most cases, by reference to a named customer).[319]

*(c)* On a number of occasions, following a discussion between directors of the Model Agency Parties who were also AMA Council members regarding fees or usage terms for a particular customer, or fees for a particular usage category, the AMA General Secretary sent emails and/or signed letters to customers or AMA members in pursuance of those discussions.[320]

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[317] Models 1 ([Director A]) confirmed in its oral representations how the AMA's role in general was often viewed by external parties as being separate from that of the Model Agency Parties: *'I do not know that, within the industry, the AMA was looked on as "the five people". I do not think people saw it in that way...'* (URN7171).

[318] See Section 3.B and in particular paragraphs 3.17 to 3.24.

[319] See Section 3.B and in particular paragraphs 3.25 to 3.33.

[320] See further paragraphs 3.80 to 3.83, 3.96 and 3.100 to 3.101 ([Online Retailer A]) and paragraph 3.133 ([Retailer B]). On occasion, an AMA Council member had provided the AMA General Secretary

*(d)* On at least two occasions, following a discussion between the directors of the Model Agency Parties who were also AMA Council members regarding a particular customer or usage issue, the AMA General Secretary sought commercially sensitive information from AMA members in pursuance of those discussions and subsequently disclosed it to the Model Agency Parties.[321]

*(e)* In addition, the AMA General Secretary was copied on the vast majority of the email discussions quoted in Section 3.C in which the Parties exchanged confidential, commercially sensitive (including future pricing information) information relating to the customers and usage categories described in the Detailed Customer Examples. The AMA General Secretary also attended all of the AMA Council meetings and AMA AGMs referenced in that section at which the same matters were discussed, and was responsible for taking and circulating notes of those meetings.[322]

## E. The role of the AMA Council

3.141 The CMA finds that the contacts between competitors described in Sections 3.B and 3.C occurred under the aegis of the AMA Council and the AMA. The CMA also considers that, throughout the Relevant Period, the Model Agency Parties played significant roles (in particular via the AMA Council members) in the management of the AMA, including in terms of either actively instructing the AMA (typically through the AMA General Secretary) to take certain actions (such as instructing the AMA General Secretary to issue AMA Alerts or to seek confidential, commercially sensitive information from other AMA members), or tacitly acquiescing to the actions of the AMA.

3.142 In particular, the CMA makes the following findings of fact:

*(a)* The AMA Council was the executive decision-making body responsible for managing the business of the AMA.[323]

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with the precise wording to use in a letter or email to be sent out in her name (see for example paragraph 3.84, second email chain and paragraphs 3.100 to 3.101).

[321] See further paragraphs 3.87 to 3.92 ([Online Retailer A]) and paragraph 3.119 to 3.123 ([Online Retailer B]).

[322] See Section 3.C See also paragraph 2.104.

[323] See further paragraph 2.97.

*(b)* Each of the Model Agency Parties had a director who was a member of the AMA Council and therefore an officer of the AMA during the Relevant Period.[324]

*(c)* All directors of the Model Agency Parties who were also AMA Council members were sighted of the AMA Alerts system operated by the AMA General Secretary. Each of the Model Agency Parties, principally through the AMA Council members, played an important role in maintaining, promoting and overseeing the AMA Alerts system.[325] In addition, the AMA Chairman[326] made a point at the start of each AMA AGM of citing the number of AMA Alerts issued that year.[327]

*(d)* Certain discussions concerning the fees and usage terms for certain customers were held amongst the representatives of the Model Agency Parties who were also AMA Council members, including but not exclusively at AMA Council meetings, before being relayed to or involving other model agencies (whether via an AMA Alert, at an AMA AGM or through email discussions involving other model agencies).[328]

In addition, the directors of the Model Agency Parties who were also AMA Council members regularly exchanged amongst themselves information concerning, or received by, other models agencies and customers relating to the fees and usage terms for modelling assignments.[329]

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[324] See further paragraph 2.99.

[325] See paragraph 3.7.

[326] Throughout the Relevant Period this was [Director] of FM Models.

[327] See further paragraph 3.6 and footnote 125.

[328] See further paragraphs 3.20 to 3.22 ([Company A]); paragraph 3.55 and 3.57 ([Online Magazine A]); paragraph 3.69 ([Retailer C]); paragraphs 3.96, 3.97, 3.99 to 3.101 and paragraph 3.102(c) ([Online Retailer A]); paragraphs 3.111 to 3.113 ([Retailer A]); paragraph 3.119 ([Online Retailer B]); paragraphs 3.126 to 3.127 ([Retailer B]) and paragraph 3.135 ([Online Magazine B]). In relation to this last example, as noted in footnote 312, the CMA has not seen any evidence which demonstrates that the suggested *'research with members'* was carried out.

[329] In addition to the paragraphs listed at footnote 328, see further paragraph 3.70 ([online magazine shop]); paragraphs 3.80, 3.84, 3.86, 3.102(a), 3.102(b), 3.103 and 3.105 to 3.109 ([Online Retailer A]); paragraph 3.116 ([Retailer A]); paragraph 3.124 ([Online Retailer B]); paragraphs 3.130 to 3.132 ([Retailer B]); paragraphs 3.135 to 3.138 ([Online Magazine B]).

# 4. LEGAL ASSESSMENT

## A. Introduction

4.1 This section sets out the CMA's legal assessment of the Parties' conduct, taking into account the relevant facts concerning the Parties' conduct set out in Section 3 and in light of the factual background set out in Section 2. The key legal principles, including references to the relevant case law and primary and secondary legislation, are also included in this section.

4.2 The CMA has assessed the evidence in this case by reference to the civil standard of proof, namely whether it is sufficient to establish on the balance of probabilities that an infringement occurred.[330]

4.3 References to specific paragraphs of Sections 2 and 3 are footnoted for ease of reference to the key relevant facts, but the CMA's conclusions are reached in light of the totality of the relevant facts presented in Sections 2 and 3.

## B. General

4.4 The Chapter I prohibition and Article 101 TFEU[331] prohibit agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade within the UK and between Member States, respectively, and which have as their object or effect the prevention, restriction or distortion of competition within the UK and the internal market, respectively, unless they are excluded or exempt.

4.5 When applying the Chapter I prohibition to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 101 TFEU which may affect trade between Member States within the meaning of that provision, the CMA must also apply Article 101 TFEU to such agreements, decisions or concerted practices.[332]

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[330] *Tesco Stores Limited v Office of Fair Trading* [2012] CAT 31, at [88].

[331] Both provisions are relevant to this case by reason of the *Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty* (the '***Modernisation Regulation***').

[332] Article 3(1) of the Modernisation Regulation. In addition, section 60 of the Act provides that, so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising in relation to UK competition law should be dealt with in a manner which is consistent with the treatment of corresponding questions under EU competition law. Further, the CMA (i) must act (so far as it is compatible with the provisions of Part I of the Act) with a view to securing

## C. Undertakings and associations of undertakings

4.6 The Chapter I prohibition and Article 101 TFEU apply to agreements or concerted practices between 'undertakings', as well as to decisions by 'associations of undertakings' (see also paragraph 4.9).

### *Legal framework*

*Undertakings*

4.7 The term 'undertaking' is not defined in the Act or in the TFEU. It is a wide term that has been defined by the CJEU 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'.[333] 'Economic activity' has been defined as conducting any activity 'of an industrial or commercial nature by offering goods and services on the market'.[334]

*Association of undertakings*

4.8 An association of undertakings is widely construed under EU and UK competition law[335] and covers any body formed to represent the interests of its members in commercial matters. It is irrelevant how the association is organised, or the exact legal form that the association takes.[336] The fact that an association acts in the interest of its members, who are undertakings, is sufficient to hold that an organisation is an association of undertakings for the purpose of the Chapter I prohibition and Article 101 TFEU.[337]

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that there is no inconsistency with the principles laid down by the TFEU, the Court of Justice (the '**CJEU**') and the General Court (the '**GC**') (together, the '**European Courts**') and any relevant decision of the European Courts; and (ii) must have regard to any relevant decision or statement of the European Commission.

[333] Judgment in *Hofner and Elser v Macrotron*, C-41/90, ECR, EU:C:1991:161, paragraph 21.

[334] Judgment in *Commission v Italy*, C-118/85, ECR, EU:C:1987:283, paragraph 7.

[335] Judgment in *Wouters and Others*, C-309/99, ECR, EU:C:2002:98 ('***Wouters***'), paragraphs 50 and 64; Judgment in *MasterCard and Others v Commission*, C-382/12 P, EU:C:2014:2201 ('***MasterCard***'), paragraph 62. See also Opinion of AG Léger in *Wouters*, paragraph 62.

[336] *OFT's Guidance on Trade associations, professions and self-regulating bodies* (OFT408, December 2004), adopted by the CMA Board ('***Guidance on Trade associations***'), paragraph 1.4.

[337] Judgment in *Verband der Sachversicher v Commission*, C-45/85, EU:C:1987:34, paragraph 29; Judgment in *FNCBV and Others* v *Commission*, joined cases T-217/03 and T-245/03, ECR, EU:T:2006:391 ('***FNCBV***'), paragraph 54; Judgment in *Eurofer v Commission*, T-136/94, ECR, EU:T:1999:45, paragraph 110; Commission Decision of 5 June 1996, *Fenex,* Case IV/34.983 ('***Fenex***'), paragraph 31.

4.9 An association of undertakings may itself be held liable for an infringement of the Chapter I prohibition or Article 101 TFEU either because it has adopted an anti-competitive decision or because it has itself entered into an anti-competitive agreement or concerted practice.[338]

4.10 In circumstances where an association of undertakings and its members have participated in the same infringement, the competition authority may address its infringement decision to either the association or its relevant members or to both.[339] According to case law of the CJEU, in order to find that both an association and its members have participated in one and the same infringement, it is necessary to establish conduct on the part of the association which is separate from that of its members.[340]

4.11 As regards the members, CMA guidance explains: '*the fact that members of an association of undertakings are acting through the association does not affect the way in which Article 81* [now Article 101 TFEU] *and/or the Chapter I prohibition apply to their decisions, rules, recommendations or other activities*; *their position is no better and no worse than if they were acting in the same manner outside the forum of such an association*'.[341]

4.12 Where an infringement by an association of undertakings relates to the activities of its members, the maximum penalty that may be imposed is 10 per cent of the sum of the worldwide turnover of each member active on the market affected by the infringement.[342]

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[338] Commission Decision of 10 July 1986, *Roofing Felt*, Case IV/31.371 ('***Roofing Felt***'), paragraph 102, decision upheld on appeal in Judgment in *Belasco v Commission,* C-246/86, ECR, EU:C:1989:301 ('***Belasco***'); Commission Decision of 16 February 1994, *Steel Beams*, OJ 1994 L/116 (upheld on appeal); Commission Decision of 30 November 1994, *Cement*, Cases IV/33.126 and 33.322, upheld on appeal in Judgment in *Cimenteries CBR v Commission,* T-25/95 ECR, EU:T:2000:77 ('***Cimenteries***'), paragraphs 1325 to 1328.

[339] See *Cimenteries*, paragraphs 478 and 485 where the GC noted that it was '*normal practice for the Commission, where it finds that an association of undertakings and its members have participated in the same infringement, to impose a fine either on the undertakings which are members of that association of undertakings or on the association of undertakings … If, for particular reasons, such as those mentioned in recital 65, paragraph 8, of the contested decision, it intends to fine both the association of undertakings and the member undertakings of that association, it must make that intention clear in the SO or in a supplement thereto'* (paragraphs 478 and 485).

[340] See *Cimenteries*, paragraph 1325, citing Judgment in *Ahlstrom Osakeyhtio and Others v Commission*, joined cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125-129/85, ECR, EU:C:1988:447 ('***Ahlstrom***').

[341] *Guidance on Trade associations*, paragraph 3.1. See also Judgment in *Bureau national interprofessionnel du cognac v Guy Clair,* C-123/83, EU:C:1985:33 ('***BNIC***'), paragraph 20.

[342] Section 36(8) of the Act; see also *Guidance on Trade Associations*, paragraph 8.4.

***Application in this case***

4.13 Each of the Model Agency Parties is engaged in offering model agency services in the UK and is therefore an entity engaged in economic activities.[343] The CMA therefore finds that each of FM Models, Models 1, Premier, Storm and Viva constitutes an undertaking for the purposes of the Chapter I prohibition and Article 101 TFEU.

4.14 In light of the facts set out in section 2.F, the CMA concludes that the AMA was formed, and operated throughout the Relevant Period, amongst other things, to act in the interests of its member model agencies and, in particular, to promote and develop the reputation and prestige of model agents and models and to promote the interests and image of the profession. Given the CMA's finding that the Model Agency Parties are undertakings, the CMA therefore concludes that for the purposes of the Chapter I prohibition and Article 101 TFEU the AMA was an association of undertakings throughout the Relevant Period.

## D. Coordination between undertakings

***Legal framework***

4.15 The Chapter I prohibition and Article 101 TFEU apply to 'agreements' as well as to 'concerted practices' and 'decisions by associations of undertakings'.

*Agreements*

4.16 The Chapter I prohibition and Article 101 TFEU are intended to catch a wide range of agreements, including oral agreements and 'gentlemen's agreements'.[344] An agreement may be express or implied by the parties, and there is no requirement for it to be formal or legally binding, nor for it to contain any enforcement mechanisms.[345] Tacit acquiescence may also be sufficient to give rise to an agreement for the purpose of the Chapter I

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[343] See paragraphs 2.52 (FM Models), 2.58 and 2.63 to 2.65 (Models 1), 2.68 (Premier), 2.73 and 2.78 to 2.79 (Storm) and 2.82 and 2.85 to 2.90 (Viva).
[344] Judgment in *ACF Chemiefarma NV v European Commission*, C-41/69, ECR, EU:C:1970:71, paragraphs 106 to 114.
[345] *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, at [658]; Commission Decision of 9 December 1998, *Greek Ferries*, Case IV/34466, paragraph 141 (upheld on appeal).

prohibition or Article 101 TFEU.[346] An agreement may also consist of either an isolated act or a series of acts or a course of conduct.[347] 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'*.[348]

4.17 Although it is necessary to show the existence of a joint intention to act on the market in a specific way in accordance with the terms of the agreement, the CMA is not required to establish a joint intention to pursue an anti-competitive aim.[349]

*Concerted practices*

4.18 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.[350]

4.19 The following key points arise from the case law on the concept of a concerted practice:

*(a)* 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 prices and commercial terms it offers to customers.[351] This requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of

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[346] Judgment in *Commission v Volkswagen AG*, C-74/04P, ECR, EU:C:2006:460, paragraph 39; Commission Notice: *Guidelines on Vertical Restraints*, OJ C 130, 19 May 2010, paragraph 25.
[347] Judgment in *Commission v Anic Partecipazioni*, C-49/92P, ECR, EU:C:1999:356 ('***Anic Partecipazioni***'), paragraph 81.
[348] Judgment in *Bayer v Commission*, T-41/96, ECR, EU:T:2000:242, paragraph 69 (upheld on appeal in Judgment in *BAI and Commission v Bayer*, joined cases C-2/01 P and C-3/01 P, ECR, EU:C:2004:2, paragraphs 96 and 97) and Judgment in *Hercules Chemicals* v *Commission*, T -7/89, ECR, EU:T:1991:75 ('***Hercules Chemicals***'), paragraph 256.
[349] Judgment in *GlaxoSmithKline Services v Commission*, T-168/01, EU:T:2006:265, paragraph 77 (upheld on appeal in Judgment in *GlaxoSmithKline Services v Commission*, joined cases C-501/06P etc, EU:C:2009:610 ('***GlaxoSmithKline***').
[350] *Argos, Littlewoods and JJB*, at [22].
[351] Judgment in *Suiker Unie v Commission*, C-40/73 etc., ECR, EU:C:1975:174 ('***Suiker Unie***'), paragraph 173. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4 ('***Apex Asphalt***'), at [206(iv)].

their competitors. It does, however, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the future conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market.[352]

*(b)* A concerted practice is a form of coordination between undertakings which falls short of *'having reached the stage where an agreement properly so-called has been concluded'*, and where competitors knowingly substitute practical cooperation between them for the risks of competition.[353] The CJEU 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'*.[354]

*(c)* The coordination (which is prohibited by the requirement of independence) comprises *'any direct or indirect contact'* between undertakings,[355] which has the object or effect[356] of influencing the conduct on the market of an undertaking[357] thereby creating conditions of competition which do not correspond to the normal conditions of the market in question. [358]

*(d)* It follows that a concerted practice implies, besides undertakings concerting together, conduct on the market pursuant to those

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[352] Judgment in *Dole Food and Dole Fresh Fruit Europe v Commission,* C-286/13, EU:C:2015:184 ('***Dole Food***'), paragraph 120; Judgment in *T-Mobile Netherlands and Others v NMa*, C-8/08, EU:C:2009:343 ('***T-Mobile***'), paragraph 33.

[353] *ICI*, paragraph 64. See also *T-Mobile*, paragraph 26 and *JJB Sports plc v OFT* [2004] CAT 17 ('***JJB Sports***'), at [151] to [153].

[354] *ICI*, paragraph 65. See also *JJB Sports* at [151].

[355] *Suiker Unie*, paragraphe 174. See also *T-Mobile*, paragraph 33; *Apex Asphalt* at [206(v)].

[356] *Ibid*. The case law provides that a concerted practice also arises in the situation in which the object or effect of the direct or indirect contact is to disclose to a competitor the course of conduct which the disclosing party has decided to adopt or contemplates adopting on the market.

[357] *Ibid*.

[358] Judgment in *Gerhard Züchner v Bayerische Vereinsbank,* C172/80, ECR, EU:C:1981:178 ('***Gerhard Züchner***'), paragraph 14; *Anic Partecipazioni*, paragraph 117; and *T-Mobile*, paragraph 33. The CJEU (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.

collusive practices, and a relationship of cause and effect between the two.[359] However, that does not necessarily mean that the conduct should produce the concrete effect of restricting, preventing or distorting competition.[360] In addition, the CJEU in *Huls v Commission* stated that '*subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market. That is all the more true where the undertakings concert together on a regular basis over a long period'*.[361]

4.20 Therefore, in order to prove concertation, it is not necessary to show that the competitor in question has formally undertaken, in respect of one or several others, to adopt a particular course of conduct or that the competitors have expressly agreed a particular course of conduct on the market. It is sufficient that the exchange of information should have removed or reduced the degree of uncertainty as to the conduct in the market to be expected on his part.

*Agreement and/or concerted practice*

4.21 It is not necessary, for the purpose of finding an infringement, to distinguish between agreements and concerted practices, or to characterise conduct as exclusively an agreement, a concerted practice or a decision by an association of undertakings.[362] Nothing turns on the precise form taken by each of the elements comprising the overall agreement and/or concerted practice. As explained by the CJEU, '*it is settled case-law that, although Article* [101 TFEU] *distinguishes between 'concerted practice', 'agreements between undertakings' and 'decisions by associations of undertakings', the aim is to have the prohibition of that article catch different forms of coordination between undertakings of their conduct on the market* […] *and thus to prevent undertakings from being able to evade the rules on*

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[359] Judgment in *Huls v Commission*, C-199/92, ECR, EU:C:1999:358 ('***Huls***'), paragraph 161.
[360] *Anic Partecipazioni*, paragraph 124. See also *Apex Asphalt*, at [206(xi)].
[361] *Huls*, paragraph 162.
[362] *Argos, Littlewoods and JJB*, at [21]. See also *Hercules Chemicals,* paragraph 264; Judgment in *Rhône-Poulenc* v *Commission,* T-1/89, ECR, EU:T:1991:56 ('***Rhône-Poulenc**')*, paragraph 127; *Anic Partecipazioni*, paragraphs 131 and 132; and also *Roofing Felt*, in which the conduct of the undertakings was found to be an agreement as well as a decision of an association.

*competition on account simply of the form in which they coordinate their conduct'.*[363]

4.22 It is also established that a series of agreements, concerted practices or decisions by associations of undertakings can be characterised as constituting a single and continuous infringement where they are interlinked in terms of pursuing a common objective (see further Section 4.E).

*Participation and implementation*

4.23 It is settled case law that it is sufficient that the party concerned participated in meetings in which anti-competitive arrangements were concluded to prove to the requisite standard that the undertaking participated in the cartel, unless there is evidence that the party had publicly distanced itself from those anti-competitive arrangements. This is because a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, encourages the continuation of the infringement and compromises its discovery.[364]

4.24 The CJEU has held that this principle applies in situations where a party receives the information regarding the anti-competitive arrangements via email, rather than in the context of a meeting:

> *'Article 101(1) TFEU must be interpreted as meaning that, where the administrator of an information system* […] *sends to those economic operators, via a personal electronic mailbox, a message informing them that the discounts on products sold through that system will henceforth be capped* […] *those economic operators may - if they were aware of that message - be presumed to have participated in a concerted practice within the meaning of that provision, unless they publicly distanced themselves from that practice, reported it to the administrative authorities*

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[363] *MasterCard*, paragraph 63 and the case law cited. See Judgment in *HFB,* T-9/99, ECR, EU:T:2002:70, paragraphs 186 to 188; Judgment in *Asnef-Equifax,* C-238/05, ECR, EU:C:2006:734, paragraph 32. See also Judgment in *LVM v Commission,* joined cases T-305/94, T-306/94, etc., ECR, 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*.'

[364] Judgment in *Dansk Rørindustri and Others* v *Commission,* joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, ECR, EU:C:2005:4, paragraphs 142 and 143; Judgment in *AC-Treuhand v Commission,* C-194/14 P, EU:C:2015:717, paragraph 31; Judgment in *Quinn Barlo v Commission,* C-70/12P, EU:C:2013:351, paragraph 29.

*or adduce other evidence to rebut that presumption, such as evidence of a systematic application of a discount exceeding the cap in question'.*[365]

4.25 The fact that a party may have played only a limited part in setting up an agreement or concerted practice, 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 or concerted practice.[366]

4.26 Parties may show varying degrees of commitment to the common plan: the fact that a party does not abide by the outcome of meetings[367] or does not act on or subsequently implement the agreement or concerted practice does not preclude the finding of its liability or relieve that undertaking of responsibility for it.[368] In addition, the fact that a party comes to recognise that it can 'cheat' on the agreement or concerted practice at certain times does not preclude the finding of an infringement.[369]

4.27 Further, where an agreement or concerted practice has the object of restricting competition, parties cannot avoid liability for the resulting infringement by arguing that the agreement or concerted practice was never put into effect.[370]

### *Application in this case*

*Summary of conclusions - agreement and/or concerted practice*

4.28 For the reasons set out in paragraphs 4.37 to 4.55, the CMA finds that, in light of the factual background and relevant facts set out in Sections 2 and 3, between at least April 2013 and 23 March 2015 the Parties engaged in an

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[365] Judgment in *Eturas UAB and Others v Lietuvos Respublikos konkurencijos taryba*, C-74/14, EU:C:2016:42, paragraph 50.

