

# **Decision of the Competition and Markets Authority**

**Galvanised steel tanks for water storage  
information exchange infringement**

**Case CE/9691/12**

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

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 Names have been replaced by a general descriptor of the individual's role.

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# 1. Introduction and executive summary

1.1 By this decision, of which Annex A forms an integral part (the ‘Information Exchange Decision’) the Competition and Markets Authority (CMA) has concluded that the following undertakings (each ‘a Party’, together ‘the Parties’) participated in a concerted practice which infringed the prohibition imposed by section 2(1) (the ‘Chapter I prohibition’) of the Competition Act 1998 (‘the Act’) and Article 101 of the Treaty on the Functioning of the European Union (‘Article 101 TFEU’).<sup>1</sup>

- Franklin Hodge Industries Limited (‘Franklin Hodge’) and its parent Carter Thermal Industries Limited (‘Carter Thermal’) (together, ‘FHI’),<sup>2</sup>
- Galglass Limited, in liquidation (‘Galglass’) and its parents Kernoff Limited (‘Kernoff’) and Irish Industrial Tanks Limited (‘IIT’),
- KW Supplies Limited (‘KW Supplies’), as economic successor to Kondea Water Supplies Limited now in liquidation (‘Kondea’), and
- Balmoral Tanks Limited (‘Balmoral Tanks’) and its parent Balmoral Group Holdings Limited (‘Balmoral Group’) (together, ‘Balmoral’).

1.2 Specifically, in July 2012, the Parties infringed the Chapter I prohibition and Article 101 TFEU by participating in a concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of cylindrical galvanised steel tanks (‘CGSTs’) in the UK. The infringement (the ‘information exchange infringement’) took the form of an exchange amongst the Parties of commercially sensitive information regarding their current pricing and future pricing intentions which took place at a meeting on 11 July 2012 (or, in the case of Galglass, following that meeting). The information provided was comprised of both generic and contract-specific information, in the form of price bands and prices quoted for specific contracts relating to two types of CGSTs. Such exchange of information reduced uncertainty as regards the pricing to be adopted by the Parties involved for the supply of CGSTs and thereby had the object of restricting competition.

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<sup>1</sup> The basis for attributing liability for the infringement is explained in paragraph 2.44 to 2.98 below.

<sup>2</sup> FHI approached the CMA’s predecessor organisation, the Office of Fair Trading (the ‘OFT’) on 26 April 2013 and was granted a marker for Type C leniency under the OFT’s leniency policy on 3 May 2013.

- 1.3 By way of a separate decision issued on 19 December 2016 (the ‘Main Cartel Decision’), the CMA has also found that FHI, Galglass, Kernoff, IIT and KW Supplies, together with CST Industries (UK) Limited (‘CST UK’) and its parent CST Industries Inc. (together ‘CST’),<sup>3</sup> participated in an agreement and/or concerted practice (in the form of price-fixing, bid-rigging and market sharing by way of customer allocation) which had as its object the prevention, restriction or distortion of competition in relation to the supply of CGSTs in the UK between 29 April 2005 and 27 November 2012, and in the case of CST between 29 April 2005 and 2 May 2012, and thereby infringed the Chapter I prohibition and Article 101 TFEU. While that infringement (the ‘main cartel infringement’) provides the background against which the information exchange infringement took place, the CMA has concluded that Balmoral was not a party to the main cartel infringement.
- 1.4 On 17 March 2016, the CMA settled the case with FHI, Galglass, Kernoff, IIT and KW Supplies (‘the Settling Parties’) in respect of both the main cartel infringement and the information exchange infringement, as announced by the CMA on 21 March 2016.<sup>4</sup>
- 1.5 The CMA has imposed a financial penalty on Balmoral under section 36 of the Act in respect of its participation in the information exchange infringement. As set out in the Main Cartel Decision, the CMA has imposed a financial penalty on each of the Settling Parties in respect of their participation in the main cartel infringement, in accordance with the terms of the settlement. The CMA has not imposed an additional penalty on the Settling Parties in respect of their participation in the information exchange infringement, taking into account the particular circumstances of the case.
- 1.6 For ease of reference, Annex A includes a table of defined terms used in this decision.

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<sup>3</sup> CST reported the conduct to the OFT and was granted a marker for Type A immunity under the OFT’s leniency policy on 2 May 2012.

<sup>4</sup> See the CMA’s case page at <https://www.gov.uk/cma-cases/investigation-into-the-supply-of-galvanised-steel-tanks-for-water-storage>.

## 2. Factual background

### A. Industry overview

- 2.1 The information exchange infringement concerns the supply of CGSTs for water storage used primarily for the purposes of fire suppression, serving sprinkler systems in buildings in the UK. CGSTs supply water to sprinkler systems and are replenished from the mains water supply. This section provides a brief overview of the requirements imposed on water storage tanks used in fire suppression systems, considers the types of storage tanks produced by the Parties and their end uses, the route to market, production method and different types of galvanised steel tanks ('GSTs').
- 2.2 Sprinkler systems are typically installed at large commercial and some public-sector premises such as those of retailers, warehouse operators, office buildings and schools.<sup>5</sup> The demand for these systems is driven by such factors as the requirements of the insurance industry, the advice and/or expectations of the Fire and Rescue Service, the Government, and property owners and by demand in the construction industry for commercial and industrial property.<sup>6</sup>
- 2.3 GSTs are made from flat sheets of galvanised steel and assembled on-site on foundations (usually concrete) and are lined to prevent corrosion. Peripherals connect them to the sprinkler system and control water flow. They can be cylindrical or rectangular in shape, with the shape generally being determined by the location of the tank. Broadly speaking, CGSTs are generally preferred for outdoor locations, and are cheaper to produce, especially in larger sizes. Rectangular GSTs are normally provided to sites where ground area is at a premium, for example where the tank might have to fit inside a building.<sup>7</sup> Rectangular GSTs tend to be more expensive to produce as they need to be reinforced by using thicker steel or internal bracing which is not required for

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<sup>5</sup> [Armstrong Priestley senior employee] witness statement, 30 October 2013, paragraph 4 [URN 4936].

<sup>6</sup> Hughes, K (ed) *Market Report 2012 – Fire Protection Report*, Key Note January 2012, pages 1, 29, 46 and 64.

<sup>7</sup> [Franklin Hodge senior employee 2] witness statement, 4 February 2014, paragraph 27 [URN 4963]; [Franklin Hodge employee 4] witness statement, 11 November 2013, paragraph 14 [URN 4962]; [Galglass senior employee 2] witness statement, 5 September 2013, paragraph 15 [URN 4949]. [CST UK senior employee 2] witness statement, 22 August 2013, page 11 [URN 4958] also mentions that CST UK's CGSTs take three or four weeks to manufacture compared with four to five weeks for rectangular GSTs.

CGSTs.<sup>8</sup> Several sources indicate that the vast majority of GSTs sold are cylindrical.<sup>9</sup>

- 2.4 GSTs used in sprinkler systems also need to be fitted with a device known as a vortex inhibitor. A vortex inhibitor stops the fire sprinkler tank pump within the tank from drawing in air if the water level gets too low and allows a safer and more efficient operation of the tank.<sup>10</sup>
- 2.5 GSTs are built to order to fit the requirements of the customer's specific needs, but typical volumes for CGSTs are 27-30m<sup>3</sup> (often used for schools) and 135m<sup>3</sup> (often used for supermarkets).<sup>11</sup> Fire suppression contractors ('FS contractors') will generally request bids from a number of GST suppliers in relation to each tank.<sup>12</sup> The supplier who wins the bid will then build the tank on-site, generally under the supervision of the FS contractor.<sup>13</sup>
- 2.6 With the exception of Kondea, the Parties supplied GSTs as part of a range of tanks made from other materials. Kondea supplied only GSTs. Set out below is the range of tanks each Party supplied and a short description of their primary end uses.

#### *Tanks manufactured/supplied by the Parties*

- 2.7 A range of tanks were manufactured or supplied by the Parties during the period March 2005 to November 2012:
- Galglass' range included CGSTs and rectangular GSTs, glass enamel coated steel tanks, epoxy-coated steel tanks and concrete tanks,<sup>14</sup>

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<sup>8</sup> [Franklin Hodge senior employee 3] witness statement, 5 February 2014, paragraph 28 [URN 4966].

<sup>9</sup> For CST UK, [CST UK senior employee 1] witness statement, 9 May 2013, page 13 [URN 2448]: '98% of all tanks supplied were cylindrical.' [Franklin Hodge senior employee 3] [3<] For Galglass, [Galglass senior employee 2] witness statement, 5 September 2013, paragraph 15 [URN 4949]: 'The vast majority of sprinkler tanks we build are round...'; [Argus Fire Protection senior employee] live testimony, Livenote transcript [criminal trial], 12 June 2015, page 5, lines 18-25 and page 6, lines 1-5 [URN 6616].

<sup>10</sup> [Building Research Establishment senior employee] witness statement, 15 April 2013, page 3 [URN 2418].

<sup>11</sup> [CST UK senior employee 1] witness statement, 20 February 2013, pages 4-5 [URN 0689]; [Compco employee] witness statement, 2 July 2013, paragraph 14 [URN 2460]; [Customer 1 senior employee] witness statement, 12 November 2013, paragraphs 4 and 14 [URN 4938].

<sup>12</sup> See customer witness statements, for example, [Automatic Fire Control Ltd senior employee] witness statement, 3 July 2013, paragraph 2 [URN 2468]; [Compco employee] witness statement, 2 July 2013, paragraph 2 [URN 2460]; [Customer 1 senior employee] witness statement, 12 November 2013, paragraph 6 [URN 4938].

<sup>13</sup> [Automatic Fire Control Ltd senior employee] witness statement, 3 July 2013, paragraph 3 [URN 2468].

<sup>14</sup> [Galglass senior employee 2] witness statement, 5 September 2013, paragraph 14 [URN 4949].

- Franklin Hodge supplied CGSTs and rectangular GSTs and cylindrical and rectangular aluminium tanks,<sup>15</sup>
- Balmoral Tanks supplied an extensive range of tanks, which included but was not limited to, glass reinforced plastic tanks ('GRPs'), hot pressed steel tanks and from January 2012 CGSTs,<sup>16</sup>
- Kondea supplied CGSTs and rectangular GSTs manufactured by CST UK.<sup>17</sup>

2.8 By way of background, the primary end uses for the above categories of tanks supplied by the Parties can be summarised as follows:

- cylindrical and rectangular GSTs: storage of water for use in fire suppression systems, irrigation systems<sup>18</sup> and agricultural water storage,<sup>19</sup>
- glass enamel and epoxy coated steel tanks: storage of water, waste water, slurry, bioenergy digestion, general liquids and dry bulk materials,<sup>20</sup>
- concrete tanks: civil engineering projects,<sup>21</sup>
- aluminium tanks: potable or process water storage and storage of non-potable water for use in fire suppression,<sup>22</sup>
- GRPs: storage of potable water and storage of non-potable water for use in fire suppression,<sup>23</sup>

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<sup>15</sup> FHI's response dated 18 August 2015 to the CMA's request for information dated 16 July 2015, paragraph 1.1 [URN 6830].

<sup>16</sup> Balmoral's response dated 24 July 2015 to the CMA's request for information dated 16 July 2015, paragraph 1 [URN 6101]. In 2014 Balmoral further extended the range of tanks it produces by acquiring Galglass' industrial tanks and concrete tanks business.

<sup>17</sup> [CST UK senior employee 1] witness statement, 20 February 2013, pages 7-8 [URN 0689]; [CST UK senior employee 2] witness statement, 22 August 2013, pages 2, 3 and 12 [URN 4958]; [Kondea senior employee] interview transcript, 27 November 2012, page 40 [URN 0690].

<sup>18</sup> [CST UK senior employee 2] witness statement, 22 August 2013, page 2 [URN 4958] and CST's response dated 30 July 2015 to the CMA's request for information dated 16 July 2015, paragraph 1.c [URN 6117]; Balmoral's response dated 24 July 2015 to the CMA's s26 notice dated 16 July 2015, paragraph 1 [URN 6101].

<sup>19</sup> [CST UK senior employee 1] witness statement, 20 February 2013, page 4 [URN 0689]; [CST UK senior employee 2] witness statement, 22 August 2013, page 2 [URN 4958].

<sup>20</sup> [Galglass senior employee 2] witness statement, 5 September 2013, paragraph 14 [URN 4949]; CST's response dated 30 July 2015 to the CMA's request for information dated 16 July 2015, paragraph 1.c [URN 6117].

<sup>21</sup> [Galglass senior employee 2] witness statement, 5 September 2013, paragraph 14 [URN 4949].

<sup>22</sup> FHI's response dated 18 August 2015 to the CMA's request for information dated 16 July 2015, paragraph 1.2 [URN 6830].

<sup>23</sup> Balmoral's response dated 24 July 2015 to the CMA's request for information dated 16 July 2015, paragraph 1 [URN 6101] refers to '*cold water storage*'; [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraphs 23–24 [URN 5007]; note of OFT meeting with Balmoral 21 January 2013 [URN 1576]. Customer evidence supports that GRPs are sometimes used in sprinkler systems. Further detail is set out below.



- hot press steel tanks: water and waste water storage.<sup>24</sup>
- 2.9 Evidence suggests that between 2005 and 2012 the majority of GSTs sold in the UK were for use in fire suppression systems.<sup>25</sup> CST UK sometimes also supplied GSTs for use in irrigation systems, for example for golf courses, but witnesses from CST UK suggest that this accounted for 5% or less of CST UK's total GST sales.<sup>26</sup>
- 2.10 The immediate customers of GST suppliers are usually FS contractors appointed by end-users to design, supply and install sprinkler systems, with the FS contractor deciding which tank to use as one of many inputs needed to complete a contract.<sup>27</sup> Major FS contractors include Tyco, Compco and Hall & Kay. Occasionally, end-users buy tanks directly from tank suppliers before having FS contractors install systems,<sup>28</sup> or put requirements into contracts as to which tank to use.<sup>29</sup>

### *Certification of GSTs*

- 2.11 End-users' insurers typically require the use of certified products for fire suppression, so for most contracts for the supply of tanks used in fire

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<sup>24</sup> Balmoral's response dated 24 July 2015 to the CMA's request for information dated 16 July 2015, paragraph 1 [URN 6101]; [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 23 [URN 5007]; note of OFT meeting with Balmoral 21 January 2013 [URN 1576].

<sup>25</sup> For CST UK: [CST UK senior employee 1] witness statement, 20 February 2013, page 4 [URN 0689]; [CST UK senior employee 2] witness statement, 22 August 2013, page 2 [URN 4958]; For Franklin Hodge: [Franklin Hodge senior employee 1] stated that: 'Franklin Hodge's business can be divided approximately as follows: [3<]'. [Franklin Hodge senior employee 1] prepared statement, 23 May 2013, paragraph 34 [URN 6527]; [Galglass senior employee 2] witness statement, 5 September 2013, paragraph 14 [URN 4949] states that Galglass manufactured galvanised steel tanks 'predominantly' for the fire sprinkler market; Balmoral listed fire sprinkler as the only end use application for its GSTs in its response dated 24 July 2015 to the CMA's s26 notice dated 16 July 2015, paragraph 1 [URN 6101].

<sup>26</sup> [CST UK senior employee 1] witness statement, 20 February 2013, page 4 [URN 0689]; [CST UK senior employee 2] witness statement, 22 August 2013, page 2 [URN 4958].

<sup>27</sup> Witnesses mainly mention dealing with FS contractors and only rarely with end-users direct. For example, [CST UK senior employee 1] witness statement, 20 February 2013, page 15 [URN 0689] discusses the customers targeted by the cartel. [Franklin Hodge senior employee 1] prepared statement, 23 May 2013, paragraph 65 [URN 6527] notes that Franklin Hodge sold predominantly to FS contractors, [3<]. The witness statements of several FS contractors' state that they contract with end-users before buying inputs such as sprinkler tanks from suppliers, dealing with the parties' salespeople for tanks. [Automatic Fire Control Ltd senior employee]'s account is typical: 'The system we work is that a client comes to us for a sprinkler system to be manufactured and fitted into their premises... We go to the suppliers in the industry to obtain costs for the various components of the sprinkler system and then work out a profit margin... We tend to get two quotes for the tank but it depends how quickly we need it, sometimes we go straight to one Tank Company for a price.' [Automatic Fire Control Ltd senior employee] witness statement, 3 July 2013, paragraph 2 [URN 2468].

<sup>28</sup> [Customer 1 senior employee] witness statement, 12 November 2013, paragraph 7 [URN 4938]: [3<]; [Franklin Hodge senior employee 2] witness statement, 4 February 2014, paragraph 73 [URN 4963] [3<].

<sup>29</sup> For example, some schools specify GRPs of a size common among schools.

suppression systems the tanks have to meet certain industry standards.<sup>30</sup> In the UK, the Loss Prevention Certification Board ('LPCB')<sup>31</sup> adopted the LPS 1276 standard in 2009 which implements the EU's EN 12845 standard.<sup>32</sup> It replaces the slightly less stringent LPS 1254.<sup>33</sup> Manufacturers whose tanks have received LPCB approval are listed in the LPCB's Red Book of approved products. The other standard manufacturers may need to meet is the Factory Mutual Approvals Standard.<sup>34</sup>

- 2.12 LPS 1276 imposes requirements on tank design<sup>35</sup> but does not require tanks to be of a particular material or shape. However, it does state that current industry experience shows that the following materials may be suitable: galvanised steel, glass enamel coated steel, glass-reinforced plastic or concrete (with minimum standards for each type, such as the required amount of galvanising and type of lining for GSTs).<sup>36</sup>
- 2.13 As CGSTs are built to the same standards, they are a commoditised product for which the predominant parameter of competition is price, though customer service and after-care can also be factors.<sup>37</sup>
- 2.14 Until Balmoral Tanks' entry into the GST market in early 2012, CST UK, Galglass and Franklin Hodge were the only UK-based LPCB approved

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<sup>30</sup> Confirmed by [Building Research Establishment senior employee] witness statement, 15 April 2013, page 1 [URN 2418].

<sup>31</sup> The LPCB has existed for over 100 years and is now operated by BRE (formerly the government's Buildings Research Establishment, now privatised). It also certifies FS contractors to standard LPS 1048.

<sup>32</sup> [http://www.redbooklive.com/download/pdf/LPS1276-1.1\\_SPNL.pdf](http://www.redbooklive.com/download/pdf/LPS1276-1.1_SPNL.pdf).

<sup>33</sup> <http://www.redbooklive.com/download/pdf/LPS1254.pdf>. The CMA did not find evidence of the standard change affecting the types of sprinkler tank supplied, or the suppliers active, in the UK.

<sup>34</sup> See, for example, [CST UK senior employee 1] witness statement, 9 May 2013, page 13 [URN 2448] noting that most GSTs are covered by both LPCB and FM. A minority of UK clients may demand FM tanks explicitly: [CST UK senior employee 1] witness statement, 9 May 2013, page 10 [URN 2448]. See [FM Approvals senior employee] witness statement, 8 January 2014, page 4 [URN 4940]: Franklin Hodge, CST UK, Galglass and Balmoral Tanks were all accredited to manufacture tanks to FM Approvals Standard 4020.

<sup>35</sup> For example, tanks must have access for inspection, heating to prevent freezing in winter, certain drainage features and vortex inhibitors to prevent supply problems when the water volume is low.

<sup>36</sup> LPS 1276: issue 1.2 – Requirements for the LPCB certification and listing of above ground suction tanks for sprinkler systems, para 3.2.2, guidance on superior supply tanks.

<sup>37</sup> [Franklin Hodge senior employee 1] prepared statement, 23 May 2013, paragraph 35 [URN 6527]. Confirmed by customers, see: [Argus Fire Protection senior employee] witness statement, dated 21 May 2013, page 2 [URN 2450]; [Armstrong Priestley senior employee] witness statement, dated 30 October 2013, paragraph 14, [URN 4936]; [Compco employee] witness statement, dated 2 April 2013, paragraph 2 [URN 2460]; [Tyco senior employee] witness statement, 21 March 2013, paragraph 6 [URN 2413].

manufacturers of GSTs and (together with Tyco Fire Products Manufacturing Limited) vortex inhibitors.<sup>38</sup>

## B. The relevant market

### Purpose of assessing the relevant market

- 2.15 When applying the Chapter I prohibition or Article 101 TFEU, the CMA is not obliged to define the relevant market, unless it is impossible, without such a definition, to determine whether the agreement and/or concerted practice under investigation had as its object or effect the appreciable prevention, restriction or distortion of competition.<sup>39</sup> No such obligation arises in this case.
- 2.16 However, the CMA will still form a view of the relevant market in order to calculate the Parties' 'relevant turnover' in the market affected by the infringement, for the purposes of establishing the level of any financial penalties that may be imposed on each Party.<sup>40</sup>
- 2.17 In this respect, the Competition Appeal Tribunal (the 'CAT') and the Court of Appeal have accepted that it is not necessary to carry out a formal analysis of the relevant product market in order to assess the appropriate level of the penalty. Rather, the CMA must be 'satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement.'<sup>41</sup> As the Court of Appeal has stated:

'... the market which is taken for calculation of the turnover relevant for Step 1 on a penalty assessment may properly be assessed on a broad view of the particular trade which has been affected by the proved infringement, rather than by a relatively exact application of

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<sup>38</sup> [Building Research Establishment senior employee] witness statement, 15 April 2013, pages 8 to 11 [URN 2418] and exhibits [§<] to [§<] [URN 2431 to URN 2442]; Balmoral Tanks obtained LPCB certification for CGSTs for sprinkler systems on 16 December 2011 and for vortex inhibitors on 24 May 2012. See exhibit [§<] [URN 5010] and [§<] [URN 5011].

<sup>39</sup> Judgment of 6 July 2000, *Volkswagen AG v Commission*, T-62/98, EU:T:2000:180, paragraph 230 and judgment of 21 February 1995, *SPO and Others v Commission*, T-29/92, EU:T:1995:34, paragraph 74. This principle has also more recently been applied by the CAT in *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, in which the CAT stated at [176] that '[i]n Chapter I cases, unlike Chapter II cases, determination of the relevant market is neither intrinsic to, nor normally necessary for, a finding of infringement'.

<sup>40</sup> *Guidance as to the appropriate amount of a penalty* (OFT423; September 2012), adopted by the CMA Board, paragraphs 2.1 and 2.3 to 2.11.

<sup>41</sup> *Argos and Littlewoods v OFT and JJB Sports v OFT* [2006] ECWA Civ 1318 ('Argos, Littlewoods and JJB'), paragraphs 169 to 173 and 189 and CAT judgment on penalty, *Argos and Littlewoods v OFT* [2005] CAT 13, paragraph 178.

principles that would be relevant for a formal analysis, such as substitutability or, on the other hand, by limiting the turnover in question to sales of the very products or services which were the direct subject of the price-fixing arrangement or other anti-competitive practice.’

- 2.18 The CMA is also not bound by market definitions adopted in previous cases, although earlier definitions can, on occasion, be informative when considering the appropriate market definition. Equally, although previous cases can provide useful information, the relevant market must be identified according to the particular facts of the case in hand.

### **Framework for assessing the relevant market**

- 2.19 The analysis below first considers what products and/or services are part of the relevant market in this case (the relevant product market) and the geographic scope of the relevant market (the relevant geographic market). Finally, it sets out the CMA's findings on the relevant market in this case (conclusion on the relevant market).

### ***Relevant product market***

- 2.20 In this case, the focal product of the infringement is CGSTs for use in fire suppression systems. This section examines whether other types of tanks may be substitutes for GSTs in this application, and whether there is substitutability between the different sizes and shapes of GSTs.

### ***Substitutability between GSTs and other types of tank***

- 2.21 From a demand-side perspective, the evidence indicates that FS contractors do not consider tanks made from other materials to be viable substitutes for GSTs in sprinkler systems as GSTs are less expensive to purchase, which is in part a reflection of the fact that they are cheaper to produce.<sup>42</sup> The only

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<sup>42</sup> CST's response dated 30 July 2015 to the CMA's request for information dated 16 July 2015, paragraph 1.c [URN 6117] states that GSTs are the least expensive tank option. [CST UK senior employee 1] stated in his live evidence: 'Q. Are these glass tanks -- they are much more expensive to purchase; isn't that right? A. Yes, correct, yes.'

possible exception to this are GRPs which, as explained below, may be a substitute for GSTs in certain circumstances.

- 2.22 Most notably, it is clear from the witness evidence provided by FS contractors that even when prices of GSTs increased significantly during the period the cartel was in operation, FS contractors did not switch to tanks made from other materials.<sup>43</sup>
- 2.23 With respect to the substitutability between GSTs and GRPs, the evidence suggests that GRPs may in certain circumstances act as a substitute for GSTs in fire suppression applications. Balmoral estimated that 85% of GRPs are used for the storage of potable water, but the evidence in the case also suggests that there is an overlap between GRPs and GSTs for use in fire sprinkler systems with low water volume requirements.<sup>44</sup> The evidence further indicates that rectangular GSTs face more competition from GRPs sold by a number of manufacturers.<sup>45</sup>
- 2.24 According to [Balmoral Tanks senior employee 1], 'The GRPs are cuboid in shape and are usually supplied to and installed on behalf of mechanical and engineering contractors as a part of a larger building project. GRPs can only be constructed to a more limited height than GSTs. There is an overlap in the uses to which each type of tank can be deployed, and each is often used for fire protection sprinkler systems.'<sup>46</sup> This is also supported by customer witness evidence, for example, from [Armstrong Priestley senior employee], who commented: 'Schools, commercial buildings and residential often have either no tank or either a GRP or steel tank can be considered.'<sup>47</sup>

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Q. I mean, a little earlier you were saying that a cylindrical steel tank might be in the order of £20,000, whereas a glass tank would be in the order of £100,000 or more; is that right?

A. Yes, depending on the size but they were significantly more expensive, yes.' [CST UK senior employee 1] live testimony, Livenote transcript [criminal trial], 8 June 2015, page 68, lines 7-15 [URN 6613].

<sup>43</sup> Customers that submitted evidence mentioned only Franklin Hodge, CST UK, Galglass, Kondea and Balmoral Tanks, as supplying them with sprinkler tanks during the period 2005 to 2012. [Argus Fire Protection senior employee] mentioned Braithwaite (a producer of sectional hot-pressed steel tanks) as another potential supplier of sprinkler tanks [§<]. See [Argus Fire Protection senior employee] witness statement, 21 May 2013, page 2 [URN 2450].

<sup>44</sup> Note of OFT meeting with Balmoral, 21 January 2013, page 5 [URN 1576].

<sup>45</sup> [Franklin Hodge senior employee 1] prepared statement, 23 May 2013, paragraph 24 [URN 6527]; Franklin Hodge summary report dated 21 July 2010 [URN 1990]; [Kondea senior employee] interview transcript, 27 November 2012, page 40 [URN 0690]: 'CST manufacture a galvanised rectangular tank and then the competition for that is numerous...More than just, you know, the four, if you like, steel cylindrical tank manufacturers then there's more because you can get those tanks in glass reinforced plastic.'

<sup>46</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 24 [URN 5007].

<sup>47</sup> [Armstrong Priestley senior employee] witness statement, 30 October 2013, paragraph 4 [URN 4936]; [Argus Fire Protection senior employee] provided copies of quotations for tank jobs which include bids by GST and GRP

2.25 However, the evidence also suggests that GRPs represented only a small proportion of all sprinkler tanks sold. FS contractors that provided data on their purchases mainly bought GSTs. For example, Tyco (the largest contractor) bought only one Balmoral GRP tank (and 14 Balmoral GSTs) out of over 150 orders between 2009 and 2012.<sup>48</sup> Moreover, it does not appear from the customer witness evidence that FS contractors switched to GRPs when the price of GSTs rose. Instead, it may be that there are submarkets for GRPs in particular uses. For example, where end customers require partitioned dual-use tanks to store both drinking water and sprinkler water, a feature which GSTs do not offer; or for smaller sizes of GRP that have low water volume requirements, for example for use in sprinkler systems in schools,<sup>49</sup> where there is some overlap between GRPs and GSTs.

2.26 From a supply side perspective, the evidence indicates that manufacturers of other types of tanks cannot easily switch to making GSTs due to the significant costs of setting up production. Balmoral Tanks, an already experienced manufacturer of GRPs, had to acquire dedicated machinery and personnel and obtain accreditation of tanks and components in order to start producing GSTs. The costs for the steel sheets punching machine alone was estimated by one Balmoral witness to cost between [£300,000 and £1,500,000].<sup>50</sup>

### *Substitutability between different sizes and shapes of GSTs*

2.27 The evidence suggests that the size and shape of GST used for any particular project is determined by the end-user's specific requirements.<sup>51</sup> Therefore, from a demand-side perspective, there may be few or no substitutes to the

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manufacturers for the installation of a school tank, see [Argus Fire Protection senior employee] witness statement, 21 May 2013, page 4 [URN 2450] and exhibit [3<] [URN 2454]; [Customer 2 senior employee] witness statement, 24 September 2013, paragraph 5 [URN 4925] refers to Galglass and Franklin Hodge quoting for a tank to be fitted in a school.

<sup>48</sup> [Tyco senior employee] witness statement, 21 March 2013 [URN 2413] and exhibit [3<] [URN 2414].

<sup>49</sup> [Franklin Hodge senior employee 1] prepared statement 23 May 2013, paragraph 66 [URN 6527]; Note of OFT meeting with Balmoral, 21 January 2013, page 5 [URN 1576]; [Armstrong Priestley senior employee] witness statement, 30 October 2013, paragraph 4 [URN 4936]; [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraphs 24 and 38 [URN 5007]; [Balmoral Group senior employee 1] witness statement, 9 December 2013, paragraph 28 [URN 4951]. Among the Parties, only Balmoral supplied GRPs, with the others supplying GSTs.

<sup>50</sup> [Balmoral Group senior employee 1] witness statement, 9 December 2013, paragraph 29 [URN 4951] (actual figure replaced with a range to protect confidential information).

<sup>51</sup> [CST UK senior employee 1] witness statement, 20 February 2013, pages 4-5 [URN 0689]; [CST UK senior employee 2] witness statement, 22 August 2013, page 11 [URN 4958]; [Franklin Hodge senior employee 2] witness statement, 4 February 2014, paragraph 29 [URN 4963]; [Franklin Hodge employee 4] witness statement, paragraph 15 [URN 4962].

particular shape and/or size of GST installed, given the requirements of the sprinkler system.

- 2.28 From a supply-side perspective, the evidence reveals that all sizes of GSTs are manufactured using identical machinery and processes.<sup>52</sup> In his prepared statement [Franklin Hodge senior employee 1] stated that: 'All galvanised steel tanks are manufactured identically, and as such, the choice of which galvanised steel tanks a customer chooses to buy will be influenced by price.'<sup>53</sup> Therefore, any manufacturer supplying one size of GST accredited to LPS 1276 could in principle switch production between the various sizes of GSTs.
- 2.29 However, the evidence on the degree in practice of supply-side substitutability between the different shapes of GSTs is mixed. The fact that rectangular shaped GSTs and cylindrical shaped GSTs are manufactured using the same machinery<sup>54</sup> would tend to suggest a degree of supply-side substitutability between them. In addition, most GST manufacturers produce both cylindrical and rectangular tanks.<sup>55</sup> The evidence as to whether suppliers could profitably switch to making rectangular GSTs in response to a price rise relative to CGSTs is inconclusive, however. Rectangular tanks require thicker steel and more internal bracing to be strong enough to meet LPS 1276 and tend to take longer to make and install, which makes them more expensive.<sup>56</sup> Moreover, whereas cylindrical tanks are made from common size sheets of metal and are sold in a range of standard sizes, rectangular tanks are always bespoke to the design requirements specified by the customer and can be designed in almost any type of configuration that has straight walls.<sup>57</sup> This suggests that manufacturers may incur additional costs in switching production between rectangular GSTs and CGSTs.

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<sup>52</sup> FHI's response dated 18 August 2015 to the CMA's request for information dated 16 July 2015, paragraph 1.5 [URN 6830].

<sup>53</sup> [Franklin Hodge senior employee 1] prepared witness statement, 23 May 2013, paragraph 37 [URN 6527].

<sup>54</sup> FHI's response dated 18 August 2015 to the CMA's request for information dated 16 July 2015, paragraph 1.6 [URN 6830].

<sup>55</sup> Between 2005 and 2012 Franklin Hodge, CST UK and Galglass produced both cylindrical and rectangular GSTs, while Balmoral Tanks (which only entered the market in early 2012) produced only CGSTs.

<sup>56</sup> [CST UK senior employee 2] witness statement, 22 August 2013, page 11 [URN 4958]; [Franklin Hodge senior employee 3] witness statement, 5 February 2014, paragraph 28 [URN 4966].

<sup>57</sup> FHI's response dated 18 August 2015 to the CMA's request for information dated 16 July 2015, paragraph 1.3 [URN 6830]; FHI letter dated 20 January 2016, paragraph 2.3, [URN 7770]; CST's response dated 30 July 2015 to the CMA's request for information dated 16 July 2015, paragraph 1.b [URN 6117].

### *Conclusion on the relevant product market*

- 2.30 As set out above, the focal product of this investigation is CGSTs. The CMA has examined the constraints that this product faces and considers that the evidence indicates that (with the possible exception of GRPs), tanks made from other materials are unlikely to be considered demand or supply side substitutes for GSTs for fire suppression systems. There is some limited evidence that GRPs can be used as a substitute for GSTs for small-size fire sprinkler tanks, but it is not clear that GRPs actually constrained the pricing of GSTs.
- 2.31 For the purpose of calculating any penalty in this case, the CMA therefore adopts a conservative approach, and considers that the relevant market concerns GSTs only.
- 2.32 Having examined whether there is substitutability between different sizes and shapes of GSTs, the CMA considers that the evidence suggests that from a supply-side perspective all sizes of GSTs are likely to be in the same market, but the evidence on whether cylindrical and rectangular GSTs may be substitutable is more mixed. Demand-side substitutability is very limited. Notwithstanding the fact that the same machinery and processes are used to produce both cylindrical and rectangular GSTs, the evidence in this case as to the supply-side substitutability between CGSTs and rectangular GSTs is inconclusive. In light of this, the CMA adopts a conservative approach and defines the relevant product market as the supply of CGSTs for water storage used in sprinkler systems.