[366] *OFT's Guidance on Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board ('***Guidance on Agreements and Concerted Practices***'), paragraph 2.8. See also, for example, *Cimenteries*, paragraphs 1389 and 2557 (this judgment was upheld on liability (although the fine was reduced) by the CJEU in Judgment in *Aalborg Portland and Others v Commission*, joined cases C-204/00 *P etc.,* EU:C:2004:6) and *Anic Partecipazioni*, paragraphs 79 and 80.

[367] *Cimenteries*, paragraph 1389.

[368] Judgment in *Sandoz v Commission*, C-277/87*,* ECR, EU:C:1990:6 ('***Sandoz***'), paragraph 3.

[369] *Belasco*, paragraphs 15 to 16.

[370] See, for example, Judgment in *Miller v Commission*, C-19/77, ECR, EU:C:1978:19, paragraph 7; Judgment in *Hasselblad v Commission*, Case 86/82, ECR, EU:C:1984:65, paragraph 46; *Sandoz*, paragraph 3.

agreement and/or concerted practice relating to the supply of modelling services in the UK.

4.29 The agreement and/or concerted practice had the object of coordinating the commercial and pricing behaviour of the Model Agency Parties and, through the regular and systematic circulation of AMA Alerts, the commercial and pricing behaviour of the broader AMA membership, with the intention of resisting downward pressure on prices for the supply of modelling services, both in the context of negotiations with specific customers and more generally.

4.30 The agreement and/or concerted practice involved the Model Agency Parties expressing a joint intention to conduct themselves on the market in a specific way, including (i) in the context of negotiations with certain specific customers: agreeing to fix minimum prices and to a common approach to pricing; agreeing to refuse to supply modelling services at a particular price; discussing collectively the possibility of rejecting a customer's proposed price; and discussing the acceptable minimum price; and (ii) the Parties agreeing to use the AMA and the AMA Alerts system to coordinate prices.

4.31 The agreement and/or concerted practice also involved a common understanding that the Parties would regularly and systematically share confidential, commercially sensitive information (including future pricing information) throughout the Relevant Period. The information was shared through numerous instances of more protracted and detailed contact between the Parties in relation to particular customers or usage types (as described in the Detailed Customer Examples) and through the AMA Alerts system (both indirectly, through regularly receiving the AMA Alerts circulated by the AMA, and directly, through discussions and/or email correspondence prior to and after the release of one or more AMA Alerts). These mechanisms for information-sharing are, in the CMA's view, evidence that the Parties had a shared understanding that they would exchange certain confidential, commercially sensitive information (including future pricing information).

4.32 It follows that the CMA considers that the Parties' conduct gave rise to an agreement to prevent, restrict or distort competition in the supply of modelling services in the UK.

4.33 In the alternative, the CMA finds that the Parties' conduct gave rise to a concerted practice. The Parties must have known, or could reasonably have foreseen, that their protracted and detailed contacts and the exchange of confidential, commercially sensitive information (including future pricing information) described in Section 3 were at least capable of coordinating the

conduct of the Model Agency Parties. The Parties therefore knowingly substituted practical co-operation for the risks of competition.

4.34 The CMA considers that, throughout the Relevant Period, each of the Model Agency Parties remained active in the market; received all 123 AMA Alerts which fall within the scope of this Decision; and participated in some or all of the exchanges discussed in the Detailed Customer Examples. The CMA is therefore entitled to presume that each of the Model Agency Parties took account of the information received via the AMA Alerts (and associated correspondence) and in the contacts described in the Detailed Customer Examples for the purposes of determining their conduct in the market.[371] The CMA has not seen any evidence to the contrary (and, in fact, there is evidence of some of the Model Agency Parties informing the AMA that customers had increased their proposed fees following the circulation of an AMA Alert – see paragraphs 3.43 to 3.51).

4.35 Furthermore, the CMA has not seen any evidence of any of the Parties distancing themselves publicly from any of the contacts described in Section 3 (and none of the Parties sought provided evidence to the contrary in their response to the Statement).

4.36 The CMA does not need to find an agreement in circumstances where a concerted practice has been established; nor does the CMA need to reach a firm conclusion as to whether the conduct amounted to an agreement as opposed to a concerted practice. The CMA's finding concerning the Infringement does not, therefore, depend on whether the conduct amounted specifically to an agreement or to a concerted practice.

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[371] See paragraphs 4.18 to 4.20. In its representations on the Statement, Viva stated that the CMA had not proved that [Director A] had circulated information received from the AMA and from the other AMA Council members to Viva's bookers, and that without that information bookers could not take it into account in determining their future conduct (the CMA notes that Viva did not claim that [Director A] did not circulate that information. Viva however accepts that [Director A] was herself a booker during that period, in addition to holding a senior position (director) and [✂]) (URN6892). Furthermore, the CMA is entitled to presume that undertakings remaining active on the market took account of the information exchanged when determining their conduct on the market (and that is all the more the case where the undertakings concert together on a regular basis over a long period).

*The role of the AMA*

4.37 In light in particular of the facts set out in Section 3.D, the CMA finds that the AMA was also a party to one and the same agreement and/or concerted practice as the Model Agency Parties.

4.38 The AMA participated in the agreement and/or concerted practice both passively[372] and, in many instances, actively, by circulating AMA Alerts, by participating in many of the exchanges between the Model Agency Parties described in Section 3, and by gathering certain information from other AMA members to share with the Model Agency Parties; in each case, the information being circulated, exchanged and shared was confidential, commercially sensitive information (including future pricing information). The circulation of such information was clearly not consistent with the principle that each economic operator must determine independently the policy it intends to adopt on the market.

4.39 On this basis, the CMA considers that the AMA played an essential role in operating the AMA Alerts system, and that its conduct was separate from that of the Model Agency Parties. Furthermore, as further discussed in Section 4.F, the CMA considers that the AMA intended to contribute by its own conduct to the common objectives of the agreement and/or concerted practice that is the subject of this Decision, and that it was aware of the actual conduct planned or put into effect in pursuit of the common objectives, or could reasonably have foreseen it and was prepared to take that risk.[373]

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[372] See first part of paragraph 3.142(e).

[373] The AMA has submitted that its role in the agreement and/or concerted practice that is the subject of this Decision was as a 'clearing house' and therefore the AMA did not have a separate role from the Model Agency Parties (URN7126). On this basis, the AMA has submitted that its role was akin to the role of KEA as considered by the CJEU in *Ahlstrom*. The CMA considers, however, that the role played by KEA in the infringement in *Ahlstrom* can be distinguished from the separate role played by the AMA in this case. In *Ahlstrom*, paragraph 27 in particular, the price recommendations issued by KEA could not be distinguished from the prior pricing agreements concluded by the members. In contrast, the AMA Alerts were typically issued by the AMA without any prior agreement between the Model Agency Parties in relation to the specific customer and/or assignment having been reached. Accordingly, where this was the case, the AMA played an important role, separate from the Model Agency Parties' roles, in contributing to the overall object of the Parties concerning the agreement and/or concerted practice that is the subject of this Decision, in particular of coordinating, through the regular and systematic circulation of AMA Alerts, the commercial and pricing behaviour of the broader AMA membership.

*The role of the AMA Council*

4.40 As set out in Section 3.E, the CMA finds that the contacts between the Model Agency Parties described in Sections 3.B and 3.C occurred under the aegis of the AMA and of the AMA Council, and that the Model Agency Parties played significant roles (in particular via the AMA Council members) in the management of the AMA, including in terms of either actively instructing the AMA (typically by instructing the AMA General Secretary) to take certain actions, or tacitly acquiescing in the actions of the AMA. On the basis of that evidence, and in light of the facts concerning the AMA's activities set out in Section 2.F, the CMA considers that there was an agreement between the Model Agency Parties and between the Model Agency Parties and the AMA to use the AMA and the AMA Council as a vehicle to help meet their wider aim of coordinating the Model Agency Parties' own commercial and pricing behaviour and, through the regular and systematic circulation of AMA Alerts, the commercial and pricing behaviour of the broader AMA membership.[374]

*Detailed Customer Examples*

4.41 The CMA considers that the relevant facts concerning the Detailed Customer Examples set out in Section 3.C are evidence of an agreement and/or a concerted practice amongst the Parties.

4.42 The CMA finds that, in certain instances, the Model Agency Parties agreed to fix minimum prices and to a common approach to pricing, or agreed to refuse to supply modelling services at a particular price, including in the following examples:

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[374] Viva submitted that, if [Director A] was always acting in her capacity as an AMA Council member when she sent or received the relevant emails referred to in the Statement, in the absence of other evidence of infringement by Viva, the CMA is not entitled to find that Viva infringed the Chapter I prohibition or Article 101 TFEU (URN6892). However, the CMA considers that the aim behind the contacts between the Parties (or a selection of those contacts) described in Section 3 was to coordinate the Model Agency Parties' commercial behaviour and, through the systematic circulation of AMA Alerts, the commercial behaviour of the broader AMA membership. The Parties have not put forward a plausible alternative aim. Given that this aim is to the principal benefit of the Model Agency Parties, it is implausible to suggest that [Director A] participated only in her capacity as AMA Council member, since that could only be expected to be the case if the principal aim of the conduct had been to the benefit of the AMA. Aside from enhancing its members' perception of the quality of service provided by the AMA (and possibly boosting its membership numbers as a result), there is no obvious benefit to the AMA sufficient to suggest that AMA Council members would be operating only in the interests of the AMA, rather than in the interests of their own model agency. Indeed, Viva has not provided any evidence supporting its assertion.

*(a)* In an email exchange dated 28 June 2013 among all of the Parties, Models 1, Premier and Viva each stated the specific fees that they considered should be charged for click to buy usage to the customer [Online Magazine A] and more generally. Accordingly, the CMA considers that, in this instance, the Model Agency Parties agreed to fix minimum prices and to a common approach to pricing in respect of a particular category of usage, namely, click to buy.[375]

*(b)* Following discussion at an AMA Council meeting in January 2014, which was attended by all the Parties, the Model Agency Parties agreed that they should charge an additional day rate for the additional use of modelling images in online advertising by the customer [Online Retailer A], and thereby fixed the minimum price at which they would supply to [Online Retailer A] for the usage sought. FM Models' representative on the AMA Council reported to a colleague that a *'consensus'* had been reached at the AMA Council meeting that such usage '*should merit an extra day rate*'.[376] The fact that an agreement had been reached between the Model Agency Parties is also corroborated by (i) the fact that Premier disclosed to Models 1 and Storm its pricing intentions as regards [Online Retailer A] by forwarding to those two competitors an email it had sent to the customer shortly after it had sent it;[377] and (ii) the fact that Premier reported to the other Parties that it was receiving payments from [Online Retailer A] for the use of model images in cookie-driven advertising and other usages.[378] Accordingly, the CMA considers that, in this instance, the Model Agency Parties agreed to fix minimum prices and to a common approach to prices in respect of a particular usage category, namely fees for the use of model images in online advertising.

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[375] See paragraph 3.57.

[376] See paragraph 3.106.

[377] See paragraph 3.108.

[378] See paragraph 3.109. In their written representations on the Statement, Storm and Models 1 stated that they have never charged for cookies and therefore no agreement or concerted practice exists as regards the cookie-driven advertising component of the conduct concerning [Online Retailer A] (URN6896). However, no evidence has been provided to support this statement. In any event, the CMA considers that such evidence would not impact the CMA's findings as regards the involvement of Models 1 and Storm in fixing the minimum price at which the Model Agency Parties would supply models to [Online Retailer A] for the use of modelling images in online advertising (see paragraphs 4.25 and 4.26). Furthermore, some of the Parties submitted that an agreement that the use of images in online advertising should attract an extra fee is not an agreement on price. However, the CMA notes that, in this particular instance, the Model Agency Parties agreed that on the specific 'surcharge' that would apply to this type of usage (that is, one additional day rate).

*(c)* FM Models, Models 1, Premier and Storm agreed that the new, additional, usage being required by [Retailer B] in December 2013 should attract a higher fee. Models 1 emailed FM Models, Premier, Storm and the AMA, stating *'I think we are all agreed that to have the new usage they need to increase the fees and to keep their existing fees they need to restrict the usage'*.[379] Accordingly, the CMA considers that, in this instance, the Model Agency Parties agreed to fix minimum prices and to a common approach to prices.

*(d)* In January 2014, the Model Agency Parties agreed that they would refuse to supply models for particular usage types (namely click to buy) at the rate being offered by [Online Magazine B]. In so doing, the Model Agency Parties also agreed that the rate [Online Magazine B] had offered was not acceptable. In an email to which all the Parties were recipients, Viva initiated the discussion by stating: '*I think their rates should be increased substantially if they want to continue to use a good level of girl'*.[380] Accordingly, in this instance the CMA considers that the Model Agency Parties agreed to fix minimum prices and to a common approach to prices, and to refuse to supply modelling services at a particular price.

4.43 Furthermore, the CMA finds that:

*(a)* Between June and July 2013, Premier, Models 1 and Viva each shared with the other Parties information on the fees which they considered should be charged to [Online Magazine A] and more generally for click to buy usage. Premier also shared with the Parties confidential, commercially sensitive information (including future pricing information)

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[379] See, in particular, paragraphs 3.132 to 3.133. In their written representations on the Statement, Models 1, Premier, Storm and the AMA submitted that this exchange falls short of a communication on future price information and that Premier did not state what it was going to charge [Retailer B] (URN6896). However, the CMA considers that the evidence clearly notes the agreement that prices for [Retailer B] would be increased in view of the additional usage being required.

[380] See paragraphs 3.137 to 3.138. In its written representations on the Statement, Viva stated that the fees discussed concerned an assignment in the US and that the evidence does not give any indication as to what level of fee was required before Viva or Premier would offer models to [Online Magazine B]. The CMA notes that [Online Magazine B] is the digital magazine of [Online Retailer C], which is a UK company. The CMA considers, therefore, that the price discussed and agreed to be too low, and the agreed refusal to supply models at the price sought, did concern the UK. [✂] (URN6892). The CMA has not, however, seen any evidence that Viva distanced itself from the information, and is therefore entitled to presume that Viva took the information exchanged with its competitors into account when determining its own subsequent conduct in the market (including in relation to this particular customer). Viva's statement [✂] does not impact this finding (see paragraphs 4.25 and 4.26).

received from the model agencies [Model Agency C], [Model Agency A] and [Model Agency B], and requested that an AMA Alert be sent to AMA members to stress that fees for [Online Magazine A] should be no less than £[✂], exclaiming '*we have to stop this as it will spread like MEASLES!'.*[381]

*(b)* On 13 August 2013, Models 1, Premier and Storm were copied on an email chain in which a number of model agencies (including Premier) discussed a price list which had been circulated by [Online Magazine A] following a meeting with model agencies earlier that day and exchanged information about their own future pricing intentions as regards that specific customer (and, in so doing, implying they were largely in agreement with the fees proposed by a third party model agency).[382]

*(c)* On 28 August 2013, Viva shared with the AMA pricing information received from [Online Magazine A], implying that it considered those prices to be too low, and requested confirmation as to what had been agreed by the AMA and members regarding fees at the [Online Magazine A] meeting on 13 August 2013.[383] The AMA General Secretary forwarded this information to FM Models, Models 1, Premier and Storm (together with Viva), prompting further information sharing and discussion regarding the [Online Magazine A] rate card at an AMA Council meeting on 3 September 2013.[384]

*(d)* In October 2013, Storm emailed FM Models, Models 1, Premier and the AMA proposing that the use of click to buy links by [Retailer C] meant that a higher fee was required than the £[✂] being offered by the customer, leading to a discussion regarding how the Model Agency Parties would charge for click to buy usage at an AMA Council meeting and at the AMA AGM.[385]

*(e)* In November 2013, Premier proposed in an email to the other Model Agency Parties and the AMA that the Model Agency Parties took steps to 'create boundaries' with respect to the fees charged for click to buy usage by [online magazine shop].[386]

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[381] See paragraphs 3.55 to 3.59.
[382] See further paragraphs 3.60 and 3.63 to 3.66.
[383] See further paragraph 3.61.
[384] See further paragraphs 3.62 and 3.67.
[385] See further paragraph 3.69.
[386] See further paragraph 3.70.

*(f)* Between June 2013 and September 2014, the Parties engaged in a number of direct exchanges, both on email and at AMA Council meetings, concerning the terms and conditions, including in particular the fees, on which [Online Retailer A] booked models for online content. This included confidential, commercially sensitive information (including future pricing information) regarding the Model Agency Parties' or other model agencies' negotiations with [Online Retailer A] on pricing and usage terms.[387] The Parties discussed the possibility of taking a concerted approach to withhold the supply of models to [Online Retailer A]. Viva stated: '*maybe the only way* [✂] *is if we do stop 'supporting' them to the extent that they have grown accustomed to? If we all make a concerted stand. If the level of model reduces unless they increase their rate somewhat?'.*[388] During this period, the Model Agency Parties received information, both directly (Premier)[389] and through the AMA,[390] about other model agencies' commercial positions towards [Online Retailer A]. The Model Agency Parties were involved in the preparation of letters to be circulated by the AMA to AMA members and to [Online Retailer A] (drafted by Storm and Models 1 respectively, with all of the other Model Agency Parties being sighted of the letters), setting out what were perceived to be the key issues raised by [Online Retailer A]'s new terms and conditions, including [Online Retailer A]'s proposed rate freeze.[391]

*(g)* In October 2014 Premier forwarded to the other Parties information received from another model agency regarding the fees and usage terms being offered by [Retailer A] for 'unrecognisable' modelling shoots. Premier also signalled to the other Parties (as well as to certain other model agencies) its intention not to accept the terms being offered by [Retailer A] and requested that an AMA Alert be issued to AMA members.[392]

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[387] See further paragraphs 3.80 to 3.103.

[388] See paragraph 3.84.

[389] See paragraphs 3.95 and 3.102(a).

[390] See paragraphs 3.87 to 3.92 and 3.102(c).

[391] See paragraphs 3.96 to 3.97 and 3.100 to 3.101.

[392] See paragraphs 3.111 to 3.117. In the written representations on the Statement, it has been submitted that Premier's emails as regards [Retailer A] were triggered by the fact that the extra usage being required by [Retailer A] was not immediately apparent from the customer's proposal, and that Premier's aim was to protect models' image rights (URN6896). However, the CMA finds that the usage required by [Retailer A] was clearly set out in the commissioning email (see document described in paragraph 3.115 – URN5005). In its representations on the Statement, Viva submitted that the information it received about [Retailer A] did not have any impact on Viva because its models

*(h)* In June 2014, prompted by an email sent by Storm to the other Parties (in which Storm suggested that other model agencies should not be accepting a particular rate offered by [Online Retailer B]), the AMA sought information from AMA members about the fees and other terms and conditions which members were receiving from [Online Retailer B]. The AMA subsequently disclosed the responses it received, in an individualised way (which included specific information regarding the pricing of Models 1 and Storm, plus certain other model agencies) to the Model Agency Parties.[393]

*(i)* In December 2013, FM Models, Models 1, Premier, Storm and the AMA exchanged confidential, commercially sensitive information (including future pricing information) and agreed to a common approach to future pricing in response to new, additional, usage terms sought by [Retailer B] for e-commerce and other digital use. In particular, Premier forwarded to FM Models, Models 1, Storm and the AMA an email exchange between Premier and [Company D] working on behalf of [Retailer B] in which Premier signalled its intention not to accept revised usage terms offered by the customer and asked for a higher price instead.[394] Premier also shared with FM Models, Models 1 and Storm confidential, commercially sensitive information (including future pricing information) it received from another model agency, [Model Agency D].[395]

4.44 The CMA finds that the email exchanges and discussions described in paragraph 4.43 are further evidence of the Parties' agreement to coordinate the commercial and pricing behaviour of the Model Agency Parties. They evidence both the Models Agency Parties expressing a joint intention to conduct themselves on the market in a specific way, and the Parties' common understanding that they would regularly and systematically share confidential, commercially sensitive information (including future pricing information).

4.45 In the alternative, the CMA considers that the Parties must have known, or could reasonably have foreseen, that these email exchanges and discussions

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[✂]. However, the fact that Viva had commercial dealings with [Retailer A] strengthens the inference that it took the information received into account in determining its subsequent conduct in the market.

[393] See paragraphs 3.119 to 3.124. In its written representations on the Statement, Viva stated that it has [✂]. However, the information received by Viva and the other Parties in relation to [Online Retailer B] was capable of furthering Viva's understanding of its competitors' commercial strategies, raising the presumption that such information would have been taken into account by Viva in its dealings with other customers, and as regards Viva's dealings with [Online Retailer B] (]✂]). Viva has not provided any evidence rebutting this presumption.

[394] See paragraphs 3.126 to 3.127.

[395] See paragraphs 3.130 to 3.131.

were at least capable of resulting in the coordination of the Model Agency Parties' conduct on the market, and are therefore evidence that the Parties knowingly substituted practical cooperation for the risks of competition, thus giving rise to a concerted practice. Such information exchange was clearly not consistent with the principle that each economic operator must determine independently the policy it intends to adopt on the market.

*AMA Alerts*

4.46 The CMA also finds that the Parties had a shared understanding concerning the objectives and operation of the AMA Alerts system, and that they would maintain its operation. The CMA finds that each AMA Alert, together with the other indirect and direct contacts described below related to AMA Alerts, is a manifestation of an overall agreement between the Parties to use the AMA Alerts system to help meet their aim of coordinating the Model Agency Parties' own commercial and pricing behaviour as well as the commercial and pricing behaviour of the broader AMA membership, making it easier for such model agencies to resist downward pressure on prices in negotiations with customers.

4.47 The CMA finds that, by the start of the Relevant Period and throughout that period, the AMA Alerts system was a long-established practice,[396] with a clear objective - which was well known to the Parties - of encouraging recipient model agencies to reject the fee being proposed by the customer and negotiate higher fees (or lower usage).[397] The Parties' awareness and commitment to the objective of the AMA Alerts system is evidenced by the important role they played in maintaining, promoting and overseeing the AMA Alerts system throughout the Relevant Period.[398] The AMA Alerts system involved the regular and systematic exchange of confidential, commercially sensitive information (including future pricing information).