### *Relevant geographic market*

- 2.33 The evidence suggests that UK tank suppliers serve the whole UK.<sup>58</sup> There are some indications of geographic focus of sales effort, namely on the Southern part of England.<sup>59</sup> However, customer witness statements and Top 20 customer lists provided by the parties to the main cartel show that

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<sup>58</sup> Sales staff were assigned sales areas for which they had responsibility. For Balmoral Tanks: [Balmoral Group senior employee 1] witness statement, 9 December 2013, paragraph 20 [URN 4951]; For Franklin Hodge, [Franklin Hodge senior employee 4] witness statement, 4 February 2014, paragraphs 12, 20-21 [URN 4965]. CST made all its UK sales of GSTs for use in fire suppression systems through Kondea, which operated from an office in Staleybridge and [redacted] during the period 2005 to 2012. [CST UK senior employee 1] witness statement, 20 February 2013, pages 8 and 12-13 [URN 689]; [CST UK senior employee 2] witness statement, 22 August 2013, page 4 [URN 4958].

<sup>59</sup> [Balmoral Group senior employee 1] witness statement, 9 December 2013, paragraph 20 [URN 4951].



customers are based across the UK.<sup>60</sup> This includes in particular customers from Northern Ireland, which also appear to have been included in the customer allocation arrangements which formed part of the main cartel.<sup>61</sup> In addition, [CST UK senior employee 1]'s witness evidence refers to a list of contractors that pre-dates the main cartel in August 2004 which included customers based in the Republic of Ireland and Northern Ireland as potential sales targets for [Kondea senior employee]'s (then) new company:

'The minutes identify [Kondea senior employee] as our proposed sole distributor for all Vulcan's galvanised steel tank products, cylindrical and rectangular used in the sprinkler industry. The contractors [Kondea senior employee] would sell to was also discussed and listed on the attached sheet. Lists of contractors are named and represent those who [Kondea senior employee] felt he had the best chance of getting business from and with whom he had a better relationship. At the time of making this list the galvanised steel tank market was a competitive one therefore personal contacts were very important to sustaining business in that particular market place. At the bottom of the typed list is a handwritten list of contractors based outside of mainland UK, all Ireland and Northern Ireland. I added this list. I cannot recall why I added these additional items other than their names could only have come from [Kondea senior employee] himself.'<sup>62</sup>

This would also suggest that in a competitive market customers based in Northern Ireland and customers in mainland GB may be considered to be part of the same geographic market.

- 2.34 The evidence on whether suppliers from the Republic of Ireland constrained the suppliers within the UK is mixed. As with Northern Ireland, Top 20 customer lists provided by the parties to the main cartel include customers based in the Republic of Ireland, and customers in the Republic of Ireland also

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<sup>60</sup> For example, Argus Fire Protection Company is based in Stourbridge, West Midlands, Armstrong Priestley in Leeds, Automatic Fire Control in Swindon, Wiltshire, [Customer 1] in Devon, [Customer 2] in Scotland and Compco has offices in Worcester, Hemel Hempstead, Leeds, East Kilbride and Newcastle; Top 20 customer lists: CST UK [URN 0222], Franklin Hodge [URN 0216], Galglass [URN 0570].

<sup>61</sup> Examples of customer allocation lists that contain customers based in Northern Ireland and/or the Republic of Ireland allocated to Galglass and Franklin Hodge; [URN 0078], [URN 0110], [URN 1688], [URN 1724], [URN 1805], [URN 4675], [URN 4687].

<sup>62</sup> [CST UK senior employee 1] witness statement, dated 9 May 2013, pages 5 and 6 [URN 2448].

appear to have been included in the customer allocation arrangements which formed part of the main cartel.<sup>63</sup> Furthermore, it would appear that IIT, based in the Republic of Ireland, did supply customers in Northern Ireland.<sup>64</sup>

2.35 There is also evidence that UK tank suppliers exported sprinkler tanks to other countries in Europe, including to the Republic of Ireland, and beyond.<sup>65</sup> By contrast, the CMA has not seen evidence that suppliers based outside the UK made sales of GSTs for sprinkler systems into the UK (with the possible exception of IIT as outlined above). Only one GST manufacturer based outside the UK, Avasco Tanks and Silos, has ever obtained LPCB accreditation and been listed in the LPCB Red Book with GSTs meeting LPS 1254 and 1276, but it has never sold GSTs into the UK.<sup>66</sup>

2.36 Customer evidence also suggests that the Parties supplied sprinkler tanks throughout the UK,<sup>67</sup> but that GST suppliers based outside the UK may not have exerted any competitive pressure on GST prices in the UK because of high transport costs. For example, in his witness evidence [Hall & Kay senior employee] states that 'I have been asked if I know of or use any companies in mainland Europe for galvanised steel tanks, particularly Belgium. We do not use any companies other than the ones I have previously mentioned.<sup>68</sup> I do not know any manufacturers outside the UK and would not use any as the associated transport costs would mean they would be prohibitively expensive.'

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<sup>63</sup> Examples of customer allocation lists that contain customers based in Northern Ireland and/or the Republic of Ireland allocated to Galglass and Franklin Hodge; [URN 0078], [URN 0110], [URN 1688], [URN 1724], [URN 1805], [URN 4675], [URN 4687].

<sup>64</sup> Website IIT ([www.iit.ie/tank-supply-and-installation.html](http://www.iit.ie/tank-supply-and-installation.html)); email from [CST UK employee] to [Galglass senior employee 1] dated 8 September 2005 [URN 3650]; email [CST UK senior employee 2] to [Galglass senior employee 1] dated 13 October 2005 [URN 3925].

<sup>65</sup> CST's response dated 30 July 2015 to the CMA's request for information dated 16 July 2015, paragraph 2 [URN 6117]; FHI's response dated 18 August 2015 to the CMA's request for information dated 16 July 2015, paragraph 2.2 [URN 6830]; [Galglass senior employee 2] witness statement, 5 September 2013, paragraph 39 [URN 4949] mentions Galglass exporting sprinkler tanks to the Netherlands and Germany.

<sup>66</sup> Avasco, formerly Stokota, based in Belgium, was listed in the Red Book between 2002 and 2013. See [Building Research Establishment senior employee] witness statement, dated 15 April 2013, pages 8 to 11 [URN 2418] and [Avasco Tanks and Silos senior employee] witness statement, dated 20 November 2013, pages 2 and 4 [URN 4939]: [3<].

<sup>67</sup> [Hall & Kay senior employee] witness statement, 2 October 2013, pages 1-2 [URN 4928]: 'I would say that the split of orders between Franklin Hodge and Vulcan is approximately 80/40 and in general there is nothing geographical about the split, i.e. where the companies are based in relation to the location of the build.'

<sup>68</sup> In his witness statement [Hall & Kay senior employee] named Franklin Hodge and CST UK as Hall & Kay's preferred suppliers.

<sup>69</sup> [Hall & Kay senior employee] witness statement, 2 October 2013, page 2 [URN 4928].

### *Conclusion on the relevant geographic market*

- 2.37 For the reasons set out above, the evidence indicates that the geographic scope of the market is at least the whole of the UK. There is some evidence that it may include the Republic of Ireland.<sup>70</sup> However, given that no foreign-based supplier (with the possible exception of IIT making sales into Northern Ireland) made sales into the UK, the CMA considers that the geographical scope is not likely to be wider than the UK and the Republic of Ireland.
- 2.38 On the basis that the evidence on whether GST suppliers based in the Republic of Ireland constrained prices of GSTs in the UK is inconclusive and, adopting a conservative approach for the purpose of determining the 'relevant turnover' of the Parties having regard to the CMA's guidance as to the appropriate amount of a penalty,<sup>71</sup> the CMA defines the relevant geographic market in this case as the UK.

### **Conclusions on the relevant market**

- 2.39 In summary, in light of the evidence considered above, for the purposes of calculating the financial penalties in this investigation, the CMA finds the relevant market to be the supply of CGSTs for water storage used in sprinkler systems in the UK.
- 2.40 The CMA has defined the relevant market in this case for the sole purpose of determining the level of financial penalty. It has reached the conclusion set out above without prejudice to its discretion to adopt a different product market definition in any subsequent case in the light of the relevant facts of that case.

## **C. Parties**

### **Legal background: undertakings and the attribution of liability**

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

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<sup>70</sup> There are clear examples of documented customer allocation lists and price lists which apply to customers based outside the UK (specifically, in the Republic of Ireland), but there is very little evidence that suppliers based in the Republic of Ireland constrained prices of GSTs in the UK.

<sup>71</sup> OFT423, September 2012, originally published by the Office of Fair Trading and adopted by the CMA Board.

## ***Undertakings***

- 2.42 The term ‘undertaking’ has been defined by the Court of Justice (‘CJ’) to cover ‘...every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed...’.<sup>72</sup>
- 2.43 The concept also covers an economic unit, even if in law that unit consists of several natural or legal persons.<sup>73</sup>

## ***Attribution of liability***

### ***Parental liability***

- 2.44 Companies belonging to the same corporate group will often constitute a single undertaking within the meaning of the Chapter I prohibition and Article 101 TFEU.
- 2.45 The fact that a subsidiary company has separate legal personality as such does not prevent legal responsibility for its conduct being attributed to its parent company.
- 2.46 A parent company can be held jointly and severally liable for an infringement committed by a subsidiary company where, at the time of the infringement, that parent company:
- is able to exercise ‘decisive influence’ over the conduct of the subsidiary, and
  - does in fact exercise decisive influence,
- such that the two entities can be regarded as a single economic unit and thus jointly and severally liable.<sup>74</sup>
- 2.47 In the case of a wholly owned subsidiary, the CJ has held that there is a rebuttable presumption that the parent company exerts decisive influence over the subsidiary company’s conduct and that the parent and subsidiary company

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<sup>72</sup> Judgment in *Klaus Höfner and Fritz Elser v Macrotron GmbH*, C-41/90, EU:C:1991:161, paragraph 21.

<sup>73</sup> Judgment in *P Akzo Nobel NV v Commission*, C-97/08, EU:C:2009:536, paragraph 55.

<sup>74</sup> Judgment in *P Akzo Nobel NV v. Commission*, EU:C:2009:536, at paragraph 58.

constitute a single undertaking.<sup>75</sup> 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.<sup>76</sup>

### *Economic Succession*

2.48 The general principle is that liability for an infringement of the EU and UK competition rules rests with the person(s) responsible for the operation of the undertaking that committed the infringement at the time the infringement was committed (the ‘personal responsibility’ principle).<sup>77</sup> However, in certain circumstances, an exception is made to the personal responsibility principle where responsibility for the operation of the undertaking has changed following the commission of the infringement (the ‘economic successor’ principle).

2.49 Exceptions to the personal responsibility principle have been made, in particular, in the following circumstances:

- where the person in control of the undertaking at the time the infringement was committed no longer exists<sup>78</sup> or is no longer economically active<sup>79</sup>, and/or
- where there are ‘structural links’ (economic and organisational) between the original person responsible for the undertaking that committed the infringement and the economic successor.<sup>80</sup>

2.50 In order to establish whether a person may be regarded as an economic successor, it is necessary to identify the ‘combination of physical and human elements [i.e. the assets and personnel] which contributed to the commission

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<sup>75</sup> Judgment of 15 June 2005, *Tokai Carbon v Commission*, T-71/03, EU:T:2005:220, paragraphs 59 to 60; judgment of 15 September 2005, *Daimler Chrysler v Commission*, T-325/01, EU:T:2005:322, paragraphs 218 to 221; judgment of 30 September 2003, *Michelin v Commission*, T-203/01, EU:T:2003:250, paragraph 290.

<sup>76</sup> Judgment in *Akzo Nobel NV v. Commission*, EU:C:2009:536, at paragraph 61.

<sup>77</sup> Judgment of 17 December 1991, *Enichem Anic SpA v. European Commission*, T-6/89, EU:T:1991:74, paragraph 236.

<sup>78</sup> Judgment in *Suiker Unie v. Commission*, C-40/73, EU:C:1975:174; judgment in *Compagnie Royale Asturienne des Mines and Rhein zinc GmbH v. Commission*, EU:C:1984:130; judgment in *Enichem Anic SpA v. European Commission*, EU:T:1991:74.

<sup>79</sup> Judgment in *NMH Stahlwerke GmbH v. Commission*, EU:T:1999:44; judgment in *Autorita Garante Della Concorrenza e del Mercato v Ente Tabacchi Italiani – ETI SpA*, C-280/06, EU:C:2007:775.

<sup>80</sup> Judgment in *Aalborg Portland A/S v. Commission*, C-204/00 P, EU:C:2004:6.

of the infringement and then to identify the person who has become responsible for their operation.’<sup>81</sup>

- 2.51 It is not necessary that the economic successor has taken over all of the assets and personnel of the relevant undertaking that committed the infringement. It is sufficient that the successor has taken over ‘the main part of those physical and human elements that were employed in [the relevant business] and therefore contributed to the commission of the infringement in question.’<sup>82</sup>

## **Kondea / KW Supplies**

### ***Kondea Water Supplies Limited (Kondea)***

- 2.52 Kondea is a limited liability company registered in England and Wales, with company number 05248121. Kondea’s registered address is Booth & Co, Coopers House, Intake Lane, Ossett, WF5 0RG.<sup>83</sup>
- 2.53 Kondea was incorporated on 1 October 2004. It was wholly owned by [X], [X] and [X]. [X] were on the board of directors, [X].<sup>84</sup> [X].<sup>85</sup>
- 2.54 [X]. CST UK and Kondea subsequently entered into a number of agreements through which Kondea supplied and installed CST UK’s cylindrical and rectangular GSTs to customers.<sup>86</sup>
- 2.55 Kondea was put into voluntary liquidation by its creditors on 19 December 2013. [X] of PR Booth & Co was appointed as the liquidator.<sup>87</sup>

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<sup>81</sup> Judgment in *Enichem Anic SpA v. European Commission*, EU:T:1991:74, paragraph 237.

<sup>82</sup> Judgment of, 11 March 1999, *NMH Stahlwerke GmbH v. Commission*, T-134/94, EU:T:1999:44, paragraph 130.

<sup>83</sup> AD01 Change of registered address, 20 March 2015.

<sup>84</sup> Kondea Annual Returns for period 2005-2013.

<sup>85</sup> [CST UK senior employee 2] witness statement, 22 August 2013, page 4 [URN 4958]; [Kondea senior employee] interview transcript, 27 November 2012, page 56 [URN 0690].

<sup>86</sup> [CST UK senior employee 1] witness statement, 20 February 2013, pages 7 and 8 [URN 0689]; [CST UK senior employee 1] live testimony, Livenote transcript [criminal trial], 8 June 2015, page 13, lines 4 – 25 [URN 6613]; [Kondea senior employee] interview transcript, 27 November 2012, pages 55-56 [URN 0690].

<sup>87</sup> Notice of appointment of liquidator, dated 24 December 2013.

### ***KW Supplies Limited (KW Supplies)***

- 2.56 KW Supplies is a limited liability company registered in England and Wales, with company number 08237260. KW Supplies' registered address is 3 Llys Owen, Gronant Prestatyn, Flintshire, LL19 9TJ.<sup>88</sup>
- 2.57 KW Supplies was incorporated on 2 October 2012 under the name of Kondea Water Services Limited. [X].<sup>89</sup> [X].<sup>90</sup> On 5 July 2016 [Kondea senior employee] and [X] were [X] of KW Supplies.<sup>91</sup> All shares in KW Supplies are currently held by [X] with [Kondea senior employee] holding 40%.<sup>92</sup>
- 2.58 On 19 September 2013, CST UK appointed KW Supplies as its non-exclusive agent to sell GSTs on its behalf in England, Scotland and Wales to certain named customers, so terminating the previous agreement with Kondea.<sup>93</sup>

### ***Liability***

- 2.59 The CMA finds that Kondea was directly involved in the information exchange infringement.
- 2.60 The CMA considers that there is functional and economic continuity between Kondea and KW Supplies and, therefore, KW Supplies is the economic successor of Kondea for the purposes of the Chapter I prohibition and Article 101 TFEU. This is for the following reasons:
- At KW Supplies' incorporation [Kondea senior employee] had a [X]% shareholding in KW Supplies. This was subsequently diluted to mirror the shareholding of Kondea during the period 2005 to 2012 with all shares being held by [X].<sup>94</sup>

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<sup>88</sup> KW Supplies annual return dated 2 October 2015.

<sup>89</sup> Certificate of incorporation dated 2 October 2012. Kondea Water Services Limited changed its name to KW Supplies Limited on 24 October 2013 – see Certificate of incorporation on change of name, dated 24 October 2013.

<sup>90</sup> [X].

<sup>91</sup> [X].

<sup>92</sup> KW Supplies annual return dated 2 October 2015 states that [Kondea senior employee] has a 40% shareholding in KW Supplies with the remaining shares being held by [X].

<sup>93</sup> Emails from [Pinsent Masons (for CST)] to [OFT] dated 14 and 15 October 2013 [URN 4564] attaching a copy of the agreement between CST and Kondea Water Services Ltd (now KW Supplies) dated 19 September 2013.

<sup>94</sup> Kondea annual returns for the financial years 2005 to 2012 and KW Supplies annual returns for the financial years 2012 to 2015.

- [X] of Kondea was also the sole director of KW Supplies from its incorporation on 2 October 2012 until his resignation on [X].
- The company secretary of Kondea was appointed the sole director of KW Supplies on [X].<sup>95</sup>
- The former directors of Kondea are now the current directors of KW Supplies.
- All former employees of Kondea are employed by KW Supplies.<sup>96</sup>
- Both companies shared the same registered office until that of Kondea was moved on 12 December 2013 following its entry into liquidation.
- Though Kondea has now ceased economic activity, that activity was largely the same as the economic activity now carried out by KW Supplies.
- KW Supplies has a similar distribution arrangement with CST UK as Kondea had, although this is on a non-exclusive basis, whereas Kondea was CST UK's exclusive distributor.<sup>97</sup>
- KW Supplies has acquired relevant assets from Kondea.<sup>98</sup>

2.61 On this basis, the CMA finds KW Supplies liable for the information exchange infringement.

2.62 The Information Exchange Decision is therefore addressed to KW Supplies.

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<sup>95</sup> KW Supplies Notice of appointment of director dated [X].

<sup>96</sup> For Kondea: [Kondea senior employee] interview transcript, dated 27 November 2012, page 56 [URN 0690]; [CST UK senior employee 2] witness statement, 22 August 2013, page 4 [URN 4958]; for KW Supplies' employees, see KW Supplies response dated 14 December 2015 to the CMA's request for information dated 17 November 2015 [URN 7507].

<sup>97</sup> [CST UK senior employee 2], witness statement, 22 August 2013, page 3 [URN 4958] and [Kondea senior employee], interview transcript, 27 November 2012, pages 13 and 33 [URN 0690].

<sup>98</sup> KW Supplies' response dated 14 December 2015 to the CMA's request for information dated 17 November 2015 [URN 7507]; letter of the Kondea liquidator dated 22 May 2014 and annexes [URN 4982 and URN 4985].



## **FHI**

### ***Franklin Hodge Industries Limited (Franklin Hodge)***

- 2.63 Franklin Hodge is a limited liability company registered in England and Wales, with company number 05005341. Franklin Hodge's registered address is Redhill Road, Hay Mills, Birmingham, B25 8EY.<sup>99</sup>
- 2.64 Franklin Hodge was incorporated on 5 January 2004 under the name of GW146 Limited. It changed its name to Franklin Hodge Limited on 4 February 2004 and then to Franklin Hodge Industries Limited on 24 February 2004.<sup>100</sup>
- 2.65 Franklin Hodge designs, manufactures and installs a range of site assembled tanks for the storage of water for fire sprinklers, industrial processes and drinking water.<sup>101</sup> Franklin Hodge's liquid storage tanks are made from steel or aluminium tanks, in a cylindrical or rectangular shape. Its main business is the sale of CGSTs and rectangular GSTs for fire sprinkler systems.<sup>102</sup>
- 2.66 During the period April 2005 to November 2012, [Franklin Hodge senior employee 1] was [X].<sup>103</sup> He resigned [X] on [X].<sup>104</sup>
- 2.67 The current directors of Franklin Hodge are [X], [X], [X] and [X].<sup>105</sup>
- 2.68 Since 2005, Franklin Hodge has been 100% owned by Carter Thermal.<sup>106</sup>

### ***Carter Thermal Industries Ltd (Carter Thermal)***

- 2.69 Carter Thermal is a limited liability company registered in England and Wales, with company number 00402454. Its registered address is Redhill Road, Yardley, Birmingham, West Midlands, B25 8EY.<sup>107</sup>

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<sup>99</sup> Franklin Hodge's annual return dated 08 January 2016.

<sup>100</sup> Certificate of incorporation on change of name dated 04 February 2004 and 24 February 2004.

<sup>101</sup> Franklin Hodge annual accounts for the financial year ending on 31 December 2014.

<sup>102</sup> [Franklin Hodge senior employee 1] prepared statement, 23 May 2013, paragraph 34 [URN 6527].

<sup>103</sup> [Franklin Hodge senior employee 1] was appointed as [X].

<sup>104</sup> [X].

<sup>105</sup> Franklin Hodge's annual return dated 08 January 2016 and termination of appointment of a director dated 29 February 2016.

<sup>106</sup> Franklin Hodge annual returns 2005-2016.

<sup>107</sup> Carter Thermal annual return dated 24 July 2015.

- 2.70 Carter Thermal is a privately owned engineering group, mainly providing refrigeration and building services.<sup>108</sup>

### ***Liability***

- 2.71 The CMA finds that Franklin Hodge was directly involved in, and is therefore liable for, the information exchange infringement.
- 2.72 The CMA finds that Carter Thermal is jointly and severally liable with Franklin Hodge for the information exchange infringement. This is on the basis that Carter Thermal held a 100% shareholding in Franklin Hodge at the time of the information exchange infringement and therefore there is a rebuttable presumption that Carter Thermal formed part of the same undertaking as Franklin Hodge.
- 2.73 The Information Exchange Decision is therefore addressed to Franklin Hodge and Carter Thermal (together FHI).

### **Galglass / Kernoff / IIT**

#### ***Galglass Limited (Galglass)***

- 2.74 Galglass is a limited liability company registered in England and Wales, with company number 01455434. Galglass' registered address is c/o Duff & Phelps Ltd, The Chancery, 58 Spring Gardens, Manchester M2 1EW.<sup>109</sup>
- 2.75 On 12 June 2014, joint administrators were appointed to Galglass and on 25 March 2015, Galglass moved from administration into creditors' voluntary liquidation.<sup>110</sup>
- 2.76 The sole business of Galglass was the manufacture and/or supply of liquid storage tanks including cylindrical and rectangular GSTs, concrete tanks, glass and epoxy coated tanks and stainless steel tanks.<sup>111</sup>

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<sup>108</sup> Carter Thermal financial statements for year ending 31 December 2014.

<sup>109</sup> AD01 Change of address form, dated 19 November 2015.

<sup>110</sup> Notice of administrator's appointment, dated 12 June 2014; Notice of move from administration to creditors' voluntary liquidation, date 13 March 2015. [redacted] and [redacted] of Duff & Phelps Ltd and [redacted] of The P&A Partnership, are currently acting as joint liquidators for Galglass.

<sup>111</sup> Galglass financial statements for the year ending 31 December 2012.

2.77 During the period March 2005 to November 2012, [Galglass senior employee 1] was [§<].<sup>112</sup> He resigned on [§<].<sup>113</sup>

2.78 Since 2004, Galglass has been 100% owned by Kernoff.<sup>114</sup>

### ***Kernoff Limited (Kernoff)***

2.79 Kernoff is a limited liability company registered in England and Wales, with company number 05094552. Kernoff's registered address is Staverton Court, Staverton, Cheltenham, Gloucestershire GL51 0UX.<sup>115</sup>

2.80 Kernoff's principal activity is that of an investment company whose subsidiaries are involved in the manufacture and supply of tanks. It has one other wholly-owned French subsidiary, Apro Industrie.<sup>116</sup>

2.81 During the period April 2005 to November 2012, Kernoff was 100% owned by IIT, which has held 100% of the ordinary voting shares in Kernoff since 2005.<sup>117</sup> In 2013, B class shares (which do not carry any voting rights or right to capital) were also allocated to Moygannon Limited.<sup>118</sup> Kernoff's sole current director is [§<].<sup>119</sup>

### ***Irish Industrial Tanks Limited (IIT)***

2.82 IIT is a limited liability company registered in Walkinstown, Dublin, the Republic of Ireland, with company number 35350. IIT's registered address is Unit C1, Ballymount Drive, Walkinstown, Dublin 12, Co Dublin.

2.83 IIT's principal business is the manufacture, sale and installation of liquid storage tanks in Ireland. IIT is 85% owned by Smyce Holdings Limited, a

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<sup>112</sup> [§<].

<sup>113</sup> [§<].

<sup>114</sup> Galglass Annual Returns dated 3 August 2004, 3 August 2005, 13 March 2006, 13 March 2007, 13 March 2008, 13 March 2009, 13 March 2010, 13 March 2011, 13 March 2012, 13 March 2013 and 9 February 2014.

<sup>115</sup> Kernoff annual return dated 10 August 2015.

<sup>116</sup> Kernoff financial statements for the financial year ending 31 December 2014.

<sup>117</sup> Kernoff annual returns dated 5 April 2005, 5 April 2006, 5 April 2007, 5 April 2008, 5 April 2009, 5 April 2010, 5 April 2011, 5 April 2012, and 5 April 2013.

<sup>118</sup> See Kernoff allotment of shares form dated 19 December 2013 and Kernoff's annual return dated 5 April 2016.

<sup>119</sup> Notice of appointment of director, dated 02 May 2014.

holding company registered in the Republic of Ireland and ultimately owned by [X].<sup>120</sup> The remaining 15% of shares in IIT are owned by [X].<sup>121</sup>

2.84 IIT's current directors are [X], [X] and [X].<sup>122</sup>

### ***Liability***

2.85 The CMA finds that Galglass was directly involved in, and is therefore liable for, the information exchange infringement.

2.86 The CMA finds that Kernoff and IIT are jointly and severally liable with Galglass for the information exchange infringement. This is on the basis that Kernoff and IIT held (directly or indirectly) a 100% shareholding in Galglass at the time of the information exchange infringement and therefore there is a rebuttable presumption that Kernoff and IIT formed part of the same undertaking as Galglass.<sup>123</sup>

2.87 The Information Exchange Decision is therefore addressed to Galglass, Kernoff and IIT.

### **Balmoral**

#### ***Balmoral Tanks Limited (Balmoral Tanks)***

2.88 Balmoral Tanks is a limited liability company registered in Scotland, with company number SC300656. Balmoral Tanks' registered address is Balmoral Park, Loirston, Aberdeen, AB12 3GY.<sup>124</sup>

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<sup>120</sup> IIT abridged accounts for the financial year ending 31 December 2014.

<sup>121</sup> IIT Fame report, dated 14 September 2015.

<sup>122</sup> IIT abridged accounts for the financial year ending 31 December 2014 and IIT Fame report, dated 24 May 2016.

<sup>123</sup> See shareholder details in Galglass' annual returns dated 3 August 2004, 3 August 2005, 13 March 2006, 13 March 2007, 13 March 2008, 13 March 2009, 13 March 2010, 13 March 2011, 13 March 2012 and 13 March 2013 and Kernoff's annual returns dated 5 April 2005, 5 April 2006, 5 April 2007, 5 April 2008, 5 April 2009, 5 April 2010, 5 April 2011, 5 April 2012, and 5 April 2013.

<sup>124</sup> Balmoral Tanks annual return dated 12 April 2016.

- 2.89 Balmoral Tanks was incorporated on 12 April 2006 under the name of Soleseal Limited. It changed its name to Balmoral Tanks Limited on 18 May 2006.<sup>125</sup>
- 2.90 Balmoral Tanks sells, amongst other types of tank, GRPs and hot pressed steel tanks. In recent years it has expanded rapidly, entering the GST market towards the end of 2011<sup>126</sup> and then entering the industrial tank market through the purchase of assets from Galglass in administration in June 2014. It now manufactures a large range of tanks, including GRPs, GSTs and industrial tanks.<sup>127</sup>
- 2.91 The [X] of Balmoral Tanks is [Balmoral Tanks senior employee 1], a position he has held since [X].<sup>128</sup> The current directors of Balmoral Tanks are [X], [X] and [X]. [X] is the company secretary.<sup>129</sup>
- 2.92 Since 2007, Balmoral Tanks has been 100% owned by Balmoral Group Holdings Limited.<sup>130</sup>

***Balmoral Group Holdings Limited (Balmoral Group)***

- 2.93 Balmoral Group is a limited liability company registered in Scotland, with company number SC277480. Its registered address is Balmoral Park, Loirston, Aberdeen, AB12 3GY.<sup>131</sup>
- 2.94 Balmoral Group is privately owned. Its main activities are design and manufacture of a diverse range of products and management of its property assets.<sup>132</sup>
- 2.95 Balmoral Group's current directors are: [X], [X] and [X].<sup>133</sup>

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<sup>125</sup> Certificate of incorporation, dated 12 April 2006 and Certificate of Incorporation on Change of Name, dated 18 May 2006.

<sup>126</sup> Balmoral Tanks Limited financial statements for the financial year ending 31 March 2012.

<sup>127</sup> Balmoral Tanks Limited financial statements for the financial year ending 31 March 2015.

<sup>128</sup> [X].

<sup>129</sup> Balmoral Tanks annual return dated 12 April 2016.

<sup>130</sup> Balmoral Tanks annual returns for years 2007 – 2015.

<sup>131</sup> Balmoral Tanks annual return dated 11 January 2016.

<sup>132</sup> Balmoral Group annual statements for the financial year ending 31 March 2015.

<sup>133</sup> Balmoral Group annual return dated 11 January 2016.

## ***Liability***

- 2.96 The CMA finds that Balmoral Tanks was directly involved in, and is therefore liable for, the information exchange infringement in July 2012.
- 2.97 The CMA finds that Balmoral Group is jointly and severally liable with Balmoral Tanks for the information exchange infringement and for the payment of the penalty imposed by the CMA. This is on the basis that Balmoral Group held at the time of the information exchange infringement a 100% shareholding in Balmoral Tanks and therefore there is a rebuttable presumption that Balmoral Group formed part of the same undertaking as Balmoral Tanks.
- 2.98 The Information Exchange Decision is therefore addressed to Balmoral Tanks and Balmoral Group (together Balmoral).

## **D. The CMA's investigation**

### **Leniency applications**

- 2.99 On 2 May 2012, CST approached the OFT with an application for Type A immunity under the OFT's leniency policy (which has been adopted by the CMA). CST was granted a marker on this date. The CMA signed an immunity agreement with CST on 17 March 2016.
- 2.100 On 26 April 2013, Franklin Hodge approached the OFT for Type C leniency under the OFT's leniency policy, and the OFT granted a Type C leniency marker on 3 May 2013. The CMA entered into a leniency agreement with Franklin Hodge on 17 February 2016.

### **Parallel criminal investigation**

- 2.101 The CMA opened an investigation under the Act into the conduct covered by the main cartel infringement and the information exchange infringement on 12 September 2012, in parallel with a related criminal investigation into whether certain individual employees of Franklin Hodge, Galglass and Kondea had committed the cartel offence contrary to section 188 EA02.
- 2.102 On 27 November 2012, the OFT executed warrants to carry out unannounced searches at the premises of Franklin Hodge, Galglass, Kondea and Balmoral Tanks, using its powers under section 194 EA02.

- 2.103 During these searches, the OFT used its powers under the Criminal Justice and Police Act 2001 to seize and subsequently sift images of electronic devices (desktop and laptop hard drives, server folders, mobile phones) at or accessible from these premises.<sup>134</sup>
- 2.104 Witness interviews of individuals, including individuals suspected of the criminal cartel offence under section 188 EA02,<sup>135</sup> employees of the Parties and third parties (for example, sprinkler contractors purchasing CGSTs and representatives from relevant industry bodies) were conducted as part of the CMA's criminal investigation.
- 2.105 In accordance with the case opening notices which were provided to the Parties, material gathered by the criminal investigation team (including documents seized pursuant to the EA02 warrants, interview transcripts and witness statements) which the CMA considered relevant to its civil investigation under the Act has been made available for the purposes of the CMA's civil investigation under the Act.
- 2.106 The criminal investigation resulted in the conviction of one individual, [X], who pleaded guilty to the criminal cartel offence, and in the acquittals of [X] and [X], following a trial which concluded at the end of June 2015. On 14 September 2015, [X]'s sentencing concluded the criminal proceedings.<sup>136</sup>
- 2.107 The CMA's civil investigation team has also considered material referred to during the criminal trial which took place in June 2015.

## Civil investigation

- 2.108 On 27 November 2012, the OFT's civil investigation team:
- issued case opening notices and sent information requests under section 26 of the Act to CST UK, Franklin Hodge, Kondea, Galglass, Balmoral

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<sup>134</sup> Section 50 of the Criminal Justice and Police Act 2001 empowers the CMA (and empowered the OFT before it) to seize electronic material from premises and to sift through such material at a later date, in circumstances where it believes that the electronic material contains data relevant to an investigation, and either it is not reasonably practicable to determine on the premises the extent to which that is the case and/or it is not reasonably practicable to separate out the relevant data on the premises without compromising its evidential value.

<sup>135</sup> Interviews with individuals suspected of the criminal cartel offence were carried out under caution using the procedures set out under the Police and Criminal Evidence Act 1984.

<sup>136</sup> [X].

Tanks and Balmoral Industrial Tanks Limited (previously known as Balmoral Sectional Tanks Limited),<sup>137</sup> and

- with the consent of CST, carried out an inspection of CST UK's premises for hard-copy documents that were responsive to the information request under section 26 of the Act.

2.109 A number of further information requests under section 26 of the Act were made as follows:

- on 13 May 2013 the OFT issued an information request to Kondea for copies of correspondence with customers relating to contracts or jobs won by Kondea during the period 1 September 2009 to 30 June 2010,<sup>138</sup>
- on 16 July 2015 the CMA issued information requests to Balmoral Group, Galglass and Kondea with regards to turnover information,<sup>139</sup> and
- on 8 April 2016 the CMA issued an information request to Balmoral with regards to further turnover information.<sup>140</sup>

2.110 In the course of its investigation, the CMA obtained material from both CST and Franklin Hodge as part of their duty to cooperate under the CMA's leniency policy. The non-leniency parties also provided material voluntarily in response to letters and emails requesting documents and information without recourse to the CMA's formal powers.

2.111 Following the conclusion of the criminal proceedings, the CMA informed the Parties that it had decided to continue its civil investigation under the Act, and that it would address two separate alleged infringements, one in relation to the main cartel infringement (which was the subject of the criminal proceedings and which did not include Balmoral Tanks) and one in respect of the information exchange infringement. These are the subject of the Main Cartel Decision and this decision respectively.