4.48 The role of the AMA and, in particular, of the AMA General Secretary, in this agreement was to pass information from any instigating model agency or agencies to the AMA membership following receipt of an 'instigating' email (the information disclosed being certain details of the casting including, almost

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[396] See paragraphs 3.4 to 3.9.

[397] See paragraphs 3.35 and 3.36.

[398] See paragraph 3.7. Furthermore, the issuing of an AMA Alert was just one component of the Parties' wider aim of coordinating both the Model Agency Parties' own commercial and pricing behaviour and, in some cases, the commercial and pricing behaviour of the broader AMA membership (see paragraph 3.8).

invariably, the identity of the customer, for which the instigating agency or agencies considered the fee to be too low and/or the scope of usage too wide).[399]

4.49 In the alternative, the CMA finds that the indirect contacts and direct contacts described below are evidence of a concerted practice amongst the Parties.

4.50 In particular, the AMA Alerts system involved (a) the Model Agency Parties receiving confidential, commercially sensitive information (including future pricing information) via the AMA, including through the AMA Alerts (indirect contacts), and (b) the Parties exchanging confidential, commercially sensitive information (including future pricing information) prior to (and in some instances after) the issuing of AMA Alerts (direct contacts).

*Indirect contacts*

4.51 The CMA regards AMA Alerts as involving indirect contacts between competitors (that is, contacts between competitors intermediated by the AMA through the AMA General Secretary).

4.52 Each of the Model Agency Parties received all of the AMA Alerts circulated throughout the Relevant Period which fall within the scope of the CMA's investigation. Even on this basis only, the CMA is entitled to presume that each Model Agency Party participated in the agreement and/or concerted practice.[400]

4.53 There is no evidence of any of the Model Agency Parties publicly objecting to the practice of circulating the AMA Alerts, nor of them requesting the AMA General Secretary to refrain from circulating AMA Alerts.[401] On the contrary, there is evidence of some of the Model Agency Parties seeking to ensure the continued effectiveness of the AMA Alert process, for example, by asking the AMA General Secretary to remind AMA members of the importance of the AMA Alert process (Models 1),[402] by requesting that certain key information,

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[399] See paragraphs 3.17 to 3.33.

[400] See paragraph 4.23.

[401] In its written representations, Viva claimed that [✂], and therefore cannot have followed the suggestions made in the AMA Alerts (URN6892). However, Viva did not provide supporting evidence demonstrating that it had publicly distanced itself from the agreement and/or concerted practice, nor did it provide evidence to support the statement [✂]. The CMA also notes that, during the period [Director A] [✂], all AMA Alerts circulated where sent to another Viva representative ([booker]).

[402] See further paragraphs 3.41 to 3.42.

namely the customer's name, be included in AMA Alerts (Premier)[403] and by promoting the AMA Alerts system by reciting, at AMA AGMs, the number of AMA Alerts circulated in the previous year (FM Models).[404] The Model Agency Parties also made a direct contribution to the continued effectiveness of the AMA Alert process by instigating in total the great majority of the AMA Alerts issued in the Relevant Period (FM Models, Models 1, Premier and Storm), as discussed in paragraph 4.54(d).[405]

*Direct contacts*

4.54 In addition to being involved in the indirect contacts described in paragraphs 4.51 to 4.53 above, the CMA finds that the Model Agency Parties' role in maintaining, promoting and overseeing the AMA Alerts system was achieved through direct contacts between one or more of the Model Agency Parties and the AMA in which the participants exchanged confidential, commercially sensitive information (including future pricing information). These direct contacts took place in particular in the period leading to the issuing of an AMA Alert, most notably in the following ways:

*(a)* On occasion, an AMA Alert was instigated, and issued, following an email being circulated between a number of the Model Agency Parties regarding the fees or usage for a particular shoot. For example,[406] on 15 April 2013 Storm emailed Models 1, Premier and Viva disclosing its future pricing intentions for a shoot for the [Company A]. Later that morning, Storm forwarded the same email to the AMA General Secretary, copying Models 1, Premier and Viva, adding that '*there seems to be general consensus'* (presumably amongst, at least, those copied on Storm's email) *'that £*[✂] *should be the minimum'*. An AMA Alert was circulated later that day, which the CMA infers relates to [Company A].[407]

*(b)* In addition, on at least four occasions a request made by one of the Model Agency Parties for the issuing of an AMA Alert was also copied to the other Model Agency Parties (or a number of them).[408] In each of these

[403] See further paragraph 3.15.
[404] See paragraph 3.6.
[405] See paragraph 3.18.
[406] See also the examples listed at footnote 148.
[407] See paragraphs 3.20 to 3.22.
[408] See paragraph 3.23 and footnote 152.

examples, the specific price which the instigating Model Agency Party considered to be too low was disclosed.

*(c)* On at least two occasions, one of the Model Agency Parties provided an update to the AMA General Secretary as regards pricing negotiations with a customer (Models 1 in respect of [magazine]/[retailer] and Storm in respect of [Retailer B]/[Company C]) after an AMA Alert had been issued. In the example involving [magazine]/[retailer], this prompted the AMA to circulate a follow-up to the original AMA Alert.[409]

*(d)* The Model Agency Parties were responsible for instigating (whether solely or jointly with another model agency)[410] 109 of the 123 AMA Alerts which fall within the scope of this Decision (FM Models, Models 1, Premier and Storm).[411]

*(e)* On at least two occasions, the AMA Alert was drafted with assistance from one of the Model Agency Parties (FM Models and Storm).[412]

*(f)* On at least two occasions, one of the Model Agency Parties (Premier) acted as a go-between for another model agency, either requesting an AMA Alert or following up with the AMA on another agency's request for an AMA Alert, and on at least one occasion, the same Model Agency Party (Premier) made it clear that its request for an AMA Alert was informed by discussions with other model agencies.[413]

4.55 The CMA considers that the Model Agency Parties' active participation in, and contribution to the maintenance of the AMA Alerts system, including through their involvement in the management of the AMA, is evidence of an agreement and/or concerted practice amongst them and between them and the AMA.

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[409] See further paragraphs 3.43 to 3.51.
[410] Occasionally more than one model agency sent a request for an AMA Alert regarding the same shoot: see footnote 147.
[411] See paragraph 3.18 and Annex A.
[412] See paragraphs 3.28 to 3.33.
[413] See paragraph 3.24.

## E. Single and continuous infringement

### *Legal framework*

4.56 Where two or more undertakings engage in a series of anti-competitive actions in pursuit of a common objective or objectives, it is not necessary to divide the conduct by treating it as consisting of a number of separate infringements where there is sufficient consensus to adhere to a plan in pursuit of a single economic aim.[414] Nor is the characterisation of a complex cartel as a single and continuous infringement affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute infringements.[415]

4.57 Thus, an infringement need not be based on a single, isolated act, but may operate through a pattern of conduct involving a series of agreements, concerted practices and decisions entered into over a period of time. Those arrangements may also vary and adapt to new circumstances, sub-agreements or inner circles of closer cooperation may be established and new implementing mechanisms developed. Some participants may drop out, others may join in, and not every undertaking may necessarily be involved in every aspect of the infringing arrangement.[416] Where it is established that a set of individual agreements, concerted practices or decisions by associations of undertakings are interlinked in terms of pursuing a single anti-competitive aim, they can be characterised as constituting a single and continuous infringement.[417]

4.58 The CJEU has held that this approach does not contravene the principle of personal responsibility for infringements, nor does it ignore the individual

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[414] *Rhône-Poulenc* v *Commission*, paragraph 126.

[415] *Anic Partecipazioni*, paragraphs 111 to 114. See also Commission Decision of 10 December 2003, *Organic peroxides,* Case COMP/E-2/37.857, paragraphs 7 and 8.

[416] Judgment in *LR AF 1998 v Commission,* T-23/99, ECR, EU:T:2002:75, paragraphs 106-109; *Belasco*, paragraphs 10 to 16; Commission Decision of 21 October 1998, *Pre-Insulated Pipe Cartel,* case No IV/35.691/E-4, paragraphs 129 to134; Judgment in *AC-Treuhand* v *Commission,* T-99/04, ECR, EU:T:2008:256 ('***AC-Treuhand***'), paragraph 132.

[417] *Anic Partecipazioni*, paragraph 113. See also Judgment in *BASF and UCB v Commission*, joined cases T-101&111/05, ECR, EU:T:2007:380, paragraph 159. See also Judgment in *Team Relocations and Others v Commission,* joined cases T-204/08 and T-212/08, ECR*,* EU:T:2011:286 ('***Team Relocations***')*;* Judgment in *Buchmann v Commission*, T-295/94, ECR, EU:T:1998:88; *Cimenteries.*

analysis of evidence or breach the rights of defence of the undertakings involved.[418]

4.59 Various agreements or concerted practices can be considered to form part of a single and continuous infringement where:

*(a)* the agreements or concerted practices pursued a common objective or objectives;

*(b)* through its own conduct, each undertaking intended to contribute to the common objective(s) pursued by all the participants; and

*(c)* each undertaking was aware of the offending conduct (planned or put into effect) of the other participants in pursuit of the same objective(s) or each undertaking could reasonably have foreseen it and was prepared to take the risk that it would occur.[419]

4.60 Each participating undertaking may bear personal responsibility not only for its own conduct, but also for the operation of the overall anti-competitive arrangement during the period in which it participated in it.[420] The liability of an undertaking for an infringement is not affected by the fact that it did not take part in all aspects of an anti-competitive scheme, or that it played only a minor role in the aspects in which it did participate.[421]

***Application in this case***

4.61 The CMA finds that, during the Relevant Period, there was a single overall arrangement consisting of one or more agreements and/or concerted practices which formed part of a single and continuous infringement for the purposes of the Chapter I prohibition and Article 101 TFEU.

4.62 As set out in paragraphs 4.85 to 4.117, the agreement and/or concerted practice comprised various aspects of conduct, all of which pursued a common anti-competitive object, namely to coordinate the commercial and pricing behaviour of the Model Agency Parties and, through the regular and systematic circulation of AMA Alerts, the commercial and pricing behaviour of the broader AMA membership, with the intention of resisting downward

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[418] *Anic Partecipazioni*, paragraphs 83 to 85 and 203.
[419] *Team Relocations*, paragraphs 32 to 37; *Anic Partecipazioni*, paragraph 87.
[420] *Anic Partecipazioni*, paragraph 83.
[421] *AC-Treuhand* v *Commission*, paragraph 132.

pressure on prices for the supply of modelling services in the UK, both in the context of negotiations with specific customers, and more generally.

4.63 All instances of contacts between the Parties described in Section 3 involved the exchange of confidential, commercially sensitive information (including future pricing information). In addition, on a number of occasions the Model Agency Parties expressed a joint intention to conduct themselves on the market in a specific way, including (i) in the context of negotiations with certain specific customers: agreeing to fix minimum prices and to a common approach to pricing; agreeing to refuse to supply modelling services at a particular price; discussing collectively the possibility of rejecting a customer's proposed price; and discussing the acceptable minimum price; and (ii) the Parties agreeing to use the AMA and the AMA Alerts system to coordinate prices.

4.64 In addition, the two main elements of the agreement and/or concerted practice that is the subject of this Decision (comprising (a) AMA Alerts, and (b) the Detailed Customer Examples) complemented and supported each other in that they interacted to contribute to the desired anti-competitive object. This is illustrated, for example, by two of the Detailed Customer Examples ([Online Magazine A] at paragraphs 3.55 to 3.67 and [Retailer A] at paragraphs 3.110 to 3.117) both of which also involved the use of AMA Alerts as a tool for facilitating coordination. Further, on occasion, an AMA Alert was the product of, or led to, more extensive discussions amongst the Parties regarding the fees for a particular customer or usage type, whether by email or at an AMA Council meeting.[422]

4.65 The CMA considers that each of the Parties intentionally contributed to the agreement and/or concerted practice relating to the supply of modelling services in the UK, as set out in paragraphs 4.28 to 4.55.

4.66 Furthermore, all of the Parties were involved and aware of all elements of the conduct. The vast majority of the contacts described in Section 3 involved the same individuals from each of the Parties (that is, the directors of the Model Agency Parties who were also members of the AMA Council).[423] The CMA has not seen evidence of any of the Parties seeking to distance themselves publicly from any aspect of the agreement and/or concerted practice that is

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[422] See paragraphs 3.8, 3.19 to 3.22 and footnote 148.

[423] With the exception of emails instigating AMA Alerts, which were in many cases sent to the AMA General Secretary by a booker.

the subject of this Decision (and none of the Parties sought to advance this argument in their response to the Statement).

4.67 Finally, the CMA considers that the relevant facts concerning the AMA Alerts and the Detailed Customer Examples, which span the entirety of the Relevant Period, show that there were very regular anti-competitive contacts between the Parties throughout this period.[424]

4.68 The CMA therefore considers it would be artificial to split the different elements of the collusive conduct in circumstances where they clearly form part of an overall plan to distort the normal competitive process, with the aim of establishing and maintaining artificially higher price levels for the provision of modelling services than would otherwise have existed, and of maximising the Model Agency Parties' profits. Accordingly, for the purposes of determining the liability of each Party as regards its involvement in the infringement, the CMA has not considered it appropriate to give material weight to the fact that certain Parties did not participate in every aspect of the anti-competitive contacts.[425]

## F. Object of preventing, restricting or distorting competition

### *Legal framework*

4.69 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'.*

4.70 It is settled case law that if an agreement, concerted practice or decision by an association of undertakings has as its object the prevention, restriction or

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[424] See footnote 132 and footnote 191.

[425] For instance, Viva did not instigate any AMA Alerts and did not participate in the Detailed Customer Example, concerning [Retailer B] and [Retailer C]. Viva also submitted that it could not have participated in the single and continuous infringement during a period of four months during which [Director A] [✂] and not monitoring emails (URN7106). However, the CMA notes in this regard that a Viva representative, [booker], was included on all of the AMA Alerts during that period (see footnote 133). In any event, as explained in paragraph 4.60, the liability of an undertaking for an infringement is not affected by the fact that it did not take part in all aspects of an anti-competitive scheme, or that it played only a minor role in the aspects in which it did participate.

distortion of competition, it is not necessary to take account of its actual effects in order to establish an infringement.[426]

*Restrictions of competition by object*

4.71 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.[427]

4.72 In this regard, the CJEU has held 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.[428]

4.73 Consequently, certain collusive behaviour may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods or services, that it may be considered redundant, for the purposes of applying the Chapter I prohibition and Article 101 TFEU, to prove that they have actual effects on the market.[429] Further, it is not necessary for the CMA to demonstrate the precise mechanism by which the restrictive object was attained.[430]

4.74 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.[431] In cases where the anti-competitive object is readily apparent, the analysis of that context may be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object.[432] Where appropriate, the way in which the

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[426] Judgment in *Consten and Grundig v Commission,* joined cases 56 & 58/64, ECR, EU:C:1966:41, paragraph 342. See also *Cityhook Limited v OFT* [2007] CAT 18 (‘***Cityhook***’), at [269].
[427] *Dole Food*, paragraph 114; Judgment in *Groupement des Cartes Bancaires v Commission*, case C-67/13, EU:C:2014:2204 (‘***Groupement des Cartes Bancaires***’), paragraph 50; and Case C-32/11 *Allianz Hungária Biztosító Zrt and Others*, judgment of 14 March 2013 (‘***Allianz Hungária***’), paragraph 35.
[428] *Dole Food*, paragraph 113; and *Groupement des Cartes Bancaires*, paragraphs 49 and 57.
[429] *Dole Food*, paragraph 115; and *Groupement des Cartes Bancaires*, paragraph 51 and the case-law cited.
[430] *Re Seamless Steel Tubes Cartel: Sumitomo Metal Industries Ltd and Others v Commission of the European Communities*, judgment of 25 January 2007, paragraph 203.
[431] *Allianz Hungária*, paragraph 36 and *Groupement des Cartes Bancaires*, paragraph 53. See also *GlaxoSmithKline*, paragraph 58; Judgment in *Competition Authority v Beef Industry Development Society and Barry Brothers*, C-209/07, EU:C:2008:643, paragraphs 16 and 21; Judgment in *Football Association Premier League and Others*, C-403/08, EU:C:2011:631, paragraph 136.
[432] Judgment in *Toshiba Corporation* v *Commission,* C-373/14, EU:C:2016:26, paragraph 29.

coordination (or collusive behaviour) is implemented may be taken into account.[433]

4.75 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.[434]

4.76 Where the obvious consequence of an agreement or concerted practice is to prevent, restrict or distort competition, that will be its object for the purpose of the Chapter I prohibition and Article 101 TFEU, even if the agreement or concerted practice had other objectives as well.[435]

4.77 Furthermore, the fact that an agreement pursues other legitimate objectives does not preclude it from being regarded as having a restrictive object.[436]

*Price fixing and the sharing of commercially sensitive information*

4.78 The European Courts and the European Commission have held on numerous occasions that agreements or concerted practices that related to the fixing of prices between competitors, or that involved the sharing between competitors of pricing or other information of commercial or strategic significance, or both, restrict competition by object under the Chapter I prohibition and Article 101 TFEU.[437]

4.79 As regards price fixing, Article 101 TFEU and the Chapter I prohibition both apply, in particular, to agreements or concerted practices which *'directly or indirectly fix purchase or selling prices'*.

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[433] *Cityhook* at [268] which noted the provisions of paragraph 22 of the Commission Notice: *Guidelines on the application of Article 81(3) of the Treaty* (now Article 101(3) TFEU), OJ C 101/97, 27 April 2004 ('***Article 101(3) Guidelines***'). Paragraph 22 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'*.

[434] *Allianz Hungária*, paragraph 37 and *Groupement des cartes bancaires*, paragraph 54.

[435] For example, Judgment in *NV IAZ International Belgium and Others v Commission,* joined cases 96/82 etc., ECR, EU:C:1983:310*,* paragraphs 22 to 25.

[436] Judgment in *Competition Authority v Beef Industry Development Society and Barry Brothers,* EU:C:2008:643*,* paragraph 21. See also *Groupement des Cartes Bancaires,* paragraph 70.

[437] See for example: *Dole Food*, paragraphs 113 to 127; *T-Mobile*. See also the Commission Notice: *Guidelines on the applicability of Article 101 of the Treaty of the Functioning of the European Union to horizontal co-operation agreements,* OJ C 11/1, 14 January 2011 ('***Horizontal Cooperation Agreements Guidelines***'), paragraphs 72 to 74; and *Article 101(3) Guidelines*.

4.80 Price fixing can take many forms.[438] Price fixing may involve fixing either the price itself or the components of a price, setting a minimum price below which prices are not to be reduced,[439] establishing the amount or percentage by which prices are to be increased, or establishing a range outside which prices are not to move. Price fixing may also take the form of an agreement to restrict price competition, and an agreement may restrict price competition even if it does not entirely eliminate it.[440]

4.81 The fixing of a price, even one which merely constitutes a target or non-binding recommendation, restricts competition because it enables all participants to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be.[441] The CJEU has also held that, even though fixed prices might not have been observed in practice, the decisions fixing them had the object of restricting competition.[442]

4.82 The European Commission has also found that pre-pricing communications discussing factors relevant for setting future prices, with the purpose of reducing the degree of uncertainty as to the conduct of the parties with regard to the prices to be set by them, had the object of coordinating the setting of prices, were liable to influence pricing behaviour, and concerned the fixing of prices.[443]

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[438] *Guidance on Agreements and Concerted Practices*, paragraphs 3.4 to 3.8.

[439] Judgment in *Faci SpA v European Commission*, Case T-46/10, EU:T:2014:138; Judgment in *Coop de France bétail et viande & Others v Commission of the European Communities*, C-101/07, EU:C:2008:741. European Commission decision AT.39965 *Canned mushrooms*, 25 June 2014. European Commission decision COMP/39165 *Flat glass*, 28 November 2007. European Commission decision COMP/C.38.281/B.2 *Italian Raw Tobacco*, 29 October 2005. European Commission decision COMP/C.38.238/B.2 *Spanish Raw* Tobacco, 20 October 2004. Fixing minimum prices includes decisions aimed at imposing minimum prices, see European Commission decision 39510 *ONP*, 8 December 2010. *BNIC*, paragraph 22; and Judgment in *SPRL Louis Erauw-Jacquery v La Hesbignonne SC,* C-27/87, ECR, EU:C:1988:183, paragraph 15.

[440] Judgment in *DaimlerChrysler AG v Commission of the European Communities*, T-325/01, EU:T:2005:322, paragraphs 196 to 212; and CMA decision CE/9784-13 *Conduct in the ophthalmology sector*, paragraphs 4.125, 4.145 and 4.150. *Guidance on Agreements and Concerted Practices*, paragraphs 3.5 and 3.6.

[441] Judgment in *Vereeniging van Cementhandelaren,* C-8/72, ECR, EU:C:1972:84, paragraph 21. See also European Commission decision 38549 *Barême d'honoraires de l'Ordre des Architectes belges*, 24 June 2004, paragraph 78.

[442] *Belasco*, paragraph 15.

[443] Commission Decision of 15 October 2008, *Bananas,* Case COMP/39.188, paragraphs 54 and 271, upheld in *Dole Food*, and Judgment in *Fresh Del Monte Produce v Commission and Commission / Fresh Del Monte Produce,* joined cases C-293/13 P & C-294/13 P, EU:C:2015:416.

4.83 The Horizontal Cooperation Agreement Guidelines note that information exchanges between competitors of individualised data regarding intended future prices should be considered a restriction of competition by object. In addition, it provides that private exchanges between competitors of their individualised intentions regarding future prices would normally be considered and fined as cartels because they generally have the object of fixing prices.[444]

4.84 The European Courts have further held that the exchange of information between competitors, by itself, is liable to be incompatible with Article 101 TFEU (and EU Member States' equivalent national competition laws) if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted.[445] In particular, an exchange of information which is capable of reducing or removing the degree uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anti-competitive object.[446]

***Application in this case***

*Summary of conclusions - object of preventing, restricting or distorting competition*

4.85 For the reasons set out in paragraphs 4.92 to 4.117, the CMA finds that the Parties entered into an agreement and/or concerted practice that had as its object the prevention, restriction or distortion of competition in relation to the supply of modelling services in the UK.

4.86 Having examined as a whole the objectives of the agreement and/or concerted practice, the content of its provisions and the legal and economic context, the CMA considers that the agreement and/or concerted practice can be regarded, by its very nature, as being injurious to the proper functioning of normal competition.

4.87 The agreement and/or concerted practice had the object of coordinating the Model Agency Parties' own commercial and pricing behaviour and, through the regular and systematic circulation of AMA Alerts, the commercial and pricing behaviour of the broader AMA membership with the intention of resisting downward pressure on prices for the supply of modelling services

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[444] *Horizontal Cooperation Agreements Guidelines,* paragraph 74.
[445] Judgment in *Dole Food*, paragraph 121; Judgment in *Thyssen Stahl v Commission,* C-194/99 P, ECR, EU:C:2003:527, paragraph 86; Judgment in *T-Mobile*, paragraph 35.
[446] Judgment in *Dole Food*, paragraph 122; Judgment in *T-Mobile*, paragraph 41.

both in the context of negotiations with specific customers, and more generally.

4.88 The agreement and/or concerted practice involved the Model Agency Parties expressing a joint intention to conduct themselves on the market in a specific way, including (i) in the context of negotiations with certain specific customers: agreeing to fix minimum prices and to a common approach to pricing; agreeing to refuse to supply of modelling services; discussing collectively the possibility of rejecting a customer's proposed price; and discussing the acceptable minimum price; and (ii) the Parties agreeing to use the AMA and the AMA Alerts system to coordinate prices.

4.89 The agreement and/or concerted practice also involved a common understanding that the Parties would regularly and systematically share confidential, commercially sensitive information (including future pricing information). The information was shared indirectly through regularly receiving the AMA Alerts circulated by the AMA, directly through discussions and/or email correspondence prior to and after the release of one or more AMA Alerts, and through other instances of more protracted and detailed contact between the Parties in relation to particular customers or usage types (as described in the Detailed Customer Examples).

4.90 As regards all aspects of the agreement and/or concerted practice that is the subject of this Decision, the Parties' objective was to coordinate commercial and pricing behaviour (so as to resist downward pressure on prices).

4.91 The CMA sets out below its assessment of the objectives of the agreement and/or concerted practice, the content of its provisions, and the legal and economic context. The CMA has considered the written and oral representations made by the AMA, Models 1, Premier, Storm and Viva (collectively, the ***'Representations***') concerning the aim of and context for the Parties' conduct, which it was submitted either prevent the Chapter I prohibition and Article 101 TFEU from applying, or mean that the conduct did not have the object of preventing, restricting or distorting competition. For the reasons set out below, the CMA does not agree with the Representations and considers the agreement and/or concerted practice had the object of preventing, restricting or distorting competition and infringed the Chapter I prohibition and Article 101 TFEU.

*Restriction of competition by object*

*Objectives*

4.92 Although the parties' subjective intention is not a necessary factor in determining whether an agreement has an anti-competitive object, the CMA may nevertheless take this aspect into account in its analysis of the objectives of the conduct.[447]

4.93 The Parties' intention to coordinate the Model Agency Parties' commercial and pricing behaviour with each other and, through the regular and systematic circulation of AMA Alerts, that of the broader AMA membership (so as to resist downward pressure on prices) is explicit on the face of much of the evidence relating to the Detailed Customer Examples and the AMA Alerts, as illustrated below:

*(a)* On 15 April 2013, in relation to the customer [Company A], Storm reported the following in an email to the AMA General Secretary, copying Models 1, Premier and Viva: '*There seems to be general consensus that £*[✂] *should be the minimum but could you send a note round to say that what's on offer is unacceptable?'.*[448] On the same day, an AMA Alert was circulated which the CMA considers relates to the customer [Company A].

*(b)* In June 2013 Premier requested that an AMA Alert be issued to all AMA members, and stated to the other Parties that fees for [Online Magazine A] involving click to buy should be no less than £[✂], expressing concern that clients requiring images for use through click to buy (which the model agencies considered should attract significantly higher fees than images used for online content which is purely editorial in nature – see footnote 17) would in the future insist on paying the (lower) rates applicable to editorial work instead of the (higher) rates associated with commercial work. In the email requesting the AMA Alert, Premier clearly expressed the anti-competitive intention behind this request: '*we have to stop this* [the particular instance of [Online Magazine A] seeking to pay a rate associated with modelling services for editorial content for modelling services involving the commercial activity of click to buy] *as it* [the practice of paying editorial rates for click to buy] *will spread like MEASLES!'*.[449]

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[447] See paragraph 4.75.

[448] See paragraphs 3.20 to 3.22.

[449] See paragraph 3.55.

*(c)* In October and November 2013, FM Models, Models 1, Premier and Storm exchanged between them (and subsequently with the broader AMA membership at an AMA AGM) commercially sensitive information (including future pricing information) regarding the use of click to buy links by the customer [Retailer C]. The CMA infers from the minutes of the AMA AGM that the purpose of such information was to enable collusion: *'these were important issues and information with regard to usage must be shared… Non-member agents did not help the situation and we should try to get everyone on board'*.[450]

*(d)* In June 2014, Storm expressed concern that model agencies would be setting '*an awful precedent*' if they accepted the low fees of *'£[✂] for e-com'* being sought by [Online Retailer B],[451] thus clearly revealing the anti-competitive intention behind its decision to disclose to the other Parties its own pricing intentions in relation to [Online Retailer B]. Furthermore, Storm justified its suggestion that the AMA should meet with [Online Retailer B] by expressing concern that various other model agencies were being paid '*a broad spectrum of fees*'.[452]

4.94 The Parties' intention to coordinate the Model Agency Parties' own commercial and pricing behaviour and, through the regular and systematic circulation of AMA Alerts, the commercial and pricing behaviour of the broader AMA membership, so as to resist downwards pressure on prices, is clear from the evidence reviewed by the CMA relating to AMA Alerts. In this regard, the CMA has considered the context for the well-established practice of issuing AMA Alerts. For example, various early documents[453] clearly articulate the objective of the AMA Alerts, as follows:

*(a)* In the report delivered by the AMA Chairman at the 2006 AMA AGM, he noted: '*since January 2006 the Secretary had issued 50-60 fee alerts which had been extremely effective in maintaining fees levels*'.[454]

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[450] See paragraph 3.69.
[451] See paragraph 3.119. In its written representations on the Statement, Viva submitted that the evidence does not disclose Storm's future pricing intentions. However, the CMA considers that, in this occasion, Storm clearly informed other model agencies what it considered the minimum price should be, and noted that a *'general consensus'* was reached that the price should be the minimum.
[452] See paragraph 3.124. The evidence suggests that the fee quoted for Storm was lower than that of other model agencies (see footnote 300).
[453] Although these documents fall outside of the Relevant Period, they are nevertheless relevant to interpreting the objectives of the Parties' conduct vis-à-vis the AMA Alerts during the Relevant Period.
[454] See footnote 169.

*(b)* An email sent by the AMA General Secretary to AMA members (including all of the Model Agency Parties apart from FM Models) in August 2011 stated: '*AMA FEE ALERTS. If a client offers silly money for a job tell the AMA: we will alert your colleagues. We are receiving information less frequently do please help us to resist the downward pressure on model fees'.*[455]

*(c)* An email from Models 1 to the AMA General Secretary in November 2012 stated: '*it completely defeats the object of sharing information if this is going to get back to the client* […] *Please could you remind members and their teams that we share information to make us stronger but they cannot quote "The AMA says we can't accept this" and certainly not forward an email alert on*'.[456]

4.95 During the Relevant Period, the same objective was often expressly and clearly stated in the AMA Alerts themselves, which were regularly and systematically circulated to AMA members. Certain AMA Alerts circulated during the Relevant Period explicitly urged recipient model agencies to resist the low prices being sought by a customer for a shoot;[457] reminded recipient model agencies that accepting a lower fee may result in lower price levels in the future;[458] reminded recipient model agencies that the level of the fees achieved by model agencies is determined by the lowest fee that any model agency will accept;[459] and informed recipient model agencies of the steps being taken by other model agencies to negotiate with the client.[460]

4.96 On occasion, the instigating model agency expressly stated its objectives when instigating an AMA Alert; for example, to persuade recipient model agencies to reject the fee being offered and insist on higher fees[461] and to urge recipient model agencies to query the usage being requested by the customer for the stated fee.[462]

4.97 In addition, on at least two occasions during the Relevant Period an AMA Alert specifically stated the (higher) level of the fee that might be appropriate

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[455] See footnote 169.
[456] See footnote 143.
[457] See paragraphs 3.34 to 3.35.
[458] See paragraph 3.40.
[459] See paragraphs 3.41 to 3.42.
[460] See paragraph 3.36.
[461] See paragraph 3.38.
[462] See paragraph 3.39.

instead of the fee being offered by the customer,[463] with the clear intention of coordinating prices.

4.98 Furthermore, the CMA considers that the anti-competitive *objective* of the agreement and/or concerted practice is also evidenced by the fact that the Model Agency Parties expressed a joint intention to conduct themselves on the market in a specific way, including by (i) in the context of negotiations with certain specific customers: agreeing to fix minimum prices and to a common approach to pricing; agreeing to refuse to supply modelling services at a particular price; discussing collectively the possibility of rejecting a customer's proposed price; and discussing the acceptable minimum price;[464] and (ii) the Parties agreeing to use the AMA and the AMA Alerts system to coordinate prices.[465]

*Content and provisions*

4.99 In addition to the Parties' clearly stated intention to coordinate prices, discussed in paragraphs 4.92 to 4.98, the anti-competitive object of the agreement and/or concerted practice is also evident from the content of the communications between the Parties described in Section 3.

4.100 The CMA considers that the information the Parties exchanged in the Detailed Customer Examples, and the information shared between them in the correspondence associated with the AMA Alerts, was generally exchanged privately between the Parties and often had a very high degree of specificity both as regards the price and usage requirements of a specific customer and as regards the Model Agency Parties' individualised intentions regarding their future prices.

4.101 In all instances, including the AMA Alerts themselves (and including where price was not explicitly stated), the CMA considers that the information exchanged was, at the very least, capable of reducing the degree of uncertainty amongst at least the Model Agency Parties as to the prices for the supply and/or usage that model agencies would be prepared to accept when supplying modelling services to a specific customer or for customers with similar requirements.

4.102 As regards the AMA Alerts system, the CMA considers that the manner and frequency with which the information was exchanged was intended to make it

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[463] See paragraph 3.37.

[464] See paragraphs 4.42 and 4.43.

[465] See paragraphs 4.40 and 4.46 to 4.55.

easier for the Model Agency Parties and the broader AMA membership to resist downward pressure on prices and to restrict price competition between model agencies. Each AMA Alert almost invariably referred to a specific and identified customer; and was generally issued - so as to facilitate coordination - to AMA members shortly after the relevant model agency received a request from a customer. This was so that the recipient could be 'alerted' to the pricing and commercial strategy contained in the AMA Alert, before that recipient decided on whether, and if so, how to respond to the customer's request. On at least two occasions during the Relevant Period, the AMA Alerts themselves referred to the (higher) level of fees that would be appropriate.[466] In any event, given that customers typically made requests to multiple model agencies at the same time, the CMA considers that those model agencies who had received the customer's request were able to readily deduce the fee being described in the AMA Alert as 'not appropriate'.[467] The importance of the contents of the AMA Alerts, and the need for it to be treated as confidential among recipient model agencies, was often highlighted in the body of the AMA Alert itself.[468]

4.103 As a consequence, by telling recipient model agencies (which would usually include all, or the vast majority of, AMA members) that the fees that specific customers had proposed were '*not appropriate'* and, in some cases, urging members to resist them or noting that other competitors had resisted them, the AMA Alerts went beyond mere '*guidelines on which basis to begin negotiations'* (as submitted by Models 1, Premier, Storm and the AMA). Instead, the CMA considers that the content, timing and frequency of circulation of the AMA Alerts was such that they were intended to reduce, and were sufficiently specific so as to reduce, the degree of uncertainty amongst the Parties and the broader AMA membership, as regards the timing, extent and details of the conduct being adopted by at least one, and possibly more, of the AMA membership on the market as regards negotiating prices for models' images with specific customers (as well as more generally for customers making similar offers for modelling services).

4.104 It has been submitted in the Representations that no aspect of the conduct described in this Decision was capable of fixing prices, of restricting

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[466] See paragraph 3.37.
[467] See paragraph 3.14.
[468] See paragraph 3.16.

competition by object, nor of restricting the recipient parties' freedom to determine prices.[469]

4.105 First, it has been submitted in the Representations that the information the Parties exchanged through AMA Alerts did not have any bearing on the final prices the Model Agency Parties charged to customers.[470]

4.106 Second, it has been submitted in the Representations that the contents of the AMA Alerts were not *capable* of restricting the recipient parties' freedom to determine prices, nor of reducing the degree of uncertainty as to the Model Agency Parties' conduct or the operation of the market for the supply of modelling services, as each AMA Alert did not contain sufficient specificity concerning the price that was being rejected (other than on two occasions), nor which model agency was rejecting the price in question; amounted only to a non-binding recommendation; recipient model agencies were free to negotiate with customers (that is, compliance with any AMA Alert was not monitored nor enforced); prices were negotiated by each model agency individually and in liaison with models, who were the ultimate decision-makers

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[469] Models 1, Premier, Storm and the AMA have submitted that, in the light of the CAT's Judgment in *Sainsbury's Supermarkets v MasterCard* [2016] CAT 11 ('***Sainsbury's v MasterCard***'), in particular paragraphs 100 to 102, the agreement and/or concerted practice that is the subject of this Decision cannot be found to prevent, restrict or distort competition by its object. The CMA notes that in the *Sainsbury's v MasterCard* judgment the CAT found that the restriction in question could not be considered a restriction by object for a series of reasons explained in paragraph 102 of that judgment, assessed in combination. It was not clear which of these reasons was submitted by Models 1, Premier, Storm and the AMA as being relevant in the context of this Decision. However, those Parties appeared to place reliance on the first of the CAT's reasons, which concerned the fact that it was open to issuing and acquiring banks to agree a different interchange fee, which in the CAT's view had a '*diluting effect on the extent to which anti-competitive consequences can be presumed*'. The CMA has noted in paragraph 4.81 (and the case law cited) that the fixing of a price, even one which merely constitutes a target or non-binding recommendation, restricts competition because it enables all participants to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be. The CJEU has also held that, even though fixed prices might not have been observed in practice, the decisions fixing them had the object of restricting competition. However, the CAT in *Sainsbury's v MasterCard* also considered the nature of the agreement, and the objective of and context for the restrictive agreement in question before reaching a conclusion in that case that the agreement did not have the object of restricting competition. In this regard paragraphs 4.92 to 4.117 set out the CMA's consideration of the objectives, content and the legal and economic context for the agreement and/or concerted practice that is the subject of this Decision. Moreover, a key difference between circumstances in *Sainsbury's v MasterCard* and those in this case is the fact that MasterCard did not derive any direct financial benefit from the interchange fee at issue. In contrast, in the present case, the Model Agency Parties derived a direct financial benefit from the fees for modelling services and that their commission depends on the level of models' fee.

[470] URN6896, paragraph 34.

and could reject the fees proposed by model agencies; and the final prices negotiated for the model's images were never disclosed to other competitors.[471] These submissions are examined in turn below.

4.107 As regards whether any aspect of the agreement and/or concerted practice had any bearing on the final prices charged, the CMA notes that it is not required to demonstrate that the exchanges had an actual effect on the Model Agency Parties' prices. As noted in paragraph 4.81, it is settled case law that even though fixed prices might not have been observed in practice, the decisions fixing them had the object of restricting competition.

4.108 In this regard, absent sufficient evidence from the Parties to the contrary, the CMA is entitled to presume that the Model Agency Parties took into account the information exchanged in the Detailed Customer Examples and via the AMA Alerts in determining their conduct on the market.[472] The Parties have not submitted any evidence rebutting this presumption.

4.109 Moreover, the CMA considers that there is some evidence, which the Parties have not contested, that reveals that the AMA Alerts did have an impact on the behaviour of model agencies on the market. For example, some of the Model Agency Parties informed the AMA that customers had increased their proposed fees following the circulation of an AMA Alert.[473] In addition, in a letter to the CMA dated 16 June 2015, the legal advisers representing Models 1, Premier, Storm and the AMA acknowledged that AMA Alerts *'can lead to communication between members and some haggling with clients'*. [474]

4.110 As regards the *capability* of the information exchanged to restrict the recipient parties' freedom to determine prices and reducing the degree of uncertainty, the CMA makes the following observations:

*(a)* The CMA notes that the Representations generally concerned the capability of the contents of the AMA Alerts (as opposed to all other conduct described in Section 3) to affect recipient model agencies' freedom to determine prices and reduce uncertainty. The CMA has set

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[471] URN6892 at paragraphs 7.49 to 7.68.

[472] See paragraph 4.19(d). In addition, it is not necessary for the participants to have always respected the concerted practice for the cartel to have existed – see Judgment in *Cascades v Commission*, T-308/94, ECR, ECLI:EU:T:1998:90, paragraph 230; Judgment in *Tokai Carbon Co. Ltd and others v Commission,* joined cases T-71, 74, 87 and 91/03, ECR, ECLI:EU:T:2005:220, paragraph 297; Judgment in *Thyssen Stahl* v *Commission*, T-141/94, ECR, EU:T:1999:48, paragraphs 233, 255, 256 and 341.

[473] See paragraphs 3.43 to 3.51.

[474] URN0717, paragraph 30.

out its findings as regards the Parties' objective, often expressly stated, to coordinate the Model Agency Parties' own commercial and pricing behaviour and, through the regular and systematic circulation of AMA Alerts, the commercial and pricing behaviour of the broader AMA membership. In addition, the content of the information exchanged through the AMA Alerts, and the manner in which it was exchanged (considering, in particular, the timing and frequency of the circulation of the AMA Alerts), was such that the CMA considers that all aspects of the agreement and/or concerted practice were capable of reducing uncertainty as regards the timing, extent and details of the conduct being adopted by at least one, and possibly more, AMA members on the market. Consistent with the settled case law noted in paragraph 4.81, even if the information exchanged or communications could be interpreted as non-binding recommendations on price, the CMA considers that it restricts competition on the basis that it enables all participants to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors would be. Moreover, the Parties expressed a joint intention to conduct themselves on the market in a specific way, including in the manner set out in paragraph 4.98.

*(b)* The fact that a model may ultimately decide whether to work on a particular assignment does not, in the CMA's view, preclude the CMA finding that the Parties participated in the agreement and/or concerted practice that is the subject of this Decision. The CMA also notes that models may not be made aware of assignment proposals (including those that they would potentially be willing to accept) as a result of the agreement and/or concerted practice between the Parties.

*(c)* As it relates to the AMA Alerts, the CMA considers that it was not necessary for the AMA Alerts to reveal actual prices or for the AMA Alerts to have always referred to fees for the information exchanged to have had the object of restricting competition, as explained in paragraph 4.102.

*Legal and economic context*

4.111 The legal and economic context for the Detailed Customer Examples and the AMA Alerts is set out in Sections 2.B, 2.C and 2.F. The CMA notes, in particular, that much of the evidence pertaining to the agreement and/or concerted practice that is the subject of this Decision reveals coordinated attempts by the Parties to maintain price levels where specific customers are seeking to extract greater usage from a model's image, as well as to avoid setting a precedent of allowing additional usage without a corresponding

increase in fees (which could have hampered each of the Model Agency Parties' positions in subsequent negotiations with customers).[475]

4.112 Models 1, Premier, Storm and the AMA have submitted that the true aim of their communications was to satisfy a model agency's legitimate duty to protect models' interests and prevent them from being inadequately remunerated and exploited and thus that it served a legitimate social objective.[476] They have also asserted that the information the Parties exchanged through their contacts gave rise to benign or pro-competitive efficiencies that served a legitimate commercial purpose.[477] Accordingly, they have submitted that the Parties' conduct falls outside the Chapter I prohibition and Article 101 TFEU as conduct that is ancillary to a legitimate and/or commercial objective.

4.113 In this regard, the role of each of the Parties in the agreement and/or concerted practice must be placed in its appropriate context. Models 1, Premier, Storm and the AMA have, through their representations, sought to characterise the AMA as a '*de facto industry regulator*' or as akin to a '*trade union*' representing the employment interests of models. However, the AMA does not operate in this manner and cannot be characterised as such. As described at paragraphs 2.92 to 2.95, the AMA is a trade association funded by its model agency members and represents the commercial interests of its members. The Model Agency Parties, who are competitors and who each benefit financially from negotiating modelling fees that are as high as possible, are represented on the AMA Council. Given this context and the Parties' commercial interests at stake, the CMA does not accept that the AMA or any of the Model Agency Parties had an inherently regulatory or other legitimate social purpose.

4.114 Similarly, Viva submitted that there is a plausible alternative to the Parties' conduct; namely, that the Parties were simply carrying out a legitimate part of their functions to ensure that the models of AMA members were paid an appropriate fee for the work the models choose to do and that the sharing of information between the Parties was accordingly legitimate. In this regard, Viva submits that the AMA Alerts simply alerted model agencies to offers that may have affected models' welfare.[478] On this basis, Viva also asserted the Chapter I prohibition and Article 101 TFEU do not apply.

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[475] See paragraph 2.25.
[476] URN6896 at paragraph 58.
[477] URN6896 at paragraphs 55 to 57.
[478] URN6892.

4.115 However, to the extent that model agencies and their trade association have any such purpose, it does not follow that any actions taken by such model agency or association in pursuit of such objective will fall outside the Chapter I prohibition or Article 101 TFEU. It is settled law that even where certain measures pursue a legitimate objective, this does not preclude such measures from being regarded as having an object restrictive of competition within the meaning of Article 101 TFEU and the Chapter I prohibition.[479]

4.116 Further and in any event, the CMA has assessed the extent of the Parties' conduct during the Relevant Period and, as regards the agreement and/or concerted practice, considers that it went beyond what was objectively necessary and proportionate to protect models from being inadequately remunerated. It was neither objectively necessary nor proportionate for the Parties to seek to coordinate the Model Agency Parties' commercial and pricing behaviour with each other and, via the AMA and the AMA Alerts system, with the broader AMA membership. Nor was it objectively necessary or proportionate for the Model Agency Parties (i) in the context of negotiations with certain specific customers: to agree to fix minimum prices and to a common approach to pricing, to agree to refuse to supply modelling services, to discuss collectively the possibility of rejecting a customer's proposed price, and to discuss the acceptable minimum price; or (ii) for the Parties to agree to use the AMA and the AMA Alerts system to coordinate price. Neither was it objectively necessary or proportionate for the Parties to regularly and systematically share confidential, commercially sensitive information (including future pricing information).[480]

4.117 In addition, and as regards the submission that the Parties' conduct generated pro-competitive efficiencies, Models 1, Premier, Storm, and the AMA submitted the particular relevance of the following economic context: the low (or negative) profitability generated from the supply of (non-top) modelling

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[479] *Groupement des Cartes Bancaires,* paragraph 70.