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<sup>137</sup> [URN 0228]; [URN 0229]; [URN 0230]; [URN 0231]; and [URN 0232].

<sup>138</sup> [URN 5115].

<sup>139</sup> See [URN 6070]; [URN 6074] and [URN 6072].

<sup>140</sup> [URN 8307].



2.112 During the civil investigation, the CMA held State of Play meetings with the Parties in October 2015 and November 2015, and again with Balmoral in October 2016.

## **Settlement**

2.113 As noted above, on 21 March 2016, the CMA announced that it had settled the main cartel infringement and the information exchange infringement with the Settling Parties. As part of the settlement, the Settling Parties admitted their involvement in, and liability for, the main cartel infringement and the information exchange infringement, and agreed that a streamlined administrative procedure would apply to them for the remainder of the investigation.

## **Statement of Objections**

2.114 On 26 May 2016, the CMA issued a Statement of Objections covering both the main cartel infringement and the information exchange infringement to the Parties and CST ('Statement of Objections').

2.115 Following the issue of the Statement of Objections, a Case Decision Group was appointed within the CMA to act as the decision-maker on whether or not, based on the facts and evidence before it, and taking account of the Parties' representations, the legal test for establishing an infringement had been met, and on the appropriate amount of any penalty, in respect of the information exchange infringement.<sup>141</sup>

2.116 Balmoral submitted written and oral representations on the Statement of Objections on 29 July 2016 and 20 September 2016, respectively. The Settling Parties made no representations on the Statement of Objections.

2.117 In light of the written representations made by Balmoral, the CMA issued a letter of facts to Balmoral on 15 September 2016 which identified additional references to material already referred to in the Statement of Objections, or provided to Balmoral as part of access to file, supporting the CMA's

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<sup>141</sup> The role of the Case Decision Group is described in *Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8, March 2014) ('CMA8'), paragraphs 9.11 and 11.30–11.34.

provisional findings in the Statement of Objections on which it proposed to rely.

- 2.118 Balmoral submitted further written representations to the CMA on 27 September 2016 responding to questions raised by the Case Decision Group at the oral hearing and on the matters referred to in the CMA's letter of facts.

### **Transcript of the 11 July 2012 meeting**

- 2.119 Following state of play discussions in October 2016, Balmoral was provided with a transcript of the audio-visual recording of a meeting of [Kondea senior employee], [Franklin Hodge senior employee 1] and [Balmoral Tanks senior employee 1] which took place on 11 July 2012.<sup>142</sup> As part of the streamlined access to file process, all Parties were provided with a copy of this transcript, which was referred to in the Statement of Objections.
- 2.120 Following its appointment, the Case Decision Group viewed the recording and considered that it was possible to make out some of the wording which had been marked as inaudible in the original transcript. The civil investigation team therefore reviewed the original transcript and provided an amended version to Balmoral for comment on 8 September 2016.<sup>143</sup>
- 2.121 After Balmoral's legal representatives viewed the recording at the CMA's offices on 9 September 2016 and having been provided with a copy of the recording on 5 October 2016, Balmoral made representations regarding the accuracy and reliability of the original and amended transcripts at the oral hearing on 20 September 2016 and in correspondence on 29 September 2016 and 24 October 2016. On 9 November 2016, Balmoral provided suggested amendments to the revised transcript, submitting that even with the improvements made, the transcript was not accurate and remained unreliable evidence.<sup>144</sup>
- 2.122 Having considered Balmoral's representations, the CMA produced a final version of the transcript, incorporating the majority of the amendments

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<sup>142</sup> Original version of the transcript of 11 July 2012 meeting [URN 4998], as referred to in the criminal trial in June 2015.

<sup>143</sup> Email to K&L Gates dated 8 September 2016 [URN 8669], attaching revised transcript [URN 8670].

<sup>144</sup> Email from K&L Gates dated 9 November 2016 [URN 8733] attaching a marked up version of the revised transcript provided by the CMA on 8 September 2016, showing Balmoral's suggested amendments [URN 8734].

suggested by Balmoral,<sup>145</sup> together with a number of further changes made by the CMA following a further careful review of the transcript. The Parties were given an opportunity to comment on this final version of the transcript, which was provided to Balmoral on 29 November 2016 and to the Settling Parties on 2 December 2016. No representations were made on the final version of the transcript, which is the version referred to in both this decision and the Main Cartel Decision.<sup>146</sup>

- 2.123 The CMA accepts that there are limited parts of the recording where the exact words being spoken cannot be clearly heard and that, as a result, the transcript is not a complete record of every word spoken at the meeting. However, the transcript is sufficiently complete and accurate that it can be relied on as evidence of the discussion which took place and, moreover, the nature of the discussions at the meeting is corroborated by other evidence.<sup>147</sup> Any differences between the final version of the transcript and the original version or the version provided by Balmoral on 9 November 2016 are not material to the CMA's finding of an infringement as summarised at paragraph 1.2 above and as set out in this decision.

### **Draft Penalty Statement**

- 2.124 On 1 November 2016, the CMA issued a Draft Penalty Statement to Balmoral. Balmoral provided written representations on the matters set out in the Draft Penalty Statement on 14 November 2016.

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<sup>145</sup> There were 11 instances where the CMA did not agree with Balmoral's suggested amendments, either because they removed or marked as inaudible wording which the CMA was able to hear, or where the CMA did not agree with the changes to the wording proposed. Details were set out in the CMA's letter dated 29 November 2016 [URN 8754], which also enclosed a redline version [URN 8746] showing further changes made to the version of the transcript provided by K&L Gates on 9 November 2016.

<sup>146</sup> Final version of the transcript of 11 July 2012 meeting [URN 8745].

<sup>147</sup> Including the audio-visual recording of the meeting [URNs 4998A (DVD 1) and 4998B (DVD 2)]; the contemporaneous notes taken at the meeting by [Balmoral Tanks senior employee 1] [URN 2537A]; and witness evidence provided by [Franklin Hodge senior employee 1] [URN 6526].

### **3. Conduct of the Parties**

#### **A. Introduction**

- 3.1 The following section summarises evidence that at a meeting on 11 July 2012 (and, in the case of Galglass, following that meeting), the Parties exchanged commercially sensitive information regarding their current pricing and future pricing intentions. The meeting was attended by [Franklin Hodge senior employee 1], [Kondea senior employee] and [Balmoral Tanks senior employee 1]. [Galglass senior employee 1] was also due to attend the meeting and was involved in its organisation, but was unwell. As well as being heavily involved in organising the meeting, [Galglass senior employee 1] was also in contact with the other participants both before and after the meeting.<sup>148</sup> In the case of Franklin Hodge there is direct evidence that information obtained during the meeting was used to inform its subsequent conduct on the market.
- 3.2 This information exchange took place at a single meeting, in the context of a market which was already subject to a long-running cartel involving price-fixing, bid rigging and market sharing by way of customer allocation. Balmoral was not a party to the main cartel infringement and, following Balmoral Tanks' entry to the market in late 2011, members of the main cartel were forced to compete with Balmoral Tanks for the supply of CGSTs. Balmoral Tanks resisted attempts by the parties to the main cartel to persuade it to take part in the pre-existing customer allocation arrangements; but in doing so it attended a meeting on 11 July 2012 (which was covertly recorded) at which it disclosed and received commercially sensitive information.

#### **B. Balmoral Tanks' entry as a new competitor for the supply of CGSTs**

- 3.3 In late 2011, Balmoral Tanks entered the market for the supply of CGSTs, which was by this time a cartelised market. Details of the main cartel infringement, which involved all UK suppliers of CGSTs (with the exception of Balmoral), are set out in the Main Cartel Decision.

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<sup>148</sup> See section C below.

- 3.4 Prior to entering the CGST sector, Balmoral was already active in manufacturing and supplying other tank sectors. The main type of tank produced by Balmoral Tanks were GRPs, which Balmoral Tanks supplied to largely the same customers as were active in the CGST sector.<sup>149</sup> Although Balmoral Tanks had considered entering the CGST sector on previous occasions,<sup>150</sup> it was not until 2011 that it began quoting for the supply of CGSTs to expand its offering to customers.<sup>151</sup> It obtained LPCB approval for its CGST by the end of 2011<sup>152</sup> and delivered its first certified CGST in February 2012.<sup>153</sup>
- 3.5 Having an LPCB standard certified CGST required the tank to be fitted with a device known as a vortex inhibitor, which facilitates the flow of water from the tank.<sup>154</sup> Balmoral Tanks received LPCB approval for its own design of vortex inhibitor in May 2012, prior to the meeting on 11 July 2012 at which the information exchange infringement took place.<sup>155</sup> In the interim Balmoral Tanks purchased LPCB approved vortex inhibitors from CST UK, which [Balmoral Tanks senior employee 1] claims necessitated a relationship with CST UK.<sup>156</sup> He states:
- ‘Although we were not happy about the apparent cosiness of our competitors, I would like to state again that we were concerned about defending our position with the supply of the vortex inhibitor. The vortex inhibitor was essential for us not to only produce [CGST] tanks but for GRP tanks. If we were no longer supplied by Vulcan it would have affected us in both of those markets.’<sup>157</sup>

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<sup>149</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 24 [URN 5007]. See section 2.A above in relation to the different types of tanks supplied by the Parties.

<sup>150</sup> As explained in [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 25 [URN 5007]. See also [Balmoral Group senior employee 1] witness statement, 9 December 2013, paragraphs 25-26 [URN 4951].

<sup>151</sup> [Balmoral Tanks senior employee 1] confirms that Balmoral Tanks began to quote for the supply of CGSTs with Balmoral Tanks’ long established customers as early as October 2011, with the first certified tank delivered in February 2012. See [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraphs 35 and 48 [URN 5007].

<sup>152</sup> See Balmoral Tanks LPCB certificate, dated 16 December 2011 [URN 5010], as exhibited to [Balmoral Tanks senior employee 1] witness statement, 27 February 2014 (referred to as [X]) [URN 5007].

<sup>153</sup> See [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 48 [URN 5007].

<sup>154</sup> See paragraph 2.4 above.

<sup>155</sup> See LPCB certificate dated 24 May 2012 [URN 5011] and [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraphs 47 and 85 [URN 5007], explaining that Balmoral Tanks’ accreditation was received slightly earlier on 19 May 2012.

<sup>156</sup> See [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 47 [URN 5007].

<sup>157</sup> See [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 66 [URN 5007].

- 3.6 As part of its preparation for its expansion into the supply of CGSTs, Balmoral Tanks senior management met with the existing manufacturers, arranging site visits to gain an understanding of the market.<sup>158</sup> Balmoral Tanks staff also met with customers in the CGST sector as part of its research.<sup>159</sup> Balmoral has explained that these visits were efforts to familiarise itself with the market and were part of normal due diligence.<sup>160</sup>
- 3.7 As noted above, the CMA does not consider that Balmoral was party to the main cartel infringement, and makes no finding that Balmoral was party to any infringement of competition law prior to the 11 July 2012 meeting which is the subject of the information exchange infringement. Evidence of discussions between Balmoral and the other Parties prior to July 2012 set out below is included only by way of context to the meeting on 11 July 2012.
- 3.8 Balmoral Tanks' entry raised concerns with the parties to the main cartel and led to discussion about how they should respond to the introduction of competition. [Galglass senior employee 1] explained that he was concerned about 'irrationally low prices' from Balmoral Tanks and that 'CST, Vulcan, Kondea, Franklin Hodge and myself were therefore wary of Balmoral Tanks' entry into the market which had the potential to cause things to revert to the pre-LPS 1276 levels. Lowering of standards based on aggressive anti-competitive reductions in price was not a good way forward...'<sup>161</sup>
- 3.9 [CST UK senior employee 2] explains: 'These discussions led the "Club" to recognise there was no point fighting Balmoral Tanks and that it would be better trying to encourage them to attend the meetings and become members.'<sup>162</sup>

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<sup>158</sup> See [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraphs 28-30 [URN 5007] and [Balmoral Group senior employee 1] witness statement, 9 December 2013, paragraph 27 [URN 4951]. This is also corroborated by [CST UK senior employee 2] who states of [Balmoral Group senior employee 1] and [Balmoral Tanks senior employee 1]'s visit to CST UK 'the pair appeared to be on some sort of fact-finding exercise': [CST UK senior employee 2] witness statement, 22 August 2013, page 28 [URN 4958].

<sup>159</sup> See, for example, notes of a meeting with [X] emailed to [Balmoral Tanks senior employee 1] on 25 October 2011 [URN 5024]. The note also suggests that customers alerted Balmoral Tanks to the existence of anti-competitive activity in the CGST sector, noting: '[Kondea senior employee] has advised [X] that Vulcan are now in a position to start offering discounts on tanks. [X] was not surprised by this action given the fact that Balmoral was entering the Cylindrical market. [X]'s words "it's been a cartel for to [sic] long" the customer is being ripped off.'

<sup>160</sup> Balmoral's Response to the Statement of Objections dated 29 July 2016, paragraph 2.5 [URN 8627].

<sup>161</sup> [Galglass senior employee 1], interview transcript (prepared statement read during the interview) 14 March 2014, page 58, paragraph 152 [URN 6585].

<sup>162</sup> [CST UK senior employee 2] witness statement, 22 August 2013, page 30 [URN 4958].

- 3.10 Rather than abandoning the main cartel and allowing the return of competition, Franklin Hodge, Galglass, and Kondea instead decided to attempt to persuade Balmoral Tanks to join the long-standing cartel arrangements. [Franklin Hodge senior employee 1] explained the strategy for getting Balmoral Tanks to join:

‘It was with this trend in mind that [Galglass senior employee 1], [Kondea senior employee] and I decided we should attempt to get [Balmoral Tanks senior employee 1] along to one of our meetings and to persuade him that it would be beneficial for Balmoral to join us. The idea was to try and convince [Balmoral Tanks senior employee 1] that Balmoral should raise its prices to meet ours in exchange for an equal share of the steel tank market. This way, each would have to accept a limit on their proportion of the market, but in the knowledge that they would operate with a far greater profit margin. In other words, for Balmoral, they would make greater profits, but on a smaller output.’<sup>163</sup>

- 3.11 [Balmoral Tanks senior employee 1] describes the ‘numerous and persistent’ attempts made by [Franklin Hodge senior employee 1], [Galglass senior employee 1] and [Kondea senior employee] to persuade him to attend meetings with them, although [Balmoral Tanks senior employee 1] explains that the real purpose of these meetings was not apparent to him until later.<sup>164</sup> He describes how these events culminated in the meeting of 11 July 2012, where he was informed that agreements existed which effectively divided the market between the parties to the main cartel. The meeting on 11 July 2012, at which the information exchange took place, is discussed further in section C below.<sup>165</sup>

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<sup>163</sup> [Franklin Hodge senior employee 1] witness statement, 6 June 2014, paragraph 150 [URN 6526]. [Galglass senior employee 1] supports this, stating at interview: ‘Yes we’ve discussed that at meetings, and said, “well obviously Balmoral are going to come in, they’re going to take market share. They’re going to need to take the market share. Don’t want them to kill the price; let them take some – let them take some work”’, [Galglass senior employee 1] interview transcript, 27 November 2012, page 49 [URN 1316].

<sup>164</sup> See [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraphs 19 and 54 [URN 5007].

<sup>165</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 20 [URN 5007]. Balmoral has explained that falling prices (as a result of Balmoral Tanks’ entry) and the loss of market share for parties to the main cartel, led the parties to the main cartel ‘persistently to pressure Balmoral Tanks over a period of months to increase its prices.’ Balmoral accepts that representatives of Balmoral Tanks were approached to attend meetings to discuss the industry, but submits that Balmoral Tanks was never explicitly asked to join the cartel, and that Balmoral Tanks had no awareness of the full extent of the cartel behaviour even after the meeting on 11 July 2012: Balmoral’s

- 3.12 In this context, [Franklin Hodge senior employee 1], [Galglass senior employee 1] and [Kondea senior employee] met Balmoral Tanks on a number of occasions in 2012, individually and in larger group meetings, to try to encourage Balmoral Tanks to raise its prices in line with those of the ‘club’.<sup>166</sup>

***6 January 2012 – meeting between Balmoral Tanks [Balmoral Tanks senior employee 1] and Kondea [Kondea senior employee]***

- 3.13 On 6 January 2012 [Balmoral Tanks senior employee 1] met with [Kondea senior employee] at Abington Services. [Balmoral Tanks senior employee 1] explains in his witness statement that at the time he believed the purpose of the meeting was to resume previous discussions regarding [Kondea senior employee] joining Balmoral Tanks.<sup>167</sup>
- 3.14 [Balmoral Tanks senior employee 1] made a note of the meeting, which demonstrates some discussion of pricing took place (with the note including the comment ‘[Kondea senior employee] gave [Balmoral Tanks senior employee 1] indicative prices for tanks four tanks’ followed by prices for 27.5m<sup>3</sup>, 135m<sup>3</sup>, 450m<sup>3</sup> and 700m<sup>3</sup> size tanks), with a suggestion that Balmoral Tanks were pricing too cheaply.<sup>168</sup> The note also records ‘Big 3 meet regularly, (once a quarter) to discuss market, etc’<sup>169</sup> and that Balmoral Tanks was invited to the next meeting of competitors: ‘[Kondea senior employee] invited [Balmoral Tanks senior employee 1] to the next meeting, but I declined for the time being.’<sup>170</sup>
- 3.15 [Balmoral Tanks senior employee 1] said of the information provided ‘I don’t believe any of the information that [Kondea senior employee] gave me during this meeting was commercially sensitive, although I would not supply a

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Response to the Statement of Objections dated 29 July 2016, paragraph 1.6 [URN 8627]. As noted above, the CMA does not find that Balmoral was party to the main cartel infringement.