[480] Models 1, Premier, Storm and the AMA have sought to rely on the European Court judgments in *Wouters*, *Laurent Piau v Commission*, T-193/02, ECLI:EU:T:2005:22 and *Meca-Medina v Commission,* C-519/04, EU:C:2006:492. However, each of these cases concerned regulatory rules with an inherent public interest objective established by regulatory bodies (the Dutch Bar Council, FIFA and UEFA, respectively). Further, in none of these cases did the restriction on competition concern an agreement and/or concerted practice between competitors with the object of coordinating their commercial and pricing behaviour, nor did it involve competitors agreeing to fix minimum prices and to a common approach to prices, agreeing to refuse to supply at a particular price, discussing the possibility of rejecting a customer's proposed price, discussing the acceptable minimum prices for specific customers, or agreeing to use a trade association system to coordinate prices.

services;[481] and Models 1, Premier and Storm did not profit from the jobs associated with the AMA Alerts.[482] In this context, Models 1, Premier, Storm, and the AMA submitted that the AMA Alerts had a legitimate commercial purpose of regularly being able to lower the costs for agencies by reducing the risk that 'opaque' terms (including those in the 'small print') would not be noticed and by alerting model agencies to terms that may have harmed the models' interests.[483]

4.118 The CMA cannot accept this characterisation of the Parties' conduct. As set out in detail above, the CMA considers that the Parties agreed to use the AMA and the AMA Alerts system as part of an overall plan to coordinate the prices of the Model Agency Parties and the broader AMA membership. Further, as regards the nature of the information exchanged amongst the Parties and with the broader AMA membership, the CMA considers it is a mischaracterisation to describe it as being related to 'opaque terms', in particular, where such exchanges concerned prices or usage terms (given that usage is a key element of price). The CMA does not therefore accept that there was a legitimate commercial purpose that would justify the Parties' conduct. (The CMA has considered any economic benefits deriving from the conduct further under Article 101(3) TFEU and section 9 of the Act - see Section 4.K.)

## G. Appreciability

### *Legal framework*

4.119 An agreement and/or concerted practice will only infringe the Chapter I prohibition and/or Article 101 TFEU if it has as its object or effect the appreciable prevention, restriction or distortion of competition[484] within the UK or a part of it, or within the internal market, respectively.

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[481] URN6896 paragraph 27.

[482] URN6896 paragraph 54.

[483] URN6896, paragraph 55 to 56.

[484] It is settled case law that an agreement between undertakings falls outside the prohibition in Article 101 TFEU if it has only an insignificant effect on the market: see Judgment in *Expedia Inc v Autorite de la Concurrence and others*, C-226/11, ECR, EU:C:2012:795 ('***Expedia***'), paragraph 16.

4.120 An agreement 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.[485]

***Application in this case***

4.121 As set out above, the CMA has concluded that the Parties engaged in an agreement and/or concerted practice which had the object of preventing, restricting or distorting competition. The CMA therefore finds that the agreement and/or concerted practice constitutes, by its very nature and independently of any concrete effect that it may have, an appreciable restriction of competition.

4.122 In any event, and in the alternative, the CMA finds that the agreement and/or concerted practice that is the subject of this Decision had an appreciable potential impact on competition for the supply of modelling services in particular in view of the market position and importance of the Parties. As explained in paragraphs 4.141 to 4.145, at the end of the Relevant Period that AMA had 17 members, including most of the larger and most prestigious UK model agencies, and the market share of the Parties is materially above 10%.

## H. Duration

4.123 The duration of the agreement and/or concerted practice that is the subject of this Decision is a relevant factor for determining any financial penalties that the CMA may decide to impose following a finding of infringement.

4.124 For reasons of administrative prioritisation, the CMA has decided to limit its findings of infringement to conduct that took place during the Relevant Period. The relevant facts concerning the AMA Alerts and the Detailed Customer Examples span the entirety of the Relevant Period, during which there were very regular anti-competitive contacts between the Parties.[486]

4.125 Viva made the representation that Viva's involvement in the agreement and/or concerted practice was for the period of one year and seven months only because [Director A] [✂] for four months between early September 2013 and

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[485] *Expedia*, paragraph 37 and *Communication from the Commission: 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)*, paragraphs 2 and 13.
[486] See footnote 132 and footnote 191.

January 2014 and her emails were not monitored.[487] It submitted that, although [booker] replaced [Director A] as the recipient of the AMA Alerts for the period of [✂], Viva does not regard these AMA Alerts as incriminating emails or as evidence of an infringement of the Chapter I prohibition or Article 101 TFEU.[488] The CMA disagrees with this contention and considers that the receipt by [booker] of all 17 AMA Alerts circulated during the period in which [Director A] was [✂] is evidence of Viva's uninterrupted involvement in the single and continuous infringement.

4.126 Accordingly, the CMA finds that the agreement and/or concerted practice that is the subject of this Decision lasted between at least April 2013 and 23 March 2015.

## I. Effect on trade between EU Member States

### *Legal framework*

4.127 Article 101 TFEU applies where an agreement and/or concerted practice has the potential to affect trade between Member States to an appreciable extent.

4.128 An effect on trade means that 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 the agreement, decision or concerted practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between EU Member States.[489] In this context, the concept of 'trade' has a wide scope and is not limited to exchanges of goods and services across borders. It is a wider concept, covering all cross-border economic activity including establishment.[490]

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[487] URN7106.

[488] URN7158.

[489] First stated in the Judgment in *Societe Technique Miniere v Maschinenbau Ulm,* C-56/65, ECR, EU:C:1966:38, paragraph 249. See further, for example, Judgment in *Remia BV and Others v Commission*, C-42/84, ECR, EU:C:1985:327, paragraph 22, case C 172/80. See also Commission Notice: *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* (now Articles 101 and 102 TFEU), OJ C101/81, 27 April 2004 ('***Effect on Trade Guidelines***'), paragraph 24.

[490] *Gerhard Züchner*, paragraph 18; *Effect on Trade Guidelines*, paragraph 19. Services held to constitute 'trade' have included the management of artistic copyrights, employment agency services, the provision of consulting services, and the performance of individual artists.

4.129 Trade between Member States may be affected notwithstanding that the relevant market may be national or sub-national in scope.[491] Moreover, horizontal cartels covering a whole Member State are normally capable of affecting trade between Member States.[492] The European Courts have held in a number of cases that '*an agreement, decision or concerted practice extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about*'.[493]

4.130 For the purposes of assessing whether an agreement or concerted practice may affect trade between EU Member States to an appreciable extent, the CMA follows the approach set out in the *Effect on Trade Guidelines*.

***Application in this case***

4.131 The CMA finds that the agreement and/or concerted practice that is the subject of this Decision may affect trade between Member States to an appreciable extent. The CMA is therefore under a duty to apply Article 101 TFEU to the agreement and/or concerted practice.[494]

4.132 In its assessment, the CMA has taken into account a number of objective factors including the nature of the services covered by the agreement and/or concerted practice that is the subject of this Decision, the legal and economic context in which it took place, the nature of the agreement and/or concerted practice, and the position and importance of the Parties.

*The nature of the services covered by the agreement and/or concerted practice and the legal and economic context*

4.133 Modelling services (whether including or excluding top modelling services) are commonly traded across borders.

4.134 On the supply side, EU models are free to travel and provide modelling services in any country in the EU. In practice, it is very common for models based abroad to compete in, and to travel to, the UK for the purposes of an

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[491] *Effect on Trade Guidelines*, paragraph 22.

[492] *Effect on Trade Guidelines*, paragraphs 78 to 80.

[493] *Wouters*, paragraph 95. See also the *Effect on Trade Guidelines*, paragraph 78.

[494] Article 3(1) of the Modernisation Regulation.

assignment for a UK customer, and for UK-based models to take up assignments abroad.[495]

4.135 This is illustrated by one of the documents submitted by Models 1, Premier, Storm and the AMA which stated that: '[…] *Many UK clients regularly source their models from outside the country and bring them in from Europe or even the USA,* ***whilst booking them at their minimum rate****. This is particularly the case where the jobs comprises multiple days so the client can off-set the cost'* [emphasis added].[496]

4.136 During the Relevant Period, the Model Agency Parties have also provided model agency services across borders. They have organised assignments in the UK for models based abroad (including in EU Member States), in which case a 'mother agency commission' payment would typically have been made to the foreign-based model's 'mother agency'.[497] The Model Agency Parties also provided model agency services to customers based abroad (including in EU Member States) both directly[498] and with the intermediation of a foreign model agency (in which case the Model Agency Party would typically have received 'mother agency commission' payments).

4.137 Model agencies also engage in cross-border activity by establishing (or acquiring) businesses and having a common brand identity across borders. As regards the Model Agency Parties, Viva has model agency businesses and a common brand identity in London, Paris and Barcelona;[499] FM Models was acquired in July 2015 by a company with interests in modelling agency

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[495] See further paragraph 2.42.

[496] URN0722. The fact that large numbers of (non-top) models represented by the Model Agency Parties are also represented by foreign model agencies is also supportive of the fact that those models will either regularly work abroad or come from abroad to work in the UK.

[497] Models are often represented by a local model agency when working in a foreign country, so that models might be represented by more than one model agency. The model agency that oversees the model's work and their availability is known as the 'mother agency'. Potential work through other foreign model agencies is arranged with the mother agency. The mother agency receives a percentage of the commission on the work arranged through the foreign model agency, referred to as 'mother agency commission'.

[498] For example, a material proportion of the turnover of three of the Model Agency Parties in 2014 (ranging from 5% to 25%) related to services to non-UK customers (without the mediation of a foreign model agency) (URN7144; URN7012; URN7132).

[499] In this respect, [Director B] submitted during Viva's penalties oral hearing held at the CMA that '*But as she* [Director A] *has been for seven years* [✂] *understanding what is the philosophy of Viva, which is for me the most important is the way we are managing and the way that we are looking after our models*' (URN7173).

businesses in France, Brussels and the Netherlands;[500] in its penalties oral hearing, Storm stated that it has tried to promote its models in France;[501] and, in its penalties oral hearing, Models 1 stated that it has previously tried to acquire a model agency in France.[502]

4.138 Given that the CMA has found that the agreement and/or concerted practice that is the subject of this Decision concerned modelling services as a whole (that is, including both the services performed by the model and the agency services performed by the model agency), it follows that the international supply of models, including between Member States, may have been affected by the agreement and/or concerted practice (for instance by models based abroad missing out assignments which a Model Agency Party had determined were offering a fee that was too low for the usage contemplated, or by international models working on assignments following negotiations that had benefited from the agreement and/or concerted practice that is the subject of this Decision). To the extent that the international supply of models, including among Member States, was potentially affected by the agreement and/or concerted practice, any non-UK mother agency supplying the relevant model would have also been similarly impacted.

4.139 On the demand side, UK customers often seek to use a model's image (for example from a particular shoot) to market and sell products on a cross-border basis.[503] In this regard, the geographic scope of, or the sales channel concerning, the image usage permitted under the booking contract can constitute a key term that is negotiated between the customer and the model agency, as was evident on multiple occasions concerning the agreement and/or concerted practice.[504] The agreement and/or concerted practice, which had as its object to coordinate commercial and pricing behaviour (including through resisting customers' attempts at including additional geographic or sales channel usage in contracts without a corresponding increase in price), may therefore affect trade between Member States. Furthermore, to the extent that the Parties were successful with that strategy, this had the

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[500] See paragraph 2.54.

[501] URN7169.

[502] URN7171.

[503] See for example URN4051 referring to [customer] ('*The usage is to include PR, online, 3 months in store in UK and 2 German stores*.'); URN4567 referring to [customer] ('*Usage is 3 years, all media - ww exc us and Canada*'); URN4562 referring [customer] (*'Countries: UK, Germany Austria/Switzerland, NL, Italy, Nordics & South Africa*'); URN4446 referring to [customer] (*'Usage is: 6 months / UK, EIRE, Germany, Poland*'); URN6523 referring to [customer] ('*Location - US tbc; Territory: Europe, Middle East and Northern Africa.'*) and URN5057 referring to [customer] ('*Usage – UK, South Africa, Scandinavia, Australia'*). See also paragraphs 2.107 and 3.115.

[504] See for example paragraphs 2.21, 3.69, 3.80 and 3.127.

potential to restrict sales by the customer of its products to non-UK based consumers.

*The nature of the agreement and/or concerted practice*

4.140 Furthermore, as set out in paragraph 2.41, the CMA finds that the Parties' agreement and/or concerted practice extended over the whole territory of the UK, and that the AMA membership covered a significant proportion of the UK market (see paragraphs 4.142 to 4.148). As noted in paragraphs 4.78 to 4.83, agreeing to a common approach to pricing and fixing minimum prices are forms of price fixing (between competitors), and private exchanges between competitors of their individualised intentions regarding future prices are normally considered and fined as cartels because they generally have the object of fixing prices. The agreement and/or concerted practice therefore amounts to a horizontal cartel for the purposes of paragraph 78 of the *Effect on Trade Guidelines*. The CMA therefore finds that the Parties' agreement and/or concerted practice amounted to a horizontal cartel affecting the whole territory of the UK.[505]

*The market position and importance of the Parties*

4.141 The CMA considers that the market position and importance of the Parties further demonstrates that the agreement and/or concerted practice may affect trade between Member States to an appreciable extent.

4.142 At the end of the Relevant Period, the AMA had 17 members, including most of the larger and most prestigious UK model agencies.[506]

4.143 There are no reliable sources of market share information for the UK modelling services market. However, as explained in the paragraphs that follow, on all market share estimates obtained by the CMA, including those submitted by some of the Parties, the market share of the Parties is materially above 10%.

4.144 In their response to the Statement, Models 1, Premier, Storm and the AMA provided estimates of the market share of the Model Agency Parties (excluding FM Models) and of the AMA membership more widely based on number of models.[507] According to this estimate, the combined market share of the Model Agency Parties (excluding FM Models) is 13.7%, and the

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[505] *Effect on Trade Guidelines,* paragraphs 78 to 80.
[506] See paragraph 2.94 and URN7089.
[507] URN6898.

combined market share of AMA members (excluding FM Models) is 43.7%. The CMA considers that those figures are likely to underrepresent the market position of the Model Agency Parties and of the AMA membership during the Relevant Period. First, the market share of the Model Agency Parties and of AMA members *by value* is likely to be higher than by number of models, given that the Model Agency Parties, and many of the AMA members, are considered to be 'premium' model agencies. Second, these estimates exclude FM Models, which was a business of comparable size to some of the other Model Agency Parties before going into liquidation.[508]

4.145 Several documents identified by the CMA dated 2008 and 2009 (including external documents addressed to [Stakeholder B] and to [Stakeholder A]) stated that the AMA represented between 80% and 90% of the UK model industry,[509] with (according to one of these documents) a combined turnover of £41 million.[510] The CMA has not seen any evidence that the AMA lost members in significant numbers between 2008/2009 and the start of the investigation (indeed, the AMA gained members in the intervening period such as for example [Model Agency D] and Viva).

4.146 Models 1, Premier, Storm and the AMA submitted that, because the CMA did not investigate the other AMA members (and in particular whether the AMA membership systematically ignored the AMA Alerts), it is not open to the CMA to take into account the market position of the entire AMA membership in its assessment of appreciability.

4.147 The CMA disagrees. The Guidance on Trade associations, paragraph 5.3 provides that '*the wider the membership among those* [trade associations] *engaged in a market within the United Kingdom, the greater the risk that any anti-competitive behaviour carried on by the association will have an*

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[508] The CMA also notes that in the estimates provided 45% of the market (5,289 models) is attributed to unidentified agencies. The source of the data supporting this market share calculation is unclear. In addition, according to the report provided by Models 1, Premier, Storm and the AMA, '*these shares were calculated based on the numbers of models each agency has in the 'Main' and 'New Face' categories, and excludes top models, classic models and curve models'*. In another submission to the CMA, Models 1, Premier, Storm and the AMA stated that the combined market share of AMA members was 30%, with a total turnover of about £50 million (URN0566). No supporting evidence was provided to justify this market share estimate, which is markedly smaller than the one contained in the contemporaneous documents referred to in paragraph 4.145 (between 80 and 90% of the UK Model industry) (URN6898).

[509] URN3910; URN3395; URN3943.

[510] URN3943.

*appreciable effect. This will be of greater significance where members of a trade association are likely to be actual or potential competitors'.*[511]

4.148 Given that (i) the AMA was a party to the agreement and/or concerted practice; (ii) objectively the AMA's interests were aligned with those of its members; (iii) the anti-competitive practices engaged in were for the benefit of AMA members; and (iv) the object of the agreement and/or concerted practice included the coordination of the commercial and pricing behaviour of the broader AMA membership through the regular and systematic circulation of AMA Alerts; the CMA considers that it is appropriate to take into account the size and the proportion of the market covered by the wider AMA membership when assessing the potential for the agreement and/or concerted practice that is the subject of this Decision appreciably to affect the trade between Member States.

*Representations as regards the quantification of appreciability*

4.149 Models 1, Premier, Storm and the AMA submitted that the CMA had not demonstrated quantitatively that the agreement and/or concerted practice that is the subject of this Decision had had an appreciable effect on trade between Member States. The CMA notes, in this regard, that it is sufficient to demonstrate that the agreement and/or concerted practice *may have* an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.

4.150 In this context, the CMA has had particular regard to the *Effect on Trade Guidelines*, which note that the effect on trade criterion incorporates a quantitative element and the assessment of appreciability depends on the circumstances of each individual case, in particular the nature of the agreement and practice, the nature of the products covered and the market position of the undertakings concerned.[512]

4.151 Paragraph 50 of the *Effect on Trade Guidelines* (which was submitted as being applicable by Models 1, Premier, Storm and the AMA) states that agreements are not normally capable of appreciably affecting competition where they relate to the activities of SMEs (the '**SME rule**'), where the non-

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[511] The GC has also stated that '*The influence which an association of undertakings may have had on the market depends not on its own turnover, which reveals neither its size nor its economic power, but rather on the turnover of its members which gives an indication of its size and economic power'.* See *FNCBV* at paragraphs 317 and 319.

[512] *Effect on Trade Guidelines*, paragraphs 44 and 45.

appreciable affectation of trade rule (the '**NAAT-rule**')[513] applies, or where both apply.

4.152 As regards the SME rule, the *Effect on Trade Guidelines* note that the activities of SMEs are normally local or at most regional in nature, but that SMEs may be subject to EU law jurisdiction where they engage in cross-border economic activity. As noted in paragraphs 4.133 to 4.138, the Model Agency Parties engage in cross-border economic activity (through representing in the UK models that regularly work, or come from, abroad; providing model agency services on a cross-border basis; and negotiating the geographic scope of, or the sales channel concerning, the image usage permitted under booking contracts).

4.153 Combined with the CMA's other findings concerning the capability of the agreement and/or concerted practice that is the subject of this Decision to have an appreciable effect on trade between Member States, the CMA does not consider that the SME rule presumption described in paragraph 50 of the *Effect on Trade Guidelines* arises in this case (see paragraphs 4.140 to 4.148 regarding how the agreement and/or concerted practice extended over the whole territory of the UK and that the AMA membership covered a significant proportion of the UK market, and the position and importance of the Parties).

4.154 The CMA has also considered the NAAT-rule, which is a negative rebuttable presumption that applies to all agreements, irrespective of the nature of the restrictions contained within the agreement, where the following two cumulative conditions are met: (a) the aggregate market share of the parties on any relevant market in the EU affected by the agreement does not exceed 5% (the 'market share condition'); *and* (b) in the case of horizontal agreements, the aggregate annual EU turnover of the undertakings concerned in the products covered by the agreement does not exceed €40 million (the 'turnover condition').

4.155 As regards the market share condition, the CMA notes that in all of the measures considered in paragraphs 4.143 to 4.144 the aggregate market share of the Parties is well above 5%. Accordingly, the negative rebuttable presumption does not apply to the agreement and/or concerted practice that is the subject of this Decision.[514]

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[513] See paragraph 4.154.

[514] Given the conditions of the NAAT rule are cumulative, the CMA has not found it necessary to consider whether the turnover condition is also met.

*Conclusion on effect on trade between Member States*

4.156 Having considered, in the round, the nature of the services covered by the agreement and/or concerted practice that is the subject of this Decision, the legal and economic context in which it took place, the nature of the agreement and/or concerted practice, and the position and importance of the Parties, the CMA considers that the agreement and/or concerted practice that is the subject of this Decision was capable of appreciably affecting trade between Member States.

## J. Effect on trade within the United Kingdom

### *Legal framework*

4.157 The Chapter I prohibition applies to agreements and/or concerted practices which '…*may affect trade within the United Kingdom*'.[515]

4.158 Effect on trade within the UK is a jurisdictional test to demarcate the boundary between the application of EU competition law and national competition law.[516] An agreement or concerted practice is not in fact required to affect trade provided it is capable of doing so.[517] In practice it is very unlikely that an agreement which appreciably restricts competition within the UK does not also affect trade within the UK.[518]

4.159 As regards the question of whether the effect on trade within the UK should be appreciable, the CAT has held that there is no need to import into the Act the rule of 'appreciability' under EU law, the essential purpose of which is to demarcate the fields of EU law and UK domestic law respectively.[519] In a

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[515] By virtue of section 2(1)(a) of the Act. For the purposes of the Chapter I prohibition, the United Kingdom includes any part of the UK where an agreement and/or concerted practice operates or is intended to operate.

[516] *Aberdeen Journals v OFT* [2003] CAT 11 ('***Aberdeen Journals***'), at [459] and [460]. The CAT considered this point also in *North Midland Construction plc v OFT* [2011] CAT 14 ('***North Midland Construction***'), at [48] to [51] and [62]) but considered that it was '*not necessary* […] *to reach a conclusion*'.

[517] Judgment in *Tate & Lyle and Others v Commission*, T-202/98, ECR, EU:T:2001:185, paragraph 78.

[518] *Guidance on Agreements and Concerted Practices*, paragraph 2.25.

[519] *Aberdeen Journals*, at [459] and [460].

subsequent case, the CAT held that it was not necessary to reach a conclusion on that question.[520]

### *Application in this case*

4.160 As noted in paragraph 4.121, the CMA has concluded that the Parties engaged in an agreement and/or concerted practice which had the object of restricting or distorting competition and that this constitutes, by its very nature, an appreciable restriction of competition. Accordingly, the CMA considers that the agreement and/or concerted practice that is the subject of this Decision may have an appreciable effect on trade within the UK. In addition, the factors identified in Section 4.I are all supportive of the agreement and/or concerted practice being capable of having an appreciable effect on trade within the UK. Furthermore, as noted in paragraph 4.140, the CMA has concluded that the agreement and/or concerted practice that is the subject of this Decision extended over (and therefore potentially affected) the whole of the territory of the UK, and that the AMA membership concerned a significant proportion of the UK market for modelling services.

4.161 The CMA therefore considers that the agreement and/or concerted practice that is the subject of this Decision was (at the very least) capable altering the pattern of trade within in the UK to an appreciable extent, so that it may have an effect on trade within the UK.

## K. Exemption under Section 9 / Article 101(3)

### *Legal framework*

4.162 Section 9 of the Act ('Section 9') and Article 101(3) TFEU provide that agreements between undertakings and concerted practices that have as their object or effect an appreciable prevention, restriction or distortion of competition are exempt from, and do not therefore infringe, the Chapter I prohibition or Article 101 TFEU where the following four cumulative criteria are satisfied (the 'exemption conditions'):

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[520] *North Midland Construction* at [48] to [51] and [62]. The CAT stated that it was not necessary to reach a conclusion on the question whether the appreciability requirement extends to the effect on UK trade test as, at least in that case, there was a close nexus between appreciable effect on competition and appreciable effect on trade within the UK, in that if one was satisfied, the other was likely to be so.

- the agreement contributes to improving production or distribution or to promoting technical or economic progress (referred to as the requirement of 'Section 9 / Article 101(3) efficiency gains');
- while allowing consumers a fair share of the resulting benefit;
- it does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the Section 9 / Article 101(3) efficiency gains; and
- it does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

4.163 In considering whether the criteria set out in Section 9 and Article 101(3) TFEU are satisfied, the CMA will have regard to the Article 101(3) Guidelines and to the Horizontal Cooperation Agreements Guidelines.[521]

4.164 In this regard, agreements and concerted practices that contain restrictions identified as hardcore restrictions in Commission guidelines and notices are unlikely to fulfil the conditions for exemption under Section 9 and Article 101(3) TFEU because, as stated in the Article 101(3) Guidelines, they generally fail (at least) the two first conditions of Article 101(3) TFEU as they *'neither create objective economic benefits nor do they benefit consumers'*.[522] Moreover, these types of agreements and concerted practices generally also fail the indispensability test under the third condition.[523] However, each case must be assessed on its own facts, and the guidelines must be applied reasonably and flexibly.[524]

4.165 To the extent that any Section 9 / Article 101(3) efficiency gains arise, they must be objective, and are not to be assessed from the subjective point of view of the parties.[525]

4.166 The burden of proof to demonstrate that an agreement or concerted practice which infringes the Chapter I prohibition and/or Article 101(1) TFEU satisfies

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[521] See *Guidance on Agreements and Concerted Practices*, paragraph 5.5.
[522] *Article 101(3) Guidelines*, paragraph 46.
[523] *Article 101(3) Guidelines*, paragraph 46.
[524] *Article 101(3) Guidelines*, paragraph 6.
[525] *Article 101(3) Guidelines*, paragraph 49.

the exemption conditions is on the undertaking or association of undertakings claiming the benefit of the exemption.[526]

***Application to this case***

4.167 None of the Parties has submitted evidence to demonstrate that the exemption conditions are met as regards the agreement and/or concerted practice that is the subject of this Decision.

4.168 Models 1, Premier, Storm and the AMA have, however, made representations that the following Section 9 / Article 101(3) efficiency gains arose from such agreement and/or concerted practice (the 'claimed efficiency gains'):

- Lowering costs for model agencies by allowing them efficiently to identify efficiently unreasonable terms being proposed by customers;
- Protecting the interests of models more efficiently; and
- Promoting a reputable industry able to operate in the interests of the models and customers.[527]

4.169 Given the seriousness of the agreement and/or concerted practice that is the subject of this Decision, the CMA notes that any Section 9 / Article 101(3) efficiency gains would have to be substantial.[528]

4.170 As a general point, the CMA acknowledges that the functions of a trade association can be useful to members and they may also be beneficial in increasing the efficiency of the market system as a whole, such as, in certain circumstances, through having clearly expressed standard terms and conditions that are transparent to customers.[529] However, any restrictions on competition associated with standardising terms and conditions are likely to outweigh the benefits to consumers – and therefore not meet the exemption conditions – if the standardisation covers terms that are likely to be relevant to a customer in choosing between competing suppliers, for example, if they indirectly (or directly) affect the prices to be charged.[530]

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[526] Subsection 9(2) of the Act and Article 2 of the Modernisation Regulation. An undertaking must thus demonstrate by means of convincing arguments and evidence that the conditions for obtaining an exemption are satisfied. *GlaxoSmithKline*, paragraph 82.
[527] URN6896 at paragraph 94.
[528] *Horizontal Cooperation Agreements Guidelines* at paragraph 246.
[529] *Guidance on Trade associations*, paragraphs 4.7 and 5.2.
[530] *Guidance on Trade associations*, paragraph 4.7.

4.171 The CMA considers this was the case concerning the agreement and/or concerted practice that is the subject of this Decision, which concerned the Parties' objective of coordinating prices and, in certain instances, involved the Model Agency Parties expressing a joint intention to conduct themselves on the market in a specific way, including (i) in the context of negotiations with certain specific customers: agreeing to fix minimum prices and to a common approach to pricing; agreeing to refuse to supply modelling services at a particular price; discussing collectively the possibility of rejecting a customer's proposed price; and discussing the acceptable minimum price and (ii) the Parties agreeing to use the AMA and the AMA Alerts system to coordinate prices.

4.172 As regards the specific efficiencies that it has been submitted arose from the agreement and/or concerted practice that is the subject of this Decision, the CMA notes that the first two of the claimed efficiencies, to the extent they arose, would have both involved lower costs of sales for the Model Agency Parties (through reduced time spent (i) understanding the terms and conditions proposed by the customers, and (ii) liaising with models on such terms and conditions, respectively). However, the CMA has not received any evidence demonstrating:

*(a)* that any such claimed efficiencies did arise, specifically from the Parties' participation in the agreement and/or concerted practice that is the subject of this Decision.

*(b)* if they did arise, that any such claimed efficiencies were material; and

*(c)* how and when any such claimed efficiencies were passed through to consumers in the form of lower prices. [531]

4.173 The CMA therefore considers that any such cost reductions arising from the agreement and/or concerted practice that is the subject of this Decision would not have produced any pro-competitive effects on the market nor, in particular, would they have contributed to improving the production or distribution of goods or to promoting technical or economic progress. They merely would have allowed the Model Agency Parties to increase their profits, and therefore should not be taken into account for the purposes of Section 9 and Article 101(3) TFEU.[532]

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[531] *Article 101(3) Guidelines*, paragraphs 51 and 52.
[532] *Article 101(3) Guidelines*, paragraph 49.

4.174 Similarly, as regards promoting a reputable industry able to operate in the interest of models and customers, Models 1, Premier, Storm and the AMA have not substantiated their claim that any such benefit arose from participating in the agreement and/or concerted practice that is the subject of this Decision, nor the extent to which any such benefit contributed to improving production or distribution or to promoting technical or economic progress.

4.175 In light of the above, the CMA considers that Models 1, Premier, Storm and the AMA have not substantiated their claim that the agreement and/or concerted practice that is the subject of this Decision created any Section 9 / Article 101(3) efficiency gains. Accordingly, the CMA has not considered the other three limbs of the exemption conditions.

## L. Overall conclusions on the application of the Chapter I prohibition and/or Article 101 TFEU

4.176 In view of the foregoing, and in particular of the facts concerning the Parties' conduct set out in Section 3 and in light of the factual background set out in Section 2, the CMA finds that, between at least April 2013 and 23 March 2015, the Parties infringed the Chapter I prohibition and/or Article 101 TFEU by participating in a single and continuous infringement comprising an agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of modelling services in the UK.

4.177 Having examined as a whole the objectives of the agreement and/or concerted practice, the content of its provisions, and the legal and economic context, the CMA considers that the agreement and/or concerted practice can be regarded, by its very nature, as being injurious to the proper functioning of normal competition.

4.178 The CMA considers that the single and continuous infringement had the object of coordinating the commercial and pricing behaviour of the Model Agency Parties and, through the regular and systematic circulation of AMA Alerts, the commercial and pricing behaviour of the broader AMA membership, with the intention of resisting downward pressure on prices for the supply of modelling services, both in the context of negotiations with specific customers and more generally.

4.179 The AMA was also a party to the same agreement and/or concerted practice as the Model Agency Parties. The AMA participated in the agreement and/or concerted practice both passively and, in many instances, actively, by

circulating AMA Alerts, by participating in many of the anti-competitive exchanges between the Model Agency Parties, and by gathering certain information from other AMA members to share with the Model Agency Parties; in each case, the information being circulated, exchanged and shared was confidential, commercially sensitive information (including future pricing information). On this basis, the CMA finds that the AMA played an essential role in operating the AMA Alerts system, and that its conduct was separate from that of the Model Agency Parties. Furthermore, the CMA finds that the AMA intended to contribute by its own conduct to the common objectives of the agreement and/or concerted practice, and that it was aware of the actual conduct planned or put into effect in pursuit of the common objectives, or could reasonably have foreseen it and was prepared to take that risk.

4.180 The CMA also finds that there was an agreement between the Model Agency Parties and between the Model Agency Parties and the AMA to use the AMA and the AMA Council as a vehicle to help meet their wider aim of coordinating the Model Agency Parties' own commercial and pricing behaviour and, through the regular and systematic circulation of AMA Alerts, the commercial and pricing behaviour of the broader AMA membership.

4.181 The agreement and/or concerted practice involved the Model Agency Parties expressing a joint intention to conduct themselves on the market in a specific way, including (i) in the context of negotiations with certain specific customers: agreeing to fix minimum prices and to a common approach to pricing; agreeing to refuse to supply modelling services at a particular price; discussing collectively the possibility of rejecting a customer's proposed price; and discussing the acceptable minimum price; and (ii) the Parties agreeing to use the AMA and the AMA Alerts system to coordinate prices.

4.182 The agreement and/or concerted practice also involved a common understanding that the Parties would regularly and systematically share confidential, commercially sensitive information (including future pricing information) throughout the Relevant Period. The information was shared through numerous instances of more protracted and detailed contact between the Parties in relation to particular customers or usage types (as described in the Detailed Customer Examples) and through the AMA Alerts system (both indirectly, through regularly receiving the AMA Alerts circulated by the AMA, and directly, through discussions and/or email correspondence prior to and after the release of one or more AMA Alerts).

4.183 The CMA also considers that the agreement and/or concerted practice was capable of appreciably affecting trade between Member States.

4.184 The CMA does not consider that the agreement and/or concerted practice is exempt or should be legally excepted by application of section 9 of the Act or Article 101(3) TFEU.

# 5. THE CMA'S ACTION

## A. The CMA's decision

5.1 In light of the above, the CMA has made a decision that, between at least April 2013 and 23 March 2015, the Parties infringed the Chapter I prohibition and Article 101 TFEU by participating in a single and continuous agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the provision of modelling services in the UK.

5.2 Penalties in respect of the Infringement are imposed on the addressees of the Decision listed in paragraph 1.2. The undertakings in question comprise the legal entities that participated in the conduct that is the subject of the Infringement and parent companies that are jointly and severally liable for the Infringement.

## B. Directions

5.3 Section 32(1) of the Act provides that if the CMA has made a decision that an agreement[533] infringes the Chapter I prohibition or Article 101 TFEU, it may give to such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.

5.4 The CMA has been told that the AMA Alerts system has been suspended since the start of the investigation.[534] The Parties have not confirmed whether other elements of the Infringement have also ceased.

5.5 In light of the above, the CMA directs the Parties to cease the Infringement, and not to enter into the same or similar arrangements in the future.

## C. Financial penalties

### *General points*

5.6 Section 36(1) of the Act provides that, on making a decision that an agreement has infringed the Chapter I prohibition or Article 101 TFEU, the CMA may require an undertaking which is a party to the agreement to pay a

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[533] Or, as appropriate, concerted practice or decision by an association of undertakings – see section 2(5) of the Act.
[534] URN0717, paragraph 30, and URN6896.

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 being in force at the time when setting the amount of the penalty (the '*Penalty Guidance*').

5.7 The CMA has decided to impose a financial penalty on each of the Parties for the Infringement.

5.8 Provided the penalties it imposes in a particular case are (i) within the range of penalties permitted by section 36(8) of the Act and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (the '**2000 Order'**),[535] and (ii) the CMA has had regard to the *Penalty 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.[536] The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.[537] Rather, the CMA makes its assessment on a case-by-case basis[538] having regard to all relevant circumstances and the objectives of its policy on financial penalties.

5.9 In line with statutory requirements and the twin objectives of its policy on financial penalties - reflected in both the Act[539] and the *Penalty Guidance*[540] - the CMA also has regard to the seriousness of the infringement and the desirability of deterring both the undertaking on which the penalty is imposed and other undertakings from engaging in behaviour that infringes the Chapter I prohibition and Article 101 TFEU (as well as other prohibitions under the Act and the TFEU as the case may be).[541]

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[535] SI 2000/309, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

[536] *Argos and Littlewoods*, at [168] and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, at [102].

[537] See, for example, *Eden Brown and Others v OFT* [2011] CAT 8 *(Eden Brown*), at [78].

[538] 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*, 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'*.

[539] Section 36(7A) of the Act.

[540] *Penalty Guidance*, paragraph 1.4.

[541] Section 36(7A) of the Act and *Penalty Guidance*, paragraph 1.4.

***Small agreements***

*Legal framework*

5.10 Section 39(3) of the Act provides that a party to a 'small agreement' is immune from the effect of section 36(1) of the Act (that is, the CMA's power to impose penalties) for infringements of the Chapter I prohibition provided the agreement is not a 'price fixing agreement' as defined in section 39(9) of the Act ('***the small agreements immunity***').

5.11 For the purposes of the small agreements immunity, a small agreement is one in which the combined applicable turnover of the undertakings that are party to the agreement does not exceed £20 million in the business year ending in the calendar year preceding one during which the infringement occurred.[542]

5.12 For the purposes of the small agreements immunity, a price fixing agreement is defined as 'an agreement which has as its object or effect, or one of its objects or effects, restricting the freedom of a party to the agreement to determine the price to be charged (otherwise than as between that party and another party to the agreement) for the product, service or other matter to which the agreement relates'.[543]

5.13 The small agreements immunity does not apply to infringements of Article 101 TFEU.

*Application to the case*

5.14 The CMA considers that the Infringement does not amount to a small agreement for the purposes of section 39 of the Act because the combined applicable turnover of the Parties is greater than £20 million.[544]

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[542] Section 3 of the Schedule to The Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000. The applicable turnover of an undertaking shall be limited to the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities after deduction of sales rebates, value added tax and other taxes directly related to turnover. The turnover of an association of undertakings shall be the aggregate applicable turnover of the undertakings that are members of the association (sections 3 and 7 of the Schedule to The Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000).

[543] Section 39(9) of the Act.

[544] As explained in footnote 542, The Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 provides that the turnover of an association of undertakings for the purposes of section 39 of the Act is the aggregate applicable turnover of the undertakings that are

5.15 Since the agreement and/or concerted practice had the object of coordinating the commercial and pricing behaviour of the Model Agency Parties and the broader AMA membership, the CMA considers that for the purposes of applying section 39(9) of the Act, the agreement and/or concerted practice had at least as one of its objects or effects restricting the freedom of the Model Agency Parties to determine the price of the supply of models. This is particularly evident from the fact that the agreement and/or concerted practice involved a number of instances where the Model Agency Parties agreed to fix minimum prices and to a common approach to pricing, or agreed to refuse to supply modelling services at a particular price (see paragraph 4.42). The CMA therefore finds that the agreement and/or concerted practice that is the subject of this Decision is a 'price fixing agreement' as defined in section 39(9) of the Act.

5.16 Finally, having found that the Infringement was capable of affecting trade between Member States to an appreciable extent, the CMA is under a duty to apply Article 101 TFEU, to which the small agreements exclusion does not apply.[545]

5.17 The small agreements immunity therefore does not apply in this case.

***Intention/negligence***

*Legal framework*

5.18 The CMA may impose a penalty on an undertaking which 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.[546] However, the CMA is not obliged to specify whether it considers the infringement to have been intentional or merely negligent.[547]

5.19 The CAT has defined the terms 'intentionally' and 'negligently' as follows:

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members of the association. The combined applicable turnover of the AMA members exceeds £20 million. In addition to the Model Agency Parties, the AMA had other 12 members during the Relevant Period, including model agencies which are part of large international groups with substantial turnovers (such as [Model Agency E], [Model Agency H] and [Model Agency A]).

[545] Article 3 of the *Modernisation Regulation*.

[546] Section 36(3) of the Act.

[547] *Napp Pharmaceutical Holdings v OFT* [2002] CAT 1, at [453] to [457]. See also *Argos and Littlewoods*, at [221].

*'… an infringement is committed intentionally for the purposes of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct has the object or 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'.*[548]

5.20 This is consistent with the approach taken by the CJEU which has confirmed:

*'the question whether the infringements were committed intentionally or negligently* […] *is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty'.*[549]

5.21 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.[550]

5.22 Ignorance or a mistake of law is no bar to a finding of intentional infringement, even where such ignorance or mistake is based on independent legal advice.[551]

*Application in this case*

5.23 The CMA considers that the Infringement had as its object the prevention, restriction or distortion of competition[552] and therefore that the Infringement was committed intentionally.

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[548] *Argos and Littlewoods*, at [221].
[549] Judgment in *Deutsche Telekom v Commission*, C-280/08 P, ECR, EU:C:2010:603, paragraph 124.
[550] See *OFT's Guidance on Competition law application and Enforcement* (OFT407, December 2004), adopted by the CMA Board ('***Guidance on Enforcement***'), paragraph 5.9.
[551] See the CJEU's comments in Judgment in *Bundeswettbewerbsbehörde v Schenker & Co. AG,* C-681/11, ECR, EU:C:2013:404, 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 *Guidance on Enforcement*, paragraph 5.10.
[552] See Section 4.F.

5.24 Further, the CMA considers that the Parties must have been aware, could not have been unaware, or ought to have known, of the anti-competitive nature of their conduct for the following reasons.

5.25 Firstly, there are repeated examples both during and prior to the Relevant Period of customers warning one or more of the Parties that their conduct and the conduct of the AMA amounted to a serious breach of competition law. For example, [company] wrote to Storm in March 2009 that the AMA's move to unilaterally increase model fees by 25% gave the *'serious and strong indication that the agencies, of which* [Storm is] *one, have acted as a cartel'*.[553] In July 2011, Premier ([Director]) reported to Models 1 ([Director A]), [Model Agency A] (then represented on the AMA Council) and the AMA General Secretary that [Retailer B] *'think the AMA is a cartel'*.[554] This view was echoed by [Company C] in a meeting with FM Models ([Director]) and Storm ([Director]) in February 2014.[555] As quoted in the Detailed Customer Examples in Section 3.C, [Online Magazine A] *'refused to speak about rates'* at a meeting attended by a number of agencies (including at least Premier) *'as the publishing director kept banging on about a cartel'*,[556] while [Online Retailer A] stated in an email, later forwarded by the AMA General Secretary to all of the Model Agency Parties, that it declined to engage with the AMA on the basis that *'discussing a standard pricing structure between AMA & actively trading & competing members &* [Online Retailer A] *could be explained as breaching competition law'*.[557]

5.26 Secondly, there were several occasions in which one or more of the Parties acknowledged, and demonstrated an understanding of, their obligations under competition law. For example, in March 2009 the AMA received legal advice at a meeting attended by FM Models ([Director]) and the AMA General Secretary that certain of its practices (described in the legal advice as negotiating rates for models on behalf of model agencies) amounted to *'a*

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[553] 2 copies URN3825 and URN6466. The minutes of an AMA Council meeting on 23 March 2009 in which FM Models ([Director]), Models 1 ([Director A]), Premier ([Director]) and the AMA General Secretary were present (in addition to the then fifth Council member, [Director B] of [Model Agency A]) noted that [company] had similarly alleged that the AMA was operating as a cartel (2 copies: URN1256 and URN3063).

[554] URN2058.

[555] URN4687. The notes of this meeting, in which this statement was recorded, were distributed by the AMA General Secretary to all of the Model Agency Parties (URN5596).

[556] See paragraph 3.63. This report of the meeting with [Online Magazine A] was provided by [Model Agency E] in an email to Premier ([Director]), who subsequently forwarded it to the AMA General Secretary.

[557] See paragraph 3.85. See also paragraphs 3.86 and 3.98.

*clear breach'* of the Act, for which there were no *'immediately obvious and strong defences'*.[558] On the basis of this legal advice, FM Models ([Director]) wrote to customers (copying AMA members which, at this time, included Models 1, Storm and Premier)[559] to inform them that the AMA *'shall no longer* […] *negotiate on behalf of the models they represent and that each model booking for each magazine will be required to be negotiated individually with each agent'*.[560] A letter sent by the AMA to [Online Retailer A] in June 2014 (drafted by Models 1 ([Director A]), and reviewed by all of the other Parties), similarly acknowledged *'that each agent must negotiate individual fees for themselves and on behalf of their respective models'*.[561]

5.27 In its representations on the DPS, Viva stated that the Infringement is novel because the price '*is ultimately determined by the model*' and in light of certain characteristics of the AMA Alerts (including the fact that the AMA Alerts generally do not mention the actual fee being proposed nor the identity of the instigating agency; that there was no monitoring mechanism; and that, according to Viva, there was no evidence that AMA Alerts caused AMA members to change their behaviour).[562] However, in light of the evidence concerning the anti-competitive objective of the Infringement, the content of its provisions and its legal and economic context (see paragraphs 4.111 to 4.117), the CMA considers that the Parties could not have been unaware of the anti-competitive nature of their conduct (irrespective of whether or not they were aware that the conduct amounted to a breach of the Chapter I prohibition and Article 101 TFEU).