<sup>166</sup> [CST UK senior employee 2] explains that through these meetings the parties to the main cartel were ‘trying to encourage Balmoral to raise their prices in line with the “Club” members; [Kondea senior employee] described it as “stepping stones” to get Balmoral to join the “Club”.’ See [CST UK senior employee 2] witness statement, 22 August 2013, page 30 [URN 4958].

<sup>167</sup> [Balmoral Tanks senior employee 1] witness statement 27 February 2014, paragraph 55-61 [URN 5007].

<sup>168</sup> [URN 0848] and [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 56 [URN 5007].

<sup>169</sup> [URN 0848] [Kondea senior employee] is noted as telling [Balmoral Tanks senior employee 1] ‘it didn’t make sense to kill a market with a poor pricing policy’.

<sup>170</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 56 [URN 5007].



competitor with Balmoral historical product pricing, as this may be used by them to form their own pricing strategy.<sup>171</sup>

***January 2012 – meeting between Balmoral Tanks [Balmoral Tanks senior employee 1] and Franklin Hodge [Franklin Hodge senior employee 1]***

- 3.16 [Franklin Hodge senior employee 1] also met [Balmoral Tanks senior employee 1] in January at a hotel in Ross-on-Wye.<sup>172</sup> Prior to the meeting [Franklin Hodge senior employee 1] had been in contact with [Balmoral Tanks senior employee 2] and suggested a meeting between the two of them.<sup>173</sup> [Balmoral Tanks senior employee 1] explains he told [Balmoral Tanks senior employee 2] not to agree to a meeting, and arranged to meet [Franklin Hodge senior employee 1] himself. [Balmoral Tanks senior employee 1] explains that the purpose of this meeting was to tell [Franklin Hodge senior employee 1] not to contact [Balmoral Tanks senior employee 2], and that communications should be with him instead.<sup>174</sup>
- 3.17 [Balmoral Tanks senior employee 1]’s account of the meeting is that industry issues were discussed, but not pricing or customer allocation.<sup>175</sup> This is broadly consistent with [Franklin Hodge senior employee 1]’s recollection of the meeting, although he recalls that he did ask [Balmoral Tanks senior employee 1] about Balmoral Tanks’ pricing, and [Balmoral Tanks senior employee 1] responded stating Balmoral Tanks had had issues with its costings.<sup>176</sup>

***7 and 8 February 2012 – Balmoral Tanks [Balmoral Tanks senior employee 1] and [Balmoral Group senior employee 1] meetings with Galglass [Galglass senior employee 1] and Kondea [Kondea senior employee]***

- 3.18 Balmoral Tanks [Balmoral Tanks senior employee 1] and [Balmoral Group senior employee 1] also met with Galglass [Galglass senior employee 1] on 7 February 2012. [Balmoral Group senior employee 1] explains that Galglass had been pressing for a meeting with Balmoral Tanks, and as they were

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<sup>171</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 57 [URN 5007].

<sup>172</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 67 [URN 5007].

<sup>173</sup> [Franklin Hodge senior employee 1] prepared statement, 23 May 2013, paragraph 125 [URN 6527].

<sup>174</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 67 [URN 5007].

<sup>175</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 67 [URN 5007].

<sup>176</sup> [Franklin Hodge senior employee 1] interview transcript, 29 May 2013, page 89 [URN 1680].

already in the area to see another company, they agreed to a meeting.<sup>177</sup> The following day, 8 February 2012, [Balmoral Tanks senior employee 1] and [Balmoral Group senior employee 1] also met with Kondea [Kondea senior employee] at Manchester airport.<sup>178</sup>

3.19 [Balmoral Tanks senior employee 1] notes that the meetings had been set up independently, but that it was clear when he met with Kondea, that [Kondea senior employee] knew about Balmoral Tanks' meeting with Galglass the day before.<sup>179</sup> [Balmoral Tanks senior employee 1] states that 'this raised our suspicions on the cosiness of their relationship'.<sup>180</sup>

3.20 [Balmoral Tanks senior employee 1] made a contemporaneous note of the meeting,<sup>181</sup> in which both [Galglass senior employee 1] and [Kondea senior employee] are recorded as having confirmed that Galglass, Franklin Hodge and Kondea meet regularly, and that [Galglass senior employee 1] invited Balmoral Tanks to the next meeting. Again, Balmoral Tanks declined, with [Balmoral Tanks senior employee 1] recording, 'obviously we are not interested in discussions of this type, but at this moment in time we continue to purchase vortex inhibitors from Vulcan tanks. If we dismiss them, we could find ourselves with no supply of vortex inhibitors. Hopefully this problem will be eliminated soon with the launch of our own product.'<sup>182</sup> In the same note, [Balmoral Tanks senior employee 1] continues 'we are very uneasy about the cozy way this market appears to be working, but will continue to appear we are interested in further discussions until the launch of our own vortex inhibitor.'<sup>183</sup> [Balmoral Tanks senior employee 1] concludes his note: 'I appreciate we have no interest in any form of collusion with the other players in this market, and will ensure we never compromise our business, people or brand during any conversations with them. We can't avoid meeting them in

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<sup>177</sup> [Balmoral Group senior employee 1] interview transcript, 18 December 2012, pages 35-36 [URN 1313].

<sup>178</sup> [Balmoral Group senior employee 1] interview transcript, 18 December 2012, pages 35-36 [URN 1313].

<sup>179</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 65 [URN 5007].

<sup>180</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 65 [URN 5007].

<sup>181</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 65 [URN 5007]; and [URN 5013] undated draft email, but [Balmoral Tanks senior employee 1] recalls this being from 11 February 2012 (see [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 62 [URN 5007]).

<sup>182</sup> [URN 5013].

<sup>183</sup> Balmoral has argued that its principal reason for engaging with the other suppliers was out of its concern for the continued supply of the vortex inhibitor from CST UK. The CMA understands that the vortex inhibitor is a key component in a fire sprinkler system. Balmoral Tanks received the LPCB approval for its own design of vortex inhibitor on 24 May 2012.

places such as the ATCM meeting, but this will be the extent of any dialogue once we complete the testing of our own Vortex Inhibitor.’<sup>184</sup>

***22 March 2012 meeting between Galglass [Galglass senior employee 1], Kondea [Kondea senior employee], Franklin Hodge [Franklin Hodge senior employee 1] and Balmoral Tanks [Balmoral Tanks senior employee 1]***

- 3.21 Galglass, Kondea, Franklin Hodge and Balmoral Tanks also met in advance of an ATCM meeting on 22 March 2012 at Carter Retail Equipment Ltd’s offices. A pre-meeting was arranged for before the start of the ATCM at the instigation of [Galglass senior employee 1], with the stated purpose of discussing a potential new standard for site bolted cylindrical water storage tanks.<sup>185</sup>
- 3.22 [Franklin Hodge senior employee 1] recalls that at the meeting Balmoral Tanks, Franklin Hodge, Galglass and Kondea did discuss the new standard, but ‘then we moved on to pricing, and more specifically, Balmoral’s approach to the market and the price of [CGSTs]. We indicated again to [Balmoral Tanks senior employee 1] that the prices being bid by Balmoral were significantly below the established market price for such tanks.’<sup>186</sup> [Franklin Hodge senior employee 1] recalled Balmoral Tanks remaining ‘very much non-committal on the issue of pricing’<sup>187</sup> and that [Balmoral Tanks senior employee 1] said ‘Balmoral was not able to increase their prices, as they were still establishing what their true costs of manufacture were.’<sup>188</sup>
- 3.23 [Balmoral Tanks senior employee 1]’s account of the meeting is broadly consistent. He recalls in his witness statement ‘they asked me questions about how Balmoral were getting on in the market. And as I expected the main point of the meeting appeared to be the others saying Balmoral were pricing too cheaply in the [CGST] market, although I don’t recall any person specifically

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<sup>184</sup> [URN 5013].

<sup>185</sup> Emails between [Franklin Hodge senior employee 1], [Galglass senior employee 1], [Kondea senior employee] and [Balmoral Tanks senior employee 1] dated 21 March 2012 [URNs 4098, 4244]. See also: Emails between [Franklin Hodge senior employee 1], [Galglass senior employee 1], [Kondea senior employee] and [Balmoral Tanks senior employee 1] dated 20 March 2012 [URN 4092, 2132 and 2133] and 21 March 2012 [URNs 4094 - 4098 and 4244 - 4247]; [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraphs 70-73 [URN 5007]; [Franklin Hodge senior employee 1] witness statement, 6 June 2014, paragraph 156 [URN 6526]; [Franklin Hodge senior employee 1] prepared statement, 23 May 2013, paragraphs 110-111 [URN 6527]; [Kondea senior employee]’s 2012 diary with an entry for 22/3/12 ‘ATCM Meeting 10:30 AM’ [URN 2683B]; and [Franklin Hodge senior employee 1]’s Filofax 2009-2012 with entry for 22/3/12 ‘ATCM Meeting @ CRE’ [URN 2636H].

<sup>186</sup> [Franklin Hodge senior employee 1] witness statement, 6 June 2014, paragraph 157 [URN 6526].

<sup>187</sup> [Franklin Hodge senior employee 1] witness statement, 6 June 2014, paragraph 157 [URN 6526].

<sup>188</sup> [Franklin Hodge senior employee 1] witness statement, 6 June 2014, paragraph 157 [URN 6526].

saying “put your prices up” or making reference to having any specific percentage share of the market.’<sup>189</sup>

***2 May 2012 – meeting between Galglass [Galglass senior employee 1], Kondea [Kondea senior employee], Franklin Hodge [Franklin Hodge senior employee 1] and Balmoral Tanks [Balmoral Tanks senior employee 1]***

3.24 The next meeting was attended by Franklin Hodge, Galglass, Kondea and Balmoral Tanks on 2 May 2012 at the Ramada Hotel, Tamworth.<sup>190</sup> In interview, [Balmoral Tanks senior employee 1] explains that he was invited to this meeting following a call from [Galglass senior employee 1] on 23 April 2012,<sup>191</sup> in which [Galglass senior employee 1] complained about the prices Balmoral Tanks was quoting and the amount of work it was winning.<sup>192</sup> [Balmoral Tanks senior employee 1]’s note of the call states, ‘[Galglass senior employee 1], 20% lower want to meet, not happy BTC, winning all work, where do we stand.’<sup>193</sup> [Balmoral Tanks senior employee 1] recalls the meeting as follows: ‘The meeting also continued along a similar line to the previous meeting in March where I was told that Balmoral was too cheap. I maintained the same position as previously that Balmoral were new to the market and were finding our feet, and our pricing structure was all over the place.’<sup>194</sup>

3.25 [Balmoral Tanks senior employee 1] claims that the meeting made him extremely uncomfortable, but that he was still concerned about the risk to supply of the vortex inhibitor which Balmoral Tanks continued to purchase from CST UK.<sup>195</sup> Nevertheless, [Balmoral Tanks senior employee 1] claims

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<sup>189</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 73 [URN 5007].

<sup>190</sup> See [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraphs 74 to 84 [URN 5007], referring to notes taken at the meeting [URN 2539A]. See also: [Kondea senior employee]’s 2012 diary with an entry on 1/5/12 of ‘HOTEL REF No £63’ and on 2/5/12 ‘TAMWORTH 8AM’, page 2 of [URN 2683C]; [Kondea senior employee]’s expenses showing an invoice and receipt for overnight stay at the Aspect Hotel, page 4 of [URN 2693]; [Kondea senior employee]’s expenses entry for 2/5/12 for Appleby Park, page 21 of [URN 0644]; [Franklin Hodge senior employee 1]’s Filofax 2009-2012 with an entry for 2/5/12 ‘[meeting]’, page 2 of [URN 2631]; email chain with [Franklin Hodge senior employee 1]’s weekly schedule, with reference to [meeting] in Tamworth on 2/5/12 [URN 4819]; hotel invoice to Galglass for room hire and receipt [URN 2548]; [Best Western employee 1] witness statement, 25 July 2012, pages 13-14 [URN 2359] and exhibits [URN 2396] (email from Appleby Park Hotel attaching contract) and [URN 2397] (invoice for ‘syndicate room hire’ made out to Galglass).

<sup>191</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 74 [URN 5007].

<sup>192</sup> [Balmoral Tanks senior employee 1] interview transcript, 30 May 2013, pages 43-44 (tape 2 pages 14-15) [URN 1674].

<sup>193</sup> [URN 2539A] page 4.

<sup>194</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 76 [URN 5007].

<sup>195</sup> [Balmoral Tanks senior employee 1] states: ‘After this meeting I knew that these meetings were wrong but I believe I was going with a different agenda to the others. I didn’t want to put at risk our supply of vortex inhibitors until

that at the time he was not aware of ‘the full extent of the discussion’<sup>196</sup> between the parties to the main cartel, and still believed the CGST market to be ‘very competitive’.<sup>197</sup>

### **Contact between May and July 2012**

3.26 Between May and July 2012, Galglass and Kondea both continued to contact Balmoral Tanks.<sup>198</sup>

3.27 This is supported by text messages recovered from [Galglass senior employee 1]’s mobile phone evidencing contact between the parties to the main cartel and Balmoral Tanks:<sup>199</sup>

**9 May 2012:** [Galglass senior employee 1] to [Balmoral Tanks senior employee 1]: ‘Hi [Balmoral Tanks senior employee 1], did you get the new version 7 [the latest version of Balmoral’s estimating system for CGSTs] sorted for last Friday? Thanks.’ ([Galglass senior employee 1] sends the same text message to [Kondea senior employee] and [Franklin Hodge senior employee 1].)

**10 May 2012:** [Balmoral Tanks senior employee 1] replies: ‘Almost. Live Monday.’ [Galglass senior employee 1] replies: ‘Okay [Balmoral Tanks senior employee 1], we need that change. Thanks.’

**19 May 2012:** [Galglass senior employee 1] chases [Balmoral Tanks senior employee 1] again: ‘Hi [Balmoral Tanks senior employee 1] did new system go Live as planned and is it working okay? Thanks.’

[Galglass senior employee 1] sends the same text message to [Kondea senior employee] and [Franklin Hodge senior employee 1]. [Kondea senior employee] replies: ‘Hi [Galglass senior employee 1] from my point of view the answer is no! Yesterday they quoted an 13 x 8 and were at least 5k below me after i had discounted by 7%.’<sup>200</sup>

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we had our own design approved.’ [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 82 [URN 5007].

<sup>196</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 83 [URN 5007].

<sup>197</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 83 [URN 5007].

<sup>198</sup> [Franklin Hodge senior employee 1] witness statement, 6 June 2014, paragraphs 158-159 [URN 6526].

<sup>199</sup> Schedules of text messages recovered from [Galglass senior employee 1]’s phone: [URN 1366], [URN 6474].

<sup>200</sup> [URN 1366].

[Galglass senior employee 1] replies to [Kondea senior employee]:  
'Hi [Kondea senior employee], does [Balmoral Tanks senior employee 1] know that? I will text him tomorrow again. I am thinking an emergency meeting?' [Kondea senior employee] replies to [Galglass senior employee 1]: 'Hi [Galglass senior employee 1], no he doesn't know, it happened late yesterday. I assume you didn't get a reply to your earlier text. Yes an emergency meeting is needed.'<sup>201</sup>

[Galglass senior employee 1] replies [Kondea senior employee]: 'No not yet, I will send it again tomorrow and let u know.'

**21 May 2012:** [Balmoral Tanks senior employee 1] replies to [Galglass senior employee 1]: '[Galglass senior employee 1], I will give you a call later.' [Galglass senior employee 1] replies: 'Thanks [Balmoral Tanks senior employee 1].'

**22 May 2012:** [Galglass senior employee 1] chases [Balmoral Tanks senior employee 1] again: 'Morning [Balmoral Tanks senior employee 1] what time r free? Thanks' [Balmoral Tanks senior employee 1] replies: '[Galglass senior employee 1], give you a call around 3pm?' Telephone records show that [Balmoral Tanks senior employee 1] then called [Galglass senior employee 1] twice that day, at 3:09pm (duration 24 seconds) and at 3:50 pm (duration 13 seconds).<sup>202</sup>[Kondea senior employee] also checks on progress with [Galglass senior employee 1]: 'Hi [Galglass senior employee 1], any news from [Balmoral Tanks senior employee 1].'<sup>203</sup>

- 3.28 [Balmoral Tanks senior employee 1] accounts for events after the meeting on 2 May 2012 as follows: 'After that meeting I continued to receive calls and texts from the competitors and so I began to discuss with [Balmoral Group senior employee 1] and with [Balmoral Group senior employee 2] how and when we could kill the contact between us. I didn't want to kill all contact with

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<sup>201</sup> [URN 1366]. Balmoral say that [Balmoral Tanks senior employee 1] made these calls to tell [Galglass senior employee 1] that he could not make it to the meeting (Balmoral's Response to the Statement of Objections, Annex 1 [URN 8627]), however this is not mentioned in [Balmoral Tanks senior employee 1]'s evidence.

<sup>202</sup> [URN 1254A] page 22.