5.28 In addition to the legal advice referred to in paragraph 5.26 above, Models 1, Premier, Storm and the AMA also referred in the Representations to two other pieces of legal advice, over which legal privilege was also waived.[563] At their penalties oral hearings, those Parties submitted that, although those pieces of legal advice did not refer to the conduct that was within the scope of the

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[558] URN0728 (voluntarily submitted as part of the 16 June 2015 submission from the legal advisers representing Models 1, Premier, Storm and the AMA, explicitly waiving legal professional privilege).
[559] The CMA understands that Viva was not a member of the AMA at this time.
[560] URN1312; URN1343.
[561] See paragraph 3.100. An email discussion between the Parties in July 2014 implies that the Parties may have been uncertain as to whether discussions regarding usage terms (which the CMA considers amounts to discussion regarding pricing, see paragraph 2.22) was also prohibited by competition law: see URN4886 (see also Viva's representations on the Statement (URN6892). However, as stated in paragraph 5.21, ignorance or mistake of law is no bar to a finding of intentional infringement, and the CMA considers that the Parties could not have been unaware of the anti-competitive nature of their discussions regarding usage terms.
[562] URN7106, paragraphs 3.3 and 6.9 to 6.12.
[563] 2 copies: URN3949 and URN6076; and URN3948.

Infringement, the advice addressed conduct which was, in those Parties' view, more serious than the Infringement, and that on that basis those Parties had concluded that the conduct covered by the Infringement did not breach the Chapter I prohibition or Article 101 TFEU. However, the CMA does not consider that the Parties could reasonably have assumed, on the basis of those two pieces of legal advice (which concerned different facts) that the conduct covered by this Decision was not anti-competitive. Moreover, as explained in paragraph 5.22, ignorance or a mistake of law is no bar to a finding of intentional infringement (and would be the case even if such ignorance or mistake was based on independent legal advice).

5.29 The CMA therefore finds that the Parties committed the Infringement intentionally or, at the very least, negligently.

## D. Calculation of penalties

5.30 As noted at paragraph 5.6, when setting the amount of the penalty the CMA must have regard to the guidance on penalties in force at that time. The *Penalty Guidance* sets out a six-step approach for calculating the penalty.

### *Step 1 – starting point*

5.31 The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated having regard to the seriousness of the infringement and the Relevant Turnover of the undertaking.[564]

*Seriousness of the infringement*

5.32 In order adequately to reflect the seriousness of an infringement, the CMA will apply a starting point of up to 30 per cent of the undertaking's relevant turnover.[565] The actual percentage which is applied to the relevant turnover depends, in particular, upon the nature of the infringement. The more serious and widespread the infringement, the higher the likely percentage rate.[566]

5.33 When making its assessment of the seriousness of the infringement, the CMA will consider a number of factors.[567] The CMA will use a starting point towards

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[564] *Penalty Guidance*, paragraphs 2.3 to 2.11.

[565] *Penalty Guidance*, paragraph 2.5.

[566] *Penalty Guidance,* paragraph 2.4.

[567] In accordance with paragraph 2.6 of the *Penalty Guidance*, these factors include the nature of the product, the structure of the market, the market shares of the undertakings involved in the

the upper end of the range for the most serious infringements of competition law, including hardcore cartel activity.[568] The CMA will also take into account the need to deter other undertakings from engaging in such infringements in the future. The damage caused to consumers whether directly or indirectly will also be an important consideration. The assessment is made on a case-by-case basis, taking account of all the circumstances of the case.[569]

5.34 In this case, in assessing the seriousness of the Infringement, the CMA has taken into account the following factors:

*(a)* The CMA considers that the conduct that is the subject of this Decision is amongst the most serious infringements of competition law.

*(b)* The Infringement affected the total amount invoiced to customers (that is, including model fees), and therefore its potential impact was significantly greater than if it had only concerned agency commission.

*(c)* Although the UK market is to some extent fragmented, the conduct had the potential to affect a significant proportion of the UK market. In particular, the CMA has found that there was an agreement between the Model Agency Parties and between the Model Agency Parties and the AMA to use the AMA and the AMA Council as a vehicle to help meet their wider aim of coordinating the Model Agency Parties' own commercial and pricing behaviour and, through the regular and systematic circulation of AMA Alerts, the commercial and pricing behaviour of the broader AMA membership, which covered a significant proportion of the UK market. Furthermore, the AMA, as the industry trade association, portrayed itself as the 'gold standard' for the model industry, meeting with customers and key stakeholders including Government on behalf of its members, so that it was in a position to influence wider conduct across the sector.[570]

*(d)* Competition between the Model Agency Parties (and between the Model Agency Parties and other model agencies) was not completely eliminated, and there was no organised central monitoring of resulting prices or punishment mechanism.

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infringement, entry conditions and the effect on competitors and third parties. The CMA may also take into account other relevant factors.

[568] *Penalty Guidance*, paragraph 2.5.

[569] *Penalty Guidance,* paragraph 2.6.

[570] See paragraphs 2.102 to 2.104.

*(e)* At least some of the customers are likely to have had a degree of buyer power by virtue of their size and importance in the fashion industry.

5.35 Considering the above factors in the round and the submissions made in the Representations, and having regard to the CMA's past practice in assessing seriousness, the CMA considers that the appropriate starting point in this case is 21%.

*Relevant turnover*

*Calculation of relevant turnover*

5.36 The relevant turnover is the turnover of the undertaking in the relevant product and geographic market affected by the infringement in the undertaking's last business year.[571]

5.37 The CMA has found that the relevant market in this case is the supply of modelling services (excluding top modelling services) in the UK.[572]

5.38 In response to a notice under section 26 of the Act, each of the Model Agency Parties[573] provided to the CMA a list of the top models they represented in 2014 and the agency commission paid by each of them.[574] After the

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[571] *Penalty Guidance*, paragraph 2.7. This further provides that, in this context, an undertaking's last business year is the financial year preceding the date when the infringement ended. In this case, for each of the Model Agency Parties, this is the financial year ending 31 December 2014, and, for the AMA, it is the financial year ending 31 March 2014 (see paragraph 5.53).

[572] See paragraph 2.44. 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).

[573] With the exception of FM Models (in liquidation).

[574] URN6403 (Models 1); URN6399 (Premier); URN6391 (Storm); URN6396 (Viva). In the notice under section 26 of the Act requesting this information, the CMA referred to the definition of 'top models' that had been provided in a submission made on behalf of Models 1, Premier and Storm (in bold below). That submission stated: *'…. there are essentially two separate markets involved in the modelling industry in the UK.* […] *The first of these markets could be described as the New Faces and Main Board market. Here a degree of standardisation does take place* […]. *The second which is, at least for the larger agencies, the most important and remunerative part of their business, is what can be described as the Top Model Market. This market consists of* ***individual elite models whose commission arrangements vary considerably****.* […]. *In the case of Top Models, commission rates*

Statement was issued, Models 1, Storm and Viva provided a further list of models whose associated turnover they submitted should be excluded from their Relevant Turnover.

5.39 As explained in paragraph 2.31, the key differentiating factor between top modelling services and non-top modelling services is that in relation to the former the fame of the model plays a part in the decision to contract for their services, so that the model has a higher degree of market power relative to both the model agency and the customer. As a consequence of this, top models will usually pay significantly lower agency commission, and earn higher fees.

5.40 In order to determine whether certain turnover should be excluded from the Relevant Turnover on the basis that it relates to top modelling services, the CMA applied three criteria which take those three characteristics of top modelling services into account (that is, lower agency commission; higher fees; and fame of the model). Thus, where a model who a Model Agency Party submitted was a top model met any of the following tests, the turnover associated with that model was excluded from the Relevant Turnover:

*(a)* Models who paid agency commission that were considerably lower than the relevant Model Agency Party's standard agency commission.[575]

*(b)* Models who had in 2014 average daily earnings of £5,000 and above (excluding any unpaid work).[576]

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*are altered quite often; this is not the case for New Faces and Main Board models* […]. *We take it that the object of this investigation is not the Top Model market and that the concern of the CMA is to focus on the New and Main Board model market which has given rise to come collective actions on the part of the AMA. We refer to this as the relevant market from now.'* (emphasis in bold added) (see paragraph 2.32).

[575] Historically, the standard agency commission charged by the Model Agency Parties have ranged between 33 and 37.5 per cent (see paragraph 2.20). In this assessment, the CMA considered that the agency commission was 'considerably lower' than the standard agency commission where it was less than 30 per cent. This is consistent with the submission by Models 1, Premier and Storm that top models are '*individual elite models whose commission arrangements vary considerably*' and who pay much lower agency fees than other models (URN1083 and paragraph 2.32).

[576] As explained in paragraph 2.33, top models tend to earn significantly higher fees than non-top models. The CMA considered that a cut-off point lower than £5,000 would not be appropriate in this case in light of the fact that at least two of the AMA Alerts issued in the Relevant Period concerned assignments that paid a daily rate of £5,000 (URN5093 and URN5095). Using a lower cut-off point would therefore have excluded models who would potentially have been put forward for assignments that were the subject of the Infringement. See also footnote 582.

*(c)* Models who were ranked in one of the top ranking lists of [industry website] (on the basis that such ranking gives an indication of the fame of the model).[577]

5.41 The CMA notes the possibility that the second and third criteria in particular may each have resulted in the exclusion of a limited amount turnover associated with models who are not, in fact, top models.[578] To the extent that this is the case, this would result in the Relevant Turnover figures being somewhat understated but not to such an extent as would undermine the effectiveness of the resulting penalties relative to the objectives of the CMA's policy on financial penalties as set out at paragraph 5.9.

5.42 The CMA has not included in the Relevant Turnover revenue associated with individuals who primarily work in fields other than modelling, such as actors and musicians (generally referred to as 'artists'), as there is no evidence that the Infringement affected this segment, and it falls outside the relevant market.[579]

*Representations made by Models 1 and Storm*

5.43 The CMA received a number of submissions regarding the calculation of the Relevant Turnover.

5.44 Models 1 submitted that any models earning above £30,000 per year in the UK should qualify as top models on the basis that this threshold identifies models '*whose earning potential commands a negotiated rate rather than that of a rate card*'.[580] Models 1 submitted that such models will generally earn

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[577] Viva submitted that [industry website] is an objective way to identify top models, as the rankings are voted for by fashion industry professionals (excluding representatives from model agencies). According to Viva, [industry website] is recognised by the international fashion industry as a way of ranking top models and is often referred to by customers when negotiating models fees (URN7029; URN7173). Premier, Models 1 and Storm disagreed with the use of [industry website] noting the subjectivity over its model rankings. On balance, the CMA considers it is appropriate to use rankings in [industry website] as an additional criterion to exclude turnover from the Relevant Turnover (and as a proxy for the fame of the model), bearing in mind however the point noted in paragraph 5.41.

[578] In particular, the CMA notes that some of the models that meet the third criterion had relatively low daily earnings, and paid standard agency commission, and that £5,000 of daily earnings may be too low a threshold to distinguish top models from other models.

[579] The CMA also notes that (similarly as for top modelling services), fame plays a part in the decision to contract for the services of artists, and that artists tend to be subject to much lower agency fees.

[580] URN6945 (Models 1).

more revenue outside the UK, so that their global yearly earnings will be considerably above £30,000.

5.45 The CMA does not agree that yearly earnings is an appropriate criterion for determining whether a model is a top model. This is because yearly earnings reflect not only the daily rate a model commands but also how much the model works.[581] The CMA also notes that the contacts described in Section 3 concern a wide range of assignments (including two assignments with a daily rate of £5,000 and four campaigns in which the total fee for the assignment per model was £10,000 or over, and many in which the customer did not have a 'rate card').[582]

5.46 Models 1 also submitted that revenue in respect of 'classic' and 'curve' models[583] should be excluded on the basis that the Infringement did not affect those categories of models. The CMA disagrees, on the basis that some of the contacts described in Section 3 do concern assignments requiring these categories of modelling services, so that they are directly affected by the Infringement.[584]

5.47 Storm submitted that turnover associated with models with high earning power should be excluded from the Relevant Turnover, and for this purpose

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[581] By way of illustration, the CMA notes that a model working regularly for, say, £800 per day (bearing in mind £800 was the day rate [✂] was prepared to pay [✂]) would earn over £30,000 per year in the UK by working fewer than 38 days per year in the UK.

[582] The AMA Alerts issued during the Relevant Period covered a variety of modelling assignments, with total fees per model ranging from nil to over £10,000. Where daily rates were provided in the casting brief, these ranged from £250 to £5,000 per day. Approximately half of the 123 AMA Alerts issued in the Relevant Period related to assignments that had a total fee per model (that is, the fee for the entire assignment rather than a daily rate) of between £500 and £2,000, covering for example advertorial work, recognisable ecommerce, commercials as well as print/trade/instore/online advertising. About 20% of the AMA Alerts related to assignments with total fees per model between £2,000 to £10,000, which included TV commercials and campaigns. In addition, the AMA Alerts included a small number of editorial assignments which had much lower total fees per model (less than £500) and campaigns that had total fees per model of £10,000 and over. Similarly, the Detailed Customer Examples covered editorial/commercial and ecommerce work and the use of the models' images for click to buy, and a wide range of modelling fees.

[583] According to a submission made on behalf of Models 1, Premier and Storm, the term 'classic' is used to refer to models used '*to present a mature image*' and the term 'curve' is used to refer to models used specifically for 'plus size' jobs. See URN6898, page 39 (joint submission) and URN6945 (Models 1).

[584] At least 13 AMA Alerts issued in the Relevant Period referred to classic models (URN4446; URN4483; URN6523; URN6525; URN6530; URN4682; URN4707; URN4736; 2 copies URN4778 and URN4776; URN4957; URN4979; URN5057; URN5093) and four referred to curve models (URN4446; URN4655; URN4707; URN4957).

submitted a list of models whom Storm considers *'have their own minimum day rate (which would be above the amount the various customers were prepared to pay)'*.[585] Storm did not specify what such minimum day rates would be.

5.48 The CMA considers that a model's earning power is a relevant consideration in determining whether the model is a top model, which is reflected in the criterion discussed in paragraph 5.40(b). However, the CMA is not persuaded that all models whose fees are individually negotiated or that '*have their own minimum day rate*' are top models, nor that the conduct covered by the Infringement does not concern those types of models (not least because of the difficulty of objectively determining whether a particular model meets such criteria). While fees for top modelling services are more likely to be negotiated with a customer on an individual basis, individual negotiation is not, in and of itself, determinative of whether a model should be classified as a 'top model' (see paragraph 2.34).[586]

5.49 Storm also submitted that revenue in respect of 'editorial' models should be excluded from the Relevant Turnover. Storm explained that editorial is '*the industry terminology for models who work at the aspirational end of the market (as opposed to the bottom sector of the utilitarian end under consideration by the CMA)'.* Storm submitted that the CMA has included in the Relevant Turnover revenue associated with '*many models who never have and never will shoot with the clients identified in the SO* [Statement] *for the types of work contemplated by this investigation'.* According to Storm, the CMA's investigation only concerns *'the most basic modelling work'*.[587]

5.50 However, the CMA has found that some of the contacts described in Section 3 do concern editorial modelling assignments, so that editorial modelling services (to the extent that it is a separate market segment)[588] were directly

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[585] URN6963 (Storm).

[586] In its penalties oral hearing, Models 1 stated: '*Every job a model does, is - even if the fee is not negotiated, what the job is and whether they should or should not do it is negotiated. So, every single model on every single booking they do has to be looked at as to what the job is, what the images are, who the photographer is, whether the model should be working with that person or that client*' (URN7171).

[587] URN7138. Storm also stated that 'editorial' models mainly do magazines and catwalk shows with a view to getting high-fashion advertising campaigns (URN6963).

[588] Storm did not seek to put forward arguments as to why editorial modelling services would be in a separate relevant market from other (non-top) modelling services.

affected by the Infringement.[589] The CMA also rejects Storm's submission that the Infringement only concerns '*the bottom sector of the utilitarian end'* and '*the most basic modelling work'*. As explained in footnote 582, the contacts described in Section 3 concerned a wide breadth of modelling assignments.

5.51 Some of the Model Agency Parties also submitted that mother agency commission paid to foreign model agencies,[590] surcharges on travel expenses[591] and work permit fees[592] should be excluded from the Relevant Turnover.

5.52 These submissions have not generally been substantiated. The CMA considers revenue from mother agency commission amounts to turnover generated in the relevant market, and that surcharges on travel expenses and work permit fees are generated as part of the modelling services provided by model agencies. The CMA therefore considers that such fees and surcharges form part of the Model Agency Parties' turnover in the relevant market.

*Last business year*

5.53 The Relevant Turnover is the turnover of the undertaking in the relevant market affected by the infringement in the undertaking's last business year.[593] The 'last business year' is the undertaking's financial year preceding the date when the infringement ended.[594]

5.54 In this case, given the CMA's decision that the Infringement took place from at least April 2013 until 23 March 2015, the 'last business year' for each of the Model Agency Parties is the financial year ending 31 December 2014, and for the AMA it is the financial year ending 31 March 2014.

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[589] At least four AMA Alerts sent in the Relevant Period concerned editorials (URN4404; URN4398; URN1839; URN4939). In addition, the Detailed Customer Example concerning [Online Magazine A] also concerns fees for editorial assignments (see for example paragraph 3.65).
[590] URN6945; URN7008 (Models 1).
[591] URN6990 (Premier). The CMA has accepted the submission to exclude other turnover referred to in Premier's response relating to royalties for a TV show and a clerical error, as the CMA agrees that such turnover is not turnover in the relevant market affected by the Infringement.
[592] URN6963 (Storm).
[593] *Penalty Guidance*, paragraph 2.7.
[594] *Penalty Guidance*, paragraph 2.7.

*Net turnover*

5.55 The CMA has applied the 21% starting point to each Model Agency Party's net turnover (that is, to its turnover 'net' of any model commission fees), thus treating each Model Agency Party's net turnover (excluding turnover which is achieved outside the relevant geographic and product market) as the Relevant Turnover for these purposes. This is consistent with the approach taken by the Model Agency Parties in their financial statements, which with the exception of [✂], do not include commission fees paid to models in their stated turnover.[595] Moreover, the CMA considers that the penalties arrived at using 'net' turnover in the present case are sufficient for deterrence purposes.

*Parties' Relevant Turnover*

5.56 On the basis of the approach described above, the CMA considers that the Relevant Turnover for each of the Parties is as follows:

*(a)* FM Models £[✂]

*(b)* Models 1 £[✂]

*(c)* Premier: £[✂]

*(d)* Storm: £[✂]

*(e)* Viva: £[✂]

*(f)* AMA: £0 (the AMA itself does not achieve any turnover in the relevant market as it is not a model agency)

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

5.57 The starting point under Step 1 may be increased, or in particular circumstances decreased, to take into account the duration of an infringement. 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. Penalties for infringements which last for more than one year

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[595] The CMA will generally base relevant turnover on figures from an undertaking's audited accounts, but in exceptional circumstances it may be appropriate to use a different figure as reflecting the true scale of an undertaking's activities in the relevant market (*Penalty Guidance*, paragraph 2.8). In this case, the CMA considers that using 'net' turnover is sufficient for deterrence purposes.

may be multiplied by not more than the number of years of the infringement.[596]

5.58 In this case, the CMA has concluded that the duration of the Infringement is one year and eleven months.[597]

5.59 The CMA has applied a multiplier of two to all the Parties penalties at this step in the calculation.

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

5.60 The amount of the penalty, adjusted as appropriate at step 2, may be increased where there are aggravating factors, or decreased where there are mitigating factors.[598] A non-exhaustive list of aggravating and mitigating factors is set out in paragraphs 2.14 and 2.15 of the *Penalty Guidance*.

*Aggravating factor - involvement of directors*

5.61 The involvement of directors or senior management in an infringement can be an aggravating factor.[599]

5.62 In this case, almost all of the conduct was carried out by the same five individuals within each Model Agency Party, who were all company directors, namely [Director] (FM Models), [Director A] (Models 1), [Director] (Premier), [Director] (Storm) and [Director A] (Viva).[600] Furthermore, these five directors were also the sole members of the AMA Council.

5.63 Taking into account the active involvement of these five directors in the Infringement, the nature of the Infringement and the management structure of the companies concerned, the CMA considers that an uplift of 10% is appropriate and proportionate in the circumstances of this case.

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[596] *Penalty Guidance*, paragraph 2.12.
[597] See paragraph 4.125 for the representation made by Viva as regards that the duration of its involvement in the agreement and/or concerted practice.
[598] *Penalty Guidance,* paragraph 2.13.
[599] *Penalty Guidance,* paragraph 2.14.
[600] With the exception of emails instigating AMA Alerts, which were in many cases sent to the AMA General Secretary by a booker.

*Mitigating factor – genuine uncertainty*

5.64 The CMA may decrease the penalty at step 3 where it considers there was genuine uncertainty on the part of an undertaking as to whether the agreement or concerted practice constituted an infringement.

5.65 Models 1, Premier, Storm, the AMA and Viva made similar representations as regards genuine uncertainty as those they made in relation to whether the Infringement was committed intentionally or negligently.

5.66 The CMA does not consider that it would be appropriate to reduce the penalty at step 3 on the grounds of genuine uncertainty because the Infringement is not unusual or novel. Indeed, as set out in paragraph 5.25, the Parties were on a number of occasions warned by their customers that their conduct and that of the AMA breached competition law.

5.67 The CMA also rejects the submission by Models 1, Premier, Storm and the AMA that the legal advice referred to in paragraph 5.28 gave grounds for reducing the penalty on the basis of genuine uncertainty. One piece of advice concerns exclusively the application of the criminal cartel provisions of the Enterprise Act 2002, and the adviser does not appear to have been made aware of the conduct which is the subject of the Infringement (although there would have been nothing to prevent the Parties from providing full disclosure of the conduct to enable them to receive fully informed advice).[601] The other piece of advice was addressed to [Stakeholder A] and contains advice on a specific set of facts which are quite different from the facts that give rise to the Infringement, namely *'on the competition law issues in* [Stakeholder A] *publishing recommended minimum rates* [✂]*'*.

5.68 The CMA therefore considers that it would not be appropriate to reduce the penalty at step 3 for genuine uncertainty on the part of any Party as to whether the Infringement constituted a breach of competition law.

*Mitigating factor – cooperation*

5.69 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 *Penalty Guidance* provides that, for these purposes, what is expected is

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[601] The advice states '*I do not have any knowledge that your members collude between themselves to fix prices; on the contrary, my experience is that there is competition and negotiation in relation to prices'.*

cooperation over and above respecting time limits specified or otherwise agreed (which will be a necessary but not sufficient criterion to merit a reduction at step 3).[602]

5.70 In this case, all of the Parties agreed to a streamlined access to file process, which led to savings of time and resources. The CMA considers that a 5% reduction for cooperation is appropriate and proportionate in the circumstances of this case.