<sup>203</sup> [URN 1366].

our competitors; I was concerned that they didn't think I was just stringing them along.'<sup>204</sup>

3.29 [Franklin Hodge senior employee 1] explains: '[Balmoral Tanks senior employee 1] had made lots of positive noises about the market and wanting to join in with the arrangement or agreement on pricing from early 2012. He agreed that Balmoral Tanks needed to get the prices up but kept making excuses as to why they did not join.'<sup>205</sup>

3.30 Both [Balmoral Tanks senior employee 1] and [Balmoral Group senior employee 1] explain the concern that Balmoral Tanks had not wanted to 'antagonise the competitors' and that they were nervous regarding Balmoral Tanks' vulnerability and reliance on competitors for the supply of the vortex inhibitor.<sup>206</sup> [Balmoral Group senior employee 1] explains:

'[Balmoral Tanks senior employee 1] and I were nervous during this period regarding our vulnerability and reliance on the supply of the vortex inhibitor. We considered it quite possible that either Vulcan would pull that supply or one of the other competitors would persuade Vulcan to do so. The impact would be on our GRP business as much or more than our GST business... [Balmoral Tanks senior employee 1] and I therefore felt that we should try not to aggravate the competitors, whilst not letting the contact have any impact on our prices.'<sup>207</sup>

3.31 Balmoral Tanks received accreditation for its vortex inhibitor on 24 May 2012, with the last vortex inhibitors Balmoral Tanks purchased from CST UK delivered in June 2012.<sup>208</sup>

## **C. Meeting on 11 July 2012**

3.32 On 11 July 2012, a meeting at the Appleby Magna Best Western Hotel in Tamworth was attended by [Franklin Hodge senior employee 1], [Kondea

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<sup>204</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 86 [URN 5007].

<sup>205</sup> [Franklin Hodge senior employee 1] prepared statement, 23 May 2013, paragraph 172 [URN 6527].

<sup>206</sup> See [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraphs 66, 69, 82 and 97 [URN 5007]; and [Balmoral Group senior employee 1] witness statement, 9 December 2013, paragraphs 36-37 and 44-47 [URN 4951].

<sup>207</sup> [Balmoral Group senior employee 1] witness statement, 9 December 2013, paragraphs 44 and 46 [URN 4951].

<sup>208</sup> See paragraph 3.5 and footnotes 155 and 206.

senior employee] and [Balmoral Tanks senior employee 1].<sup>209</sup> [Galglass senior employee 1] had been due to attend and had been involved in its organisation, but did not attend as he was unwell.<sup>210</sup> This meeting was filmed, providing evidence of what was discussed both by the parties in the meeting, and also by [Franklin Hodge senior employee 1] who remained in the room after the meeting had concluded and made a number of telephone calls to members of his staff at Franklin Hodge reporting back on the information obtained during the meeting.<sup>211</sup>

3.33 [Franklin Hodge senior employee 1] explains that for Franklin Hodge, Galglass and Kondea the purpose of the meeting was 'an opportunity to persuade [Balmoral Tanks senior employee 1] to join our cartel. That was our agreed agenda for the meeting booked for 11<sup>th</sup> July 2012. First and foremost, to try and get [Balmoral Tanks senior employee 1] and Balmoral on board with some form of the arrangement.'<sup>212</sup>

3.34 Prior to the meeting, [Franklin Hodge senior employee 1], [Galglass senior employee 1] and [Kondea senior employee] had discussed a strategy for trying to bring Balmoral Tanks into the long-standing customer allocation and price-fixing cartel arrangements. [Franklin Hodge senior employee 1] explains:

'Having discussed Balmoral's entry between us (the manufacturers), we agreed on a particular approach. In essence, as I've described above, the approach centred on seeking to explain to [Balmoral Tanks senior employee 1] that protecting the price of GST's [sic], having a sensible price, would mean that each manufacturer could operate within the market with healthy profit margins, rather than

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<sup>209</sup> See transcript of 11 July 2012 meeting [URN 8745]. See also: [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraphs 87-96 [URN 5007] and [Balmoral Tanks senior employee 1]'s notebook with notes of the 11 July 2012 meeting, page 3 of [URN 2537A]; [Franklin Hodge senior employee 1] witness statement, 6 June 2014, paragraphs 159 - 177 [URN 6526], [Franklin Hodge senior employee 1]'s expenses for '[meeting] room booking' on 11/7/12, page 11 [URN 2611] and [Franklin Hodge senior employee 1] Filofax 2009-2012 with entry for 11/7/12 "[meeting]", page 2 of [URN 2636J]; [Franklin Hodge senior employee 1] prepared statement, 23 May 2013, paragraphs 172 - 181 [URN 6527] [Best Western employee 1] witness statement, 25 July 2012, pages 14-16 [URN 2359] and exhibits [URN 2399-2401]; [Kondea senior employee]'s 2012 diary with an entry for 11/07/12 '8AM Meeting', page 2 of [URN 2683D]; and a text message from [Galglass senior employee 1] to [Balmoral Tanks senior employee 1] on 06/07/2012 [URN 1366] which reads 'Appleby park hotel de 12 6ap. Meeting room booked for 11th at 8.00am'.

<sup>210</sup> As set out at paragraphs 3.70 below.

<sup>211</sup> See transcript of 11 July 2012 meeting [URN 8745], transcribing the content of the audio-visual recording [URNs 4998A and 4998B].

<sup>212</sup> [Franklin Hodge senior employee 1] witness statement, 6 June 2014, paragraph 159 [URN 6526].



fighting to obtain a high volume of sales but with a low profit margin. We saw this as an appeal to his business sense ...

... En-route to the meeting, I spoke to [Kondea senior employee] on the mobile. We discussed our joint expectation for the meeting and confirmed our agenda. We briefly discussed the possible outcome of the meeting and what we thought [Balmoral Tanks senior employee 1] might do or say.

[Kondea senior employee] had been pushing for us to have this meeting and to seek to bring [Balmoral Tanks senior employee 1] and Balmoral on board. In my view, [Kondea senior employee] had the most to lose if the arrangement fell apart. Although “desperate” would be too strong a word, he was very keen that the meeting with [Balmoral Tanks senior employee 1] went ahead.’<sup>213</sup>

3.35 Evidence from Balmoral Tanks’ witnesses is that Balmoral Tanks’ intention in attending the meeting was to make it clear that Balmoral Tanks would be competing for business in the CGST sector and to put an end to attempts to involve Balmoral Tanks in any anti-competitive conduct. [Balmoral Tanks senior employee 1] explains: ‘Although by the time of this meeting Balmoral had received accreditation to manufacture vortex inhibitors, as I have stated I wanted to end the contact, I wanted to make sure they saw Balmoral as a credible competitor and I didn’t want to kill off all legitimate contact with them.’<sup>214</sup> In interview, he made the additional comment that: ‘And what we were trying to avoid, in all seriousness, was a price war.’<sup>215</sup>

3.36 [Balmoral Group senior employee 1] recalls: ‘T (sic) the time we had received the inhibitor certificate. I recall that the competitors organised a meeting with [Balmoral Tanks senior employee 1]. I recall [Balmoral Tanks senior employee 1] stating to me that he had had enough of calls with the competitors and that

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<sup>213</sup> [Franklin Hodge senior employee 1] witness statement, 6 June 2014, paragraphs 160, 162 and 163 [URN 6526].

<sup>214</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 88 [URN 5007]; see also paragraph 86 [URN 5007].

<sup>215</sup> [Balmoral Tanks senior employee 1] interview transcript 27 November 2012, page 46 [URN 1315]. [Balmoral Tanks senior employee 1] made a similar comment in his interview of 10 December 2013: ‘So I went to the July meeting primarily I suppose in some way to say you know Balmoral was a professional company, but from my point of view as well I don’t want us to be involved, I don’t want us to start a price-war, I don’t want us to as a company err...how do-how do I end that contact bearing in mind that I have been talking to them without almost causing complete aggravation? So erm that was the kind of crux of it...for me.’ [Balmoral Tanks senior employee 1] interview transcript 10 December 2013, CD2, page 15 [URN 6487]: ‘

he intended to go to a meeting he'd been invited to in order to make it clear that the calls had to stop.'<sup>216</sup>

- 3.37 However, the audio-visual recording of the meeting demonstrates that, although Balmoral Tanks refused to take part in any allocation of customers, [Balmoral Tanks senior employee 1] exchanged information regarding current pricing and future pricing intentions with the other attendees, including after the existence of the customer allocation arrangements were confirmed to him during the meeting.
- 3.38 The information exchanged at the meeting included price bands and prices quoted for specific contracts for the supply of CGSTs for schools and 135m<sup>3</sup> CGSTs.
- 3.39 None of the parties present refused to participate in these discussions during the meeting, but rather the recording shows all attendees taking an active role in sharing and soliciting information on current and future pricing intentions, as well as recent past bids.<sup>217</sup>
- 3.40 After some preliminary introductory discussions around football, [Franklin Hodge senior employee 1] brings the conversation round to pricing.<sup>218</sup> [Kondea senior employee] and [Franklin Hodge senior employee 1] both suggest that the sector is quieter than it has been, before [Kondea senior employee] actively seeks information from [Balmoral Tanks senior employee 1] regarding Balmoral Tanks' prices for CGSTs. [Kondea senior employee] asks [Balmoral Tanks senior employee 1] 'How are things with your prices? How's your revision 7?'<sup>219</sup>
- 3.41 In response, [Balmoral Tanks senior employee 1] talks about a recent contract for Tyco that Balmoral Tanks had lost to Galglass then states: '...I think it's quite good that we can meet and have a chat but the cards are on the table [inaudible], I trust you guys because we can be frank with each other'.<sup>220</sup> He

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<sup>216</sup> [Balmoral Group senior employee 1] witness statement, 9 December 2013, paragraph 47 [URN 4951].

<sup>217</sup> The parties discuss recent past bids and dealings more generally with Compco (see transcript of 11 July 2012 meeting pages 13 to 15, 22 to 24, 43, 50 and 52 [URN 8745]), Tyco (see transcript of 11 July 2012 meeting pages 14 to 22, 43, 50 to 51 [URN 8745]) and Hall & Kay (see transcript of 11 July 2012 meeting pages 25 to 26 [URN 8745]).

<sup>218</sup> '...perhaps we might discuss about market pricing, the overall feeling is just a total lack of volume. It's very flat.' Transcript of 11 July 2012 meeting, page 12 [URN 8745].

<sup>219</sup> Transcript of 11 July 2012 meeting, page 14 [URN 8745]. Revision 7 refers to the next revision of Balmoral Tanks' estimating system for CGSTs.

<sup>220</sup> Transcript of 11 July 2012 meeting, page 14 [URN 8745].

goes on to state: ‘...So it was never the plan, and it won’t be the plan going forward to be the cheapest, but I’m trying to think to myself with the size of the market, is it worth the risk that we take sitting having these conversations and that’s just my view, OK...’<sup>221</sup>

- 3.42 Having explained that Balmoral Tanks were keen to be seen as a competitor in the sector, [Balmoral Tanks senior employee 1] suggests that the competitors may find their prices ‘creeping up’:

‘...Everybody’s got to make some money. I think what you might, find, seriously that you’ll see your prices creeping up, but I don’t talk to the sales guys either, they’re got guidelines and I’m saying [inaudible] they push on and they’ve got the tanks they go for, there’s a lot of pressure internally now from Balmoral now and it consists of what’s going on at Tyco now...’<sup>222</sup>

- 3.43 [Balmoral Tanks senior employee 1] goes on to explain Balmoral Tanks’ approach to winning business as a new entrant, and the importance of getting the price for CGSTs stabilised, rather than seeing it pushed very low:

‘...I’m just saying it’s, we have a chat, from Balmoral looking out, what’s going on? [Balmoral Group senior employee 1] is saying “Here, I thought you were having chats”. I’m saying, “[Balmoral Group senior employee 1] the level of detail is more .... what we’re doing, it’s a general chat” I said, but what I’m working to get is saying “You’re going in there and taken the client. We’ve gone in aggressive and you’ve gone in more aggressive. You had last shout. We didn’t close it out. Fine you got the client. When the next 3 come up and we’re going in aggressive, why are you going in even more? So if it was a tactic of saying we’ll just carry on, we’ll get into more detail, it won’t work. It’s not what we do.. What I’m trying to say is, the way Balmoral works is different from how you guys have worked. You got a smaller business but we start saying we won’t build the business, generally I’ve been there nearly 18 years] we won’t build a business just being the cheapest. GRP are the cheapest, by far they’re the cheapest. We pushed the brand, we pushed the quality.. Now the cylindrical market and the quality of the companies in the cylindrical

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<sup>221</sup> Transcript of 11 July 2012 meeting, page 15 [URN 8745].

<sup>222</sup> Transcript of 11 July 2012 meeting, page 16 [URN 8745].

market, you guys, is a lot better than it is in GRP, there's a lot of small ankle biters as I call them...you know they'll still take their share [inaudible] they're still there. I'm amazed the guys still breathing but he's still trading so, if people want to deal with him, they deal with him no matter what price they've got so the idea for us is to say get the thing stabilised, the boys think they're in a battle i.e. particularly with [inaudible] the thing for me is to get it stabilised because if we keep going even lower from my point of view as well, we're hitting rock bottom rather quickly and.....'<sup>223</sup>

- 3.44 [Franklin Hodge senior employee 1] confirms the existence of a pre-existing customer allocation agreement: 'So it's going to be, I mean, the conclusion we came to last time between ourselves we had this conversation was that we ended up divvying up the customers, gold and silver customers'.<sup>224</sup> He also acknowledges that Balmoral Tanks does not agree to allocate customers:

'Obviously it's going to be difficult to arrange that with you guys now, given you're saying you don't want to go down that road so it's going to be a complicated picture and it's going to continue to be a complicated picture.'

- 3.45 After these arrangements are confirmed to him, [Balmoral Tanks senior employee 1] remains in the room for over an hour,<sup>225</sup> continuing to discuss the size of the market, market share and current pricing and future pricing intentions.

- 3.46 In particular, Balmoral Tanks shares views on what pricing should be for specific tanks:

'Reading between the lines, there will be a low price, maybe a proper market price on the 135, anything below 15 grand is stupid. Back up to where it should have been about 17500 18000. When we start

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<sup>223</sup> Transcript of 11 July 2012 meeting, page 17 [URN 8745]. [Balmoral Tanks senior employee 1] reiterates Balmoral Tanks' desire to stabilise prices on page 23.

<sup>224</sup> Transcript of 11 July 2012 meeting, page 21 [URN 8745].

<sup>225</sup> [Balmoral Tanks senior employee 1] enters the room at 08:06. The existence of the customer allocation agreement is confirmed to him between 8:47 and 8:48 and [Balmoral Tanks senior employee 1] leaves the meeting at 10:08. Transcript of 11 July 2012 meeting, pages 5, 21 and 55 [URN 8745].

getting below 15 and two big guys are battling over a Tyco at 14 6 and we're losing it at 14 6. It's bonkers.'<sup>226</sup>

3.47 [Balmoral Tanks senior employee 1] volunteers the current prices at which Balmoral Tanks is selling school tanks and 135m<sup>3</sup> tanks:

[Balmoral Tanks senior employee 1]	I will say that price is probably about .... the lowest one we did recently is about 9 5.
[Franklin Hodge senior employee 1]	And that's what we thought. That's..that's what we thought.
[Balmoral Tanks senior employee 1]	The schools and the 135 are very similar 9 and a half, 10 and a half, 15 to 17.
[Franklin Hodge senior employee 1]	Ok.
[Kondea senior employee]	I think 15s far too low.
[Balmoral Tanks senior employee 1]	No, but what I'm trying to say is
[Kondea senior employee]	16
[Balmoral Tanks senior employee 1]	We're selling at that price, we're now below it, what I'm trying to get to say is you're hitting a level where you say, it's like GRP tanks, we know the price in the market. And I say to somebody. we've been in the game so long, why would we not know the price, quote them this price, quote them that price. If we think we've a 35% market share in GRP you say to [Balmoral Tanks senior employee 2] that's nearly six out of ten orders that we lose. Why do we get upset if we lose one?. We don't have it all, we've got to just make sure we're taking our share at the right price. I think with this it's like trying to push and get it stabilised. For me anyway, I get a much, much better

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<sup>226</sup> Transcript of 11 July 2012 meeting, page 22 [URN 8745].

feel for the way things are settling out you know.’<sup>227</sup>

3.48 Other examples of the attendees providing current pricing information and recent past bids include:

- [Franklin Hodge senior employee 1]: ‘Cos that’s kind of the target price that we were going for for schools in Scotland, was 10 1 but [Franklin Hodge senior employee 3] said it in order to beat Balmoral, we’re going to have to drop to around 9 9, that’s what I’ve been told, I’m getting you straight.’<sup>228</sup>
- An exchange between [Balmoral Tanks senior employee 1] and [Kondea senior employee], in which [Balmoral Tanks senior employee 1] asks: ‘Did you say your list price was 10 1?’ and [Kondea senior employee] replies: ‘Yes. Well that’s the lowered list.’<sup>229</sup>

3.49 During the meeting, [Kondea senior employee] takes out Kondea’s price lists and gives detailed information about prices for school tanks and the 135m<sup>3</sup> tank to Franklin Hodge and Balmoral Tanks. He tells them that Kondea charged £10,100 in February 2012, but had been charging £10,700 in July 2011 for school tanks. He goes on to say that the 135m<sup>3</sup> tank is £18,000. [Balmoral Tanks senior employee 1] queries whether that was the current price, and [Kondea senior employee] confirms it is.<sup>230</sup> [Kondea senior employee] then goes on to say that the 135m<sup>3</sup> tank price was £20,000 in January 2011, £21,000 in April 2011 and £19,000 in July 2011, and offers to provide Balmoral Tanks with more of Kondea’s pricing information.<sup>231</sup>

3.50 The attendees also provide information relating to future pricing intentions.

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<sup>227</sup> Transcript of 11 July 2012 meeting, page 23 [URN 8745].

<sup>228</sup> Transcript of 11 July 2012 meeting, page 41 [URN 8745]. See also paragraph 3.56 below.

<sup>229</sup> Transcript of 11 July 2012 meeting, page 45 [URN 8745].

<sup>230</sup> [Kondea senior employee]: ‘...and then the 135 is 18. [Balmoral Tanks senior employee 1]: Just now’ [Kondea senior employee]: Just now...’ Transcript of 11 July 2012 meeting, page 46 [URN 8745].

<sup>231</sup> Transcript of 11 July 2012 meeting, pages 46 [URN 8745]. [Kondea senior employee]: ‘Yep. Well I can get you as many figures are (sic) you want [Balmoral Tanks senior employee 1] if you want any more bands.’ [Balmoral Tanks senior employee 1] made a note of these prices in his notebook [page 3 of URN 2537A] and confirmed in his witness statement that this was historical information he received during the meeting which were indicative of the prices being charged at those times: [Balmoral Tanks senior employee 1] witness statement 27 February 2014, paragraph 95 (see page 23) [URN 5007] referring to his notebook (referred to as exhibit [S&C]).

3.51 For example, [Kondea senior employee] actively solicits information from [Balmoral Tanks senior employee 1] through a series of questions on what Balmoral Tanks' price would be should they be asked to quote for a 135m<sup>3</sup> tank in the future. [Kondea senior employee] also gives an indication of what Kondea's prices would be:

[Kondea senior employee] 'What would you quote a 135 now? Not *Arriva* [sic] but if it just came out now.

[Balmoral Tanks senior employee 1] Say somewhere between 15 and 17, I wouldn't say it's always 16, as it has been... Some of that will be a reaction that you think what you've been told as well what other people are at now, yeah, erm, so that's why I'm saying we have taken some at a decent price. We have taken some at 15 grand...but they haven't all been at 15 grand.

[Kondea senior employee] What if it was just a tender at the moment, I'm just enquiring with an order to place?

[Balmoral Tanks senior employee 1] A one off tank, I would be surprised if it is less than 16. I'd say some of these things you might quote GRP tanks where someone wants a package [?] I actually give them a price for the whole lot rather than individual tank prices then that's a better way of doing it as well they might say you are a bit out on that, you're ok on that [?].

[Kondea senior employee] If you're trying to do it as a package you should only quote them 1 price, not individual prices.

[Balmoral Tanks senior employee 1] then you get some buyer "Do it separate", give them a chance to go to other people [?] I mean it does depend on who they are and what they've said to theirs?

[Kondea senior employee] I just mean an everyday spring comes along, for a 135 tank cos at the moment I'd be quoting similar to...

[Balmoral Tanks senior employee 1] [finishes [Kondea senior employee's] sentence]...17 and a half.

[Kondea senior employee] may be we'll start high. Because if you start at 15'<sup>232</sup>

- 3.52 Earlier in the meeting, Franklin Hodge asks if Balmoral Tanks has sold any CGSTs to Compco,<sup>233</sup> getting an indication of the level of sales in the market from its competitor. [Franklin Hodge senior employee 1] later tells the others that Franklin Hodge intends to bid to win future Compco contracts, telling [Balmoral Tanks senior employee 1] that Franklin Hodge will 'bid close to but under' what Balmoral Tanks has offered.<sup>234</sup> [Franklin Hodge senior employee 1] also gives a price range that Franklin Hodge will quote for school tanks on the future Compco contracts: 'I'm going to have to go closer to the 9 and a half than 10 and half, on schools that's not because I'm trying to drag the price down, it's because I've got to try to open the door.'<sup>235</sup>
- 3.53 [Franklin Hodge senior employee 1] also discusses a recent pre-qualification bid Franklin Hodge has won for Hall & Kay and its intention not to reduce the price agreed with Hall & Kay 'come hell or high water. If someone rings up and says well they're a bit cheaper cos even Hall and Kay have gone through the process of trying to reduce, duck, instead of constantly going to Franklin Hodge. You must now get 3 prices but we have rigidly stuck to the price we agreed and we won't move off that, mainly for credibility reason, that kind of supports the point, I'm not going to move from that.'<sup>236</sup>
- 3.54 All attendees take an active role in discussing what should be the target price bands for future bids for schools and 135m<sup>3</sup> tanks. [Franklin Hodge senior employee 1] summarises the position, once it is clear that Balmoral Tanks are not prepared to take part in customer allocation: '... Good. So coming back to where we were then, it's going to be a complicated picture isn't it, on the

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<sup>232</sup> Transcript of 11 July 2012 meeting, page 49 [URN 8745].

<sup>233</sup> Transcript of 11 July 2012 meeting, page 15 [URN 8745].

<sup>234</sup> Transcript of 11 July 2012 meeting, page 22 [URN 8745]. [Franklin Hodge senior employee 1]: '...I said come on...give us an enquiry, he said you're so far out against the competition on price. Maybe we are, maybe we've made a mistake somewhere, but what we've got, some schools to place and we were going to go back and not be silly about it, but we were going to try to guess where you are, and we'd like the work, so we're going to go and bid close to but under what you've offered, but not, we are guessing around a little here.'

<sup>235</sup> Transcript of 11 July 2012 meeting, page 50 [URN 8745].

<sup>236</sup> Transcript of 11 July 2012 meeting, page 26 [URN 8745]. [Balmoral Tanks senior employee 1] asks what Franklin Hodge's price was for the bid: 'What did you say your price was there?'



pricing front, this is like market sharing we going to have to manage it as best we can I suppose, is the conclusion we're coming to.'<sup>237</sup>

3.55 [Balmoral Tanks senior employee 1] responds: 'We can always pick the phone up and have chat about it see where we are, make it quite clear where the bands are, if you go outside that band, on the low side then I'd like to think it won't be driven by us.'<sup>238</sup>

3.56 There is then a detailed discussion about what the price bands should be for two specific models of tank going forward. All attendees take an active role in this conversation, soliciting and providing information:

[Franklin Hodge senior employee 1] 'Yeah, so we were saying earlier, on the schools, for the commodity items for the schools tanks we were 9 and half to 10 and a half did we say?

[Balmoral Tanks senior employee 1] That's on average where the price should have been [They are taking notes at this point]

[Franklin Hodge senior employee 1] That's 9 and a half, 10 and a half. And the 135s? £14,650?

[Kondea senior employee] NO! [laughing],

[Balmoral Tanks senior employee 1] I've seen quite a few around about the 15 mark, so I'd say 15 to the 17 mark.

[Franklin Hodge senior employee 1] OK.

[Kondea senior employee] Well, I'd have thought a list price would have been £18, on a 135. That should be around about 17, that's with a ball-valve, with a ball valve should be about 18.

[Balmoral Tanks senior employee 1] 50mm ball valve?.

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<sup>237</sup> Transcript of 11 July 2012 meeting, page 39 [URN 8745].

<sup>238</sup> Transcript of 11 July 2012 meeting, page 40 [URN 8745]. [Balmoral Tanks senior employee 1] explained in his witness statement: 'What I meant by this, I wanted Balmoral to be considered a credible competitor in the market, and if there was a legitimate discussion to be had with competitors then I would be happy to have that discussion.' [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 96 [URN 5007]. [Balmoral Tanks senior employee 1] made additional comments in his interview which are set out at paragraph 4.26 below.

[Kondea senior employee]	50mm, yes.
[Franklin Hodge senior employee 1]	So are these prices are with or without a ball valve [inaudible]?
[Kondea senior employee]	With.
[Franklin Hodge senior employee 1]	Ok.
[Kondea senior employee]	With the 18, i think 9 and a half is reasonable. But again list will be 10 1?.
[Balmoral Tanks senior employee 1]	[?]
[Kondea senior employee]	[inaudible] For a school 10 1 with a ball valve.
[Franklin Hodge senior employee 1]	Cos that's kind of the target price that we were going for for schools in Scotland, was 10 1 but [Franklin Hodge senior employee 3] said it in order to beat Balmoral, we're going to have to drop to around 9 9, that's what I've been told, I'm getting you straight.
[Balmoral Tanks senior employee 1]	You see I've seen some at £10,2. I've seen £8,6 which is was a disaster.
[Franklin Hodge senior employee 1]	Yeah we've not done 8 6
[Balmoral Tanks senior employee 1]	I've seen below that 9 2 or 9 3, even that's low. Nine-and-a-half, 10 and half is a target. If I hear anything from our guys that's anything above that will be exciting or below that would be a concern which is why I heard 14 6 we didn't win it, we didn't win at 14650, we bid that.
[Franklin Hodge senior employee 1]	You bid that, aah, sorry I misunderstood I thought you'd said that's fine. That's cheap.

[Balmoral Tanks senior employee 1] That's was that far out even in my mind was far from what it should be in my mind.' <sup>239</sup>

3.57 [Balmoral Tanks senior employee 1] explains in this exchange what would be 'a target' price for school tanks<sup>240</sup> and later in the meeting states 'that's why I think you've got to have the bands to work with, to keep as the market price there is a market price for everything give or take. [?] if you're feeling a bit hungry you'll go here and if you're feeling a bit flush and you're not under pressure then you might squeeze it up, but if you take everyone low it's a disaster, you've got to have a mixture of jobs [?].'<sup>241</sup> He notes with regard to a price that [Franklin Hodge senior employee 1] is proposing to bid for a future contract: 'If its falling out of the bands, that's the concern'.<sup>242</sup> [Balmoral Tanks senior employee 1] goes on to state that the parties to the information exchange should be aiming for prices at the higher end: 'Better near the top of the band than the bottom of the band for sure. [inaudible]. Somehow that's the area the target price.'<sup>243</sup>

3.58 [Franklin Hodge senior employee 1] notes towards the end of the discussion: 'So in summary then we've got some agreement on bands...' <sup>244</sup> None of the attendees register any dissent to this assertion.

3.59 At the end of the meeting [Balmoral Tanks senior employee 1] explains that he found the discussion to be 'very positive'.<sup>245</sup> [Franklin Hodge senior employee 1] then asks [Balmoral Tanks senior employee 1] 'So no mark 7 price at this stage, but do you want to try to squeeze the price and get up as quickly as we can?' [Balmoral Tanks senior employee 1] responds: 'Yes, like I say the mark

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<sup>239</sup> Transcript of 11 July 2012 meeting, pages 40-41 [URN 8745]. [Balmoral Tanks senior employee 1] made a note of these bands in his notebook [page 3 of URN 2537A] and confirmed in his witness statement that this was information that he received at the meeting, but explained that these were the type of prices that Balmoral was quoting in the market: [Balmoral Tanks senior employee 1] witness statement 27 February 2014, paragraph 95 [URN 5007] referring to his notebook (referred to as exhibit [3<]).

<sup>240</sup> [Balmoral Tanks senior employee 1]: 'Nine-and-a-half, 10 and half is a target' Transcript of 11 July 2012 meeting, page 41 [URN 8745].

<sup>241</sup> Transcript of 11 July 2012 meeting, page 43 [URN 8745].

<sup>242</sup> Transcript of 11 July 2012 meeting, page 50 [URN 8745].

<sup>243</sup> Transcript of 11 July 2012 meeting, page 53 [URN 8745].

<sup>244</sup> Transcript of 11 July 2012 meeting, page 44 [URN 8745].

<sup>245</sup> Transcript of 11 July 2012 meeting, page 53 [URN 8745].

7 would be in, erm, within that band. Pushing that band up, the top end rather than the bottom.<sup>246</sup>

- 3.60 Although after the event [Franklin Hodge senior employee 1] recalled that Balmoral Tanks were passive in the meeting,<sup>247</sup> Balmoral Tanks is in fact both providing and actively seeking pricing and strategic information from its competitors that were present at the meeting, and also asking Kondea about CST UK's position.<sup>248</sup>

### ***Conduct on the market as a result of information exchanged***

- 3.61 There is specific evidence that the information provided by Balmoral regarding its pricing strategy for school tanks and 135m<sup>3</sup> tanks had an impact on FHI's conduct on the market. In particular, it was relied on by FHI to inform its bid for a contract with Compco.
- 3.62 Immediately after the meeting, [Franklin Hodge senior employee 1] was recorded making calls to three of his sales staff ([Franklin Hodge senior employee 3], [Franklin Hodge employee 4] and [Franklin Hodge employee 6]). As set out below, [Franklin Hodge senior employee 1] confirms that Balmoral Tanks was not prepared to take part in market sharing or the customer allocation arrangements in place between the parties to the main cartel, feeds back the pricing information obtained from Balmoral, and then instructs his staff to revise the Compco bid, so as just to undercut Balmoral but without discounting heavily.
- 3.63 In his call with [Franklin Hodge senior employee 3], [Franklin Hodge senior employee 1] refers to the discussions around pricing:

'No he's not, that's the point I'm making. I said are you happy, are you prepared to sit down, he said no, that's a bridge too far for me, I won't go there, [Balmoral Group senior employee 1] and I, that's too dangerous, I'm not going to do that so so I said ok, well that just makes it more complex then cos we're going to have to second guess when we back off, when we make an effort, and he just nodded and said yeah I'm afraid that's the way

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<sup>246</sup> Transcript of 11 July 2012 meeting, page 53 [URN 8745]. 'Mark 7' refers to the next revision of Balmoral Tanks' estimating system for CGSTs.

<sup>247</sup> [Franklin Hodge senior employee 1] witness statement, 23 May 2013, paragraph 168 [URN 6526].

<sup>248</sup> See Transcript of 11 July 2012 meeting, page 26 (as referred to in footnote 237), page 45 (as referred to in paragraph 3.48) and page 27 [URN 8745].

it is, but I said, so we tried to concentrate on prices then and I said to him at the moment we're being told, we're bidding 9650 on schools tanks and we're told that you're below that. [Balmoral Tanks senior employee 1] said yes we're coming in around 9 5, he said we've sold tanks to, we're selling tanks in the market place depending on who it is between 9 and a half and 10 and half with ball-valve. On the 135 we're between 15 and 17, and that's, now he reckons that, 15 and 17, so, and those are the bands and he's given instructions to his sales team not to drop below 9 and a half and not to drop below 15 for a 135, that's what.'<sup>249</sup>

3.64 In his call with [Franklin Hodge employee 4], [Franklin Hodge senior employee 1] explains:

'Ok brilliant, just to add in something into the spice into the soup as it were, I'm the recipient of some information this morning that, we have to take this not with a pinch of salt, but it gives us an idea of where we are, I believe Balmoral are quoting, between, of the schools tanks, quoting between 9 and a half and 10 and a half and that's a big band, I think with Compco probably with more toward the 9 and a half grand with Compco, with Compco on schools jobs. On the 135, they're quoting between 15 and 17 so...

...Well it's a fine balancing act, it's a judgment isn't it, this is why I'm giving you an indication of where I think Balmoral are so we can snick in under them but not, not .... Not sort of have to discount heavily at this stage, it's a judgment call... I think we need, I was thinking that sort of level, not crazily below them, not 8 6 but certainly 9 3.

...Well maybe 15 8, sounds like I'm splitting hairs, 815, 850 something like that so it's under 16, but, you know.'<sup>250</sup>

3.65 [Franklin Hodge senior employee 1] then makes a call to [Franklin Hodge employee 6], in which he states:

'Right, what I've passed onto [Franklin Hodge employee 4] and I think [Franklin Hodge employee 4]'s going to have a word with

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<sup>249</sup> Transcript of 11 July 2012 meeting, page 59, [URN 8745].

<sup>250</sup> Transcript of 11 July 2012 meeting, pages 63-64, 67 and 67 [URN 8745].

[Franklin Hodge senior employee 2] but I've passed onto you. As of this morning I've come by some information shall we say 'in inverted commas shall we say' that Balmoral are for schools tanks, are now quoting and these are broad bands ok but between 9 and a half and 10 and a half for schools tanks and I believe they are around the 9 and a half figure for Compco, at the moment erm yep...

..And from the information I've had I think Balmoral want to be in around 16 on 135's. They want to be around that figure. Yeah. Yeah, yeah, but I think that [Franklin Hodge employee 4] was just talking about 15850. We were going to talk to [Franklin Hodge senior employee 2] about it, just under the 16 effectively. Knowing that they're probably going to come back with some more off as well.'<sup>251</sup>

3.66 Later the same day Franklin Hodge submits a revised bid to Compco, which shows the 135m<sup>3</sup> tanks (nicknamed 'Eric's' at Franklin Hodge) being offered at a revised price of £15,850, as suggested by [Franklin Hodge senior employee 1] on his calls to [Franklin Hodge employee 4] and [Franklin Hodge employee 6] following the discussion with Balmoral Tanks.<sup>252</sup> This job was ultimately won by Balmoral, who submitted a bid of £14,900 (£100 below the lower end of the band discussed for 135m<sup>3</sup> tanks) on 13 July 2012.<sup>253</sup>

3.67 There is also contemporaneous email evidence that Franklin Hodge revised its prices for the 135m<sup>3</sup> and