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

5.71 The penalty may be adjusted at this step to achieve the objective of specific deterrence (namely, ensuring that the penalty imposed on the undertaking in question 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.[603] At step 4, the CMA will assess whether, in its view, the overall penalty is appropriate in the round.[604] Adjustment to the penalty at step 4 may result in either an increase or a decrease to the penalty.

5.72 Increases to the penalty figure at step 4 will generally be limited to situations in which an undertaking has a significant proportion of its turnover outside the relevant market, or where the CMA has evidence that the infringing undertaking has made or is likely to make an economic or financial benefit from the infringement that is above the level of the penalty reached at the end of step 3. The assessment of the need to adjust the penalty will be made on a case-by-case basis for each individual infringing undertaking.[605] In considering the appropriate level of uplift for specific deterrence, the CMA will ensure that the uplift does not result in a penalty that is disproportionate or excessive having regard to the infringing undertaking's size and financial position and the nature of the infringement.[606]

5.73 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

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[602] *Penalty Guidance*, paragraph 2.15 and footnote 28.
[603] *Penalty Guidance*, paragraph 2.16.
[604] *Penalty Guidance*, paragraph 2.20.
[605] *Penalty Guidance*, paragraph 2.17.
[606] *Penalty Guidance*, paragraph 2.19.

to the undertaking's size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the infringing activity on competition.[607]

5.74 The CMA's consideration of step 4 in calculating each Party's financial penalty is set out below.

*FM Models (in liquidation)*

5.75 The CMA considers that FM Models' penalty after step 3 should be decreased by [✂]% to ensure that the level of penalty is not disproportionate or excessive. The CMA's view is that such a reduction is appropriate having regard to indicators of FM Models' financial position.

5.76 In particular, the CMA notes that, although FM Models is currently in liquidation, it was making profits [✂], and that £[✂] of dividends were paid in total from 2011 to 2013. Furthermore, the two directors of FM Models who owned the company during the period of the Infringement [✂].[608]

5.77 Assessing the resulting step 4 penalty in the round, the CMA considers that the adjusted penalty of £268,138 is appropriate in this case for deterrence purposes without being disproportionate or excessive.

*Models 1*

5.78 The CMA considers that Models 1's penalty after step 3 should be decreased by [✂]% to ensure that the level of penalty is not disproportionate or excessive.

5.79 In particular, the CMA notes that the adjusted penalty amounts to [✂]% of Models 1's average total worldwide annual net turnover for the last three

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[607] *Penalty Guidance*, paragraph 2.20. In this case, the CMA has considered variously a range of indicators of the size and financial position of each of the Parties, including average total worldwide annual net (that is, excluding modelling commission fees) turnover for the last three years, adjusted net assets (namely, net assets in the last financial year plus three years of dividends), average annual profit after tax for the last three years and dividends. Adjusted net assets represents the accounting worth of the company to the shareholders, comprising the difference between assets and liabilities. Payment of dividends rather than retaining profit will reduce net assets, so to allow consistent comparison between companies that pay dividends and those that retain profit, the CMA would normally consider net assets with three years dividends added back. Unless stated otherwise, the CMA has based its assessment on figures for the financial years ending 31 December 2013, 31 December 2014 and 31 December 2015 (see *Penalty Guidance*, paragraph 2.16).

[608] After the start of the CMA's investigation those directors sold FM Models, and six months later the company was placed into liquidation.

financial years, [✂]% of Models 1's adjusted net assets and [✂]% of Models 1's average annual profit after tax for the last three financial years.

5.80 Assessing the resulting step 4 penalty in the round, the CMA considers that the adjusted penalty of £432,904 is appropriate in this case for deterrence purposes without being disproportionate or excessive.

*Premier*

5.81 The CMA considers that Premier's penalty after step 3 should be decreased by [✂]% to ensure that the level of penalty is not disproportionate or excessive.

5.82 The adjusted penalty amounts to [✂]% of Premier's average total worldwide annual net turnover for the last three financial years and [✂]% of Premier's adjusted net assets. The CMA has noted that Premier [✂] in its last completed financial year (2015), which reduced its average annual profit after tax for the three financial years 2013 to 2015 as compared to 2012 to 2014. The adjusted penalty therefore amounts to [✂]% of Premier's average annual profit after tax for the last three financial years, but the equivalent figure for the period from 2012 to 2014 is [✂]%. Despite [✂] in 2015, Premier's total worldwide net turnover in 2015 was broadly similar to that achieved in 2014, 2013 and 2012. The CMA also notes that Premier has been increasing [✂] year on year in 2013, 2014 and 2015 and that it paid £[✂] of dividends in each of 2012, 2013 and 2014. The CMA also notes that, on the basis of its management accounts for January to September 2016, it appears that Premier [✂] in 2016.[609]

5.83 Assessing the resulting penalty in the round, the CMA considers that the adjusted penalty of £150,692 is appropriate in this case for deterrence purposes without being disproportionate or excessive.

*Storm*

5.84 The CMA considers that Storm's penalty after step 3 should be decreased by [✂]% to ensure that the level of penalty is not disproportionate or excessive.

5.85 The CMA notes that the adjusted penalty amounts to [✂]% of Storm's average total worldwide annual net turnover for the last three financial years, [✂]% of Storm's adjusted net assets and [✂]% of Storm's average annual

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[609] URN7165.

profit after tax for the last three financial years. The CMA has taken into account the recent loss by Storm of two very high earning top models, [✂].[610]

5.86 Assessing the resulting penalty in the round, the CMA considers that the adjusted penalty of £491,666 is appropriate in this case for deterrence purposes without being disproportionate or excessive.

*Viva*

5.87 The CMA considers that Viva's penalty after step 3 should be increased by [✂]% to ensure that the level of the penalty is sufficient to achieve specific deterrence.

5.88 The CMA's view is that this increase is appropriate having regard to indicators of Viva's size and financial position and the fact that the legal entity directly involved in the Infringement, Viva London, is part of a larger economic entity which achieved a significant proportion of its turnover outside the relevant market in 2015.[611] In particular, the CMA notes that the adjusted penalty amounts to [✂]% of Viva's average total worldwide annual net turnover for the last three financial years, [✂]% of Viva's adjusted net assets, and [✂]% of Viva's average annual profit after tax for the last three financial years. The CMA also notes that Viva has paid [✂]dividends in the last three years, so that the adjusted penalty amounts to [✂]% of the average dividends for the last three financial years.[612]

5.89 The CMA considered whether a larger uplift would be necessary for specific deterrence. However, assessing the resulting step 4 penalty in the round, and taking into account the evidence regarding Viva's involvement in the Infringement (in particular the fact that it did not instigate any AMA Alerts in the Relevant Period),[613] the CMA considers that the adjusted penalty of £245,095 is appropriate in this case for deterrence purposes without being disproportionate or excessive.

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[610] URN7136.

[611] *Penalty Guidance*, paragraph 2.17.

[612] The figures quoted in this paragraph refer to the entire Viva undertaking. The adjusted penalty represents [✂]% of Viva London's average annual profit after tax for the last three financial years, and [✂]% of Viva London's profit after tax in 2015.

[613] URN7106.

*AMA*

5.90 In exceptional circumstances where an undertaking's relevant turnover is very low or zero, with the result that the figure at the end of step 3 would be very low or zero, the CMA would expect to make more significant adjustments, both for general and specific deterrence, at step 4.[614]

5.91 The AMA does not achieve any turnover in the relevant market (its turnover is all derived from members' subscriptions). The penalty reached at the end of step 3 is therefore zero for the AMA. Taking into account the fact that the AMA does not have any commercial activities, that it has been losing members since the start of the investigation, and that its turnover in the financial year ending 31 March 2014 was only £[✂], the CMA considers it is appropriate and proportionate to adjust the AMA's penalty to £2,500 at step 4.

5.92 Assessing the resulting penalty in the round, the CMA considers that the adjusted penalty of £2,500 is appropriate in this case for deterrence purposes without being disproportionate or excessive.

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

*Adjustments to prevent the maximum penalty from being exceeded*

5.93 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 or, if figures are not available for that business year, the one immediately preceding it.[615]

5.94 Where any infringement by an association of undertakings (for example, a trade association) relates to the activities of its members, the penalty shall not exceed 10% of the sum of the worldwide turnover of each member of the

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[614] *Penalty Guidance*, paragraph 2.18.

[615] Section 36(8) of the Act, the 2000 Order, as amended, and *Penalty Guidance*, paragraph 2.21. The applicable turnover of an undertaking is limited to the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities after deduction of sales rebates, value added tax and other taxes directly related to turnover (2000 Order, Schedule, paragraph 3).

association of undertakings active on the market affected by the infringement.[616]

5.95 No adjustments are necessary to the penalties imposed on Premier, Storm, Viva and the AMA.[617] The CMA has adjusted FM Models' and Models 1's penalties to ensure that they are below the maximum that the CMA may impose as follows:

- FM Models adjusted penalty of £251,118
- Models 1 adjusted penalty of £394,667

5.96 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 EU Member State in respect of the same agreement or conduct.[618] As there is no such applicable penalty or fine, no adjustment is necessary in this case in that regard.

***Step 6 – application if reductions for leniency and settlement***

5.97 The CMA will reduce an undertaking's penalty at step 6 where the undertaking has a leniency agreement with the CMA and/or agrees to settle with the CMA.[619] Reductions for leniency or settlement are not applicable to any of the Parties in this case.

5.98 In exceptional circumstances, the CMA may reduce a penalty where the undertaking is unable to pay the penalty due to its financial position. Such financial hardship adjustments will be exceptional and there can be no expectation that a penalty will be adjusted on this basis.[620]

5.99 In the case of FM Models, given that it is no longer trading but is in liquidation, the CMA has considered whether it would be appropriate to reduce the penalty on the grounds of financial hardship. However, the CMA considers that in the circumstances of this case, and given that the eventual payment of any penalty will be governed by the applicable statutory provisions under the

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[616] *Penalty Guidance*, paragraph 2.23. Note also that the 2000 Order provides that the turnover of an association of undertakings shall be the aggregate applicable turnover of the undertakings that are members of the association (2000 Order, Schedule, paragraph 7).
[617] The statutory cap for the AMA is the aggregate applicable turnover of all of its members.
[618] *Penalty Guidance*, paragraph 2.24.
[619] *Penalty Guidance*, paragraphs 2.25 and 2.26.
[620] *Penalty Guidance*, paragraph 2.27.

Insolvency Act 1986, there are no exceptional circumstances such as to warrant making any financial hardship adjustment to the penalty after step 6.

5.100 Financial hardship adjustments are also not necessary is relation to the other Parties.

***Penalties imposed by the CMA***

5.101 The total penalty imposed on each Party for its involvement in the Infringement is therefore:[621]

*(a)* FM Models £251,000

*(b)* Models 1 £394,000

*(c)* Premier £150,000

*(d)* Storm £491,000

*(e)* Viva £245,000

*(f)* AMA £2,500

## E. Payment of penalty

5.102 The CMA therefore requires the Parties to pay their respective penalty set out in paragraph 5.101.[622] Payment should be made to the CMA by close of banking business on 17 February 2017[623] or on such date or dates as agreed in writing with the CMA.

[621] The penalties on the Model Agency Parties have been rounded down to the nearest thousand pounds.
[622] Details on how to pay the penalty are set out in the letter accompanying this Decision.
[623] The next working day two calendar months from the date of receipt of the Decision.

SIGNED:

[✂]

John Wotton, Inquiry Chair (Chair of the Case Decision Group), for and on behalf of the Competition and Markets Authority;

[✂]

Anne Lambert, Chair, CMA Panel, for and on behalf of the Competition and Markets Authority; and

[✂]

Andrew Groves, Project Director - Enforcement, for and on behalf of the Competition and Markets Authority;

All of whom are the members of, and who together constitute, the Case Decision Group.

# ANNEX A: RELEVANT AMA ALERTS

| Alert URN | Alert date | Customer | Instigating model agency[624] | Instigation URN |
|---|---|---|---|---|
| [✂] | [2013] | Office | FM Models | [✂] |
| [✂] | [2013] | Lancôme | Models 1 | [✂] |
| [✂] | [2013] | Unnamed online production company | Storm | [✂] |
| [✂] | [2013] | Online magazines, including District MTV | Premier and [Model Agency B] | [✂] |
| [✂] | [2013] | Gran Marnier | Storm | [✂] |
| [✂] | [2013] | ASDA | Models 1 | [✂] |
| [✂] | [2013] | Peter Bailey (photography agency) | [Model Agency A] | [✂] |
| [✂] | [2013] | SLEEK make-up | [Model Agency F] | [✂] |
| [✂] | [2013] | AVEDA | Storm | [✂] |
| [✂] | [2013] | Toni & Guy | [Model Agency A] | [✂] |
| [✂] | [2013] | Triumph | Storm | [✂] |
| [✂] | [2013] | Pearl Drops | Models 1 and Storm | [✂] |
| [✂] | [2013] | Monsoon Accessorize | Storm | [✂] |
| [✂] | [2013] | Marks & Spencer | Models 1 | [✂] |
| [✂] | [2013] | Never Underdressed | Premier | [✂] |
| [✂] | [2013] | Debenhams | Models 1 | [✂] |
| [✂] | [2013] | Sainsbury's | Models 1 | [✂] |
| [✂] | [2013] | L'Oréal | FM Models | [✂] |

[624] For the reasons explained in footnote 147, it is possible that the CMA is not sighted of all requests made by model agencies for the issuing of an AMA Alert. It is therefore possible that the AMA Alerts listed in this table were instigated not only as a result of the requests made by the model agencies listed in this column, but also as a result of requests made by other model agencies. This table contains references to all evidence of instigations identified by the CMA, but does not purport to be an exhaustive list of all incidences of instigation.

| Alert URN | Alert date | Customer | Instigating model agency[624] | Instigation URN |
|---|---|---|---|---|
| [✂] | [2013] | Missoni | Models 1 | [✂] |
| [✂] | [2013] | Ben Sherman | Models 1 | [✂] |
| [✂] | [2013] | Country & Town House Magazine | Premier | [✂] |
| [✂] | [2013] | Monsoon | Models 1 | [✂] |
| [✂] | [2013] | Simple | Storm | [✂] |
| [✂] | [2013] | Unnamed newspaper titles | FM Models | [✂] |
| [✂] | [2013] | Debenhams / Janet Reger | Models 1 | [✂] |
| [✂] | [2013] | L'Oréal | FM Models | [✂] |
| [✂] | [2013] | French Connection | Models 1 | [✂] |
| [✂] | [2013] | TK MAXX | Storm | [✂] |
| [✂] | [2013] | Boux Avenue | FM Models | [✂] |
| [✂] | [2013] | Coca Cola | Models 1 | [✂] |
| [✂] | [2013] | Marks & Spencer | Premier | [✂] |
| [✂] | [2013] | Elle Magazine / Amazon | Models 1 | [✂] |
| [✂] | [2013] | Toni & Guy | Models 1 | [✂] |
| [✂] | [2013] | Monsoon | Models 1 | [✂] |
| [✂] | [2013] | LOOK magazine | Models 1 | [✂] |
| [✂] | [2013] | Wrangler | Models 1 | [✂] |
| [✂] | [2013] | Sports Direct | [Model Agency F] | [✂] |
| [✂] | [2013] | Nocturne | Premier | [✂] |
| [✂] | [2013] | JW Anderson | Models 1 | [✂] |
| [✂] | [2013] | Marks & Spencer | Storm | [✂] |
| [✂] | [2013] | Ronald Joyce Bridal wear | Models 1 | [✂] |

| Alert URN | Alert date | Customer | Instigating model agency[624] | Instigation URN |
|---|---|---|---|---|
| [✂] | [2013] | TK MAXX | FM Models | [✂] |
| [✂] | [2013] | Adidas | Storm | [✂] |
| [✂] | [2013] | YMC | Storm | [✂] |
| [✂] | [2013] | Remington | Storm | [✂] |
| [✂] | [2013] | Haagen Dazs | Models 1 | [✂] |
| [✂] | [2013] | Unnamed editorial magazines | [Model Agency D] | [✂] |
| [✂] | [2013] | Tesco | Unknown | N/A |
| [✂] | [2014] | Air Berlin | Models 1 | [✂] |
| [✂] | [2014] | Bloomingdales | Storm | [✂] |
| [✂] | [2014] | Champion clothing | Storm | [✂] |
| [✂] | [2014] | L'Oréal | Storm | [✂] |
| [✂] | [2014] | Boohoo | Models 1 | [✂] |
| [✂] | [2014] | Superdrug | Premier | [✂] |
| [✂] | [2014] | Speedo | Storm | [✂] |
| [✂] | [2014] | JD Sports | Storm | [✂] |
| [✂] | [2014] | Triumph | Storm | [✂] |
| [✂] | [2014] | Olay | Models 1 | [✂] |
| [✂] | [2014] | Roman Originals | Storm | [✂] |
| [✂] | [2014] | Unnamed editorial magazines | Models 1 | [✂] |
| [✂] | [2014] | Kera Straight | [Model Agency G] | [✂] |
| [✂] | [2014] | Unnamed whisky brand | Storm | [✂] |
| [✂] | [2014] | L'Oréal | Models 1 | [✂] |
| [✂] | [2014] | Topshop | Models 1 | [✂] |

| Alert URN | Alert date | Customer | Instigating model agency[624] | Instigation URN |
|---|---|---|---|---|
| [✂] | [2014] | Kipling | Models 1 | [✂] |
| [✂] | [2014] | Matalan | Models 1 | [✂] |
| [✂] | [2014] | Regatta | Models 1 | [✂] |
| [✂] | [2014] | Selfridges | Models 1 | [✂] |
| [✂] | [2014] | Carlsberg | Storm | [✂] |
| [✂] | [2014] | Rimmel | Models 1 and [Model Agency G] | [✂] |
| [✂] | [2014] | Pretty Little Thing | Models 1 | [✂] |
| [✂] | [2014] | Peacocks | Models 1 | [✂] |
| [✂] | [2014] | L'Oréal | Models 1 | [✂] |
| [✂] | [2014] | Patek | Models 1 and Premier | [✂] |
| [✂] | [2014] | Monsoon | Models 1 | [✂] |
| [✂] | [2014] | Elle Magazine / Revlon | Models 1 | [✂] |
| [✂] | [2014] | Adidas | [Model Agency I] | [✂] |
| [✂] | [2014] | Browns Fashion | [Model Agency G] | [✂] |
| [✂] | [2014] | L'Oréal | Models 1 | [✂] |
| [✂] | [2014] | Apricot | Storm | [✂] |
| [✂] | [2014] | Very.co.uk | Models 1 | [✂] |
| [✂] | [2014] | River Island | Models 1 | [✂] |
| [✂] | [2014] | Trevor Sorbie | Models 1 | [✂][625] |
| [✂] | [2014] | Zaeem Jamal | [Model Agency G] | [✂] |
| [✂] | [2014] | Boux Avenue | Models 1 | [✂] |

[625] This email was sent after the relevant AMA Alert, however it confirms that Models 1 instigated the AMA Alert.

| Alert URN | Alert date | Customer | Instigating model agency[624] | Instigation URN |
|---|---|---|---|---|
| [✂] | [2014] | Shortlist and Stylist magazine | [Model Agency H] | [✂] |
| [✂] | [2014] | Very magazine | Models 1 | [✂] |
| [✂] | [2014] | The Outnet | Models 1 | [✂] |
| [✂] | [2014] | Grazia | Models 1 | [✂] |
| [✂] | [2014] | Monsoon Accessorize | Models 1 | [✂] |
| [✂] | [2014] | JD Williams | Storm | [✂] |
| [✂] | [2014] | House of Fraser | Models 1 | [✂] |
| [✂] | [2014] | Conde Nast / Monsoon | Premier[626] | [✂] |
| [✂] | [2014] | Goldwell hair products | Models 1 | [✂] |
| [✂] | [2014] | Schott | Models 1 | [✂] |
| [✂] | [2014] | Head & Shoulders | Models 1 | [✂] |
| [✂] | [2014] | Elle Magazine / River Island | Models 1 | [✂] |
| [✂] | [2014] | The Outnet | Premier | [✂] |
| [✂] | [2014] | Topshop | Premier | [✂] |
| [✂] | [2014] | VO5 | Models 1 | [✂] |
| [✂] | [2014] | Charles Worthington | Models 1 | [✂] |
| [✂] | [2014] | Elemis | Storm | [✂] |
| [✂] | [2014] | Braun | Models 1 | [✂] |
| [✂] | [2014] | Diesel | Models 1 | [✂] |
| [✂] | [2014] | Unnamed car brand | [Model Agency G] | [✂] |

[626] Models 1 sent a request to the AMA General Secretary for an AMA Alert to be issued in respect of this casting, however it was sent after the relevant AMA Alert had been circulated ([✂]).

| Alert URN | Alert date | Customer | Instigating model agency[624] | Instigation URN |
|---|---|---|---|---|
| [✂] | [2015] | Everything5pounds | [Model Agency F] | [✂] |
| [✂] | [2015] | Toni & Guy | Models 1[627] | [✂] |
| [✂] | [2015] | Diesel | Models 1 | [✂] |
| [✂] | [2015] | IOMA | Premier | [✂] |
| [✂] | [2015] | Bentley magazine | Models 1 | [✂] |
| [✂] | [2015] | Marks & Spencer | Storm | [✂] |
| [✂] | [2015] | Barry Jeffery (photography agency) | [Model Agency G] | [✂] |
| [✂] | [2015] | JD Williams | Storm | [✂] |
| [✂] | [2015] | Forevermark Diamonds | Premier | [✂] |
| [✂] | [2015] | Good Housekeeping / Clarins | Models 1 | [✂] |
| [✂] | [2015] | Toni & Guy | Storm | [✂] |
| [✂] | [2015] | BE Creative make-up | Storm | [✂] |
| [✂] | [2015] | Elle Magazine / McArthurGlen | Storm | [✂] |
| [✂] | [2015] | Grazia magazine / Bourjois | Storm | [✂] |
| [✂] | [2015] | Nioxin | Storm | [✂] |
| [✂] | [2015] | Samsung | [Model Agency B] | [✂] |
| [✂] | [2015] | Firetrap | Premier | [✂] |
| [✂] | [2015] | Ben Sherman | Models 1 | [✂] |

[627] [Model Agency G] sent a request to the AMA General Secretary for an AMA Alert to be issued in respect of this casting, however it was sent after the relevant AMA Alert had been circulated ([✂]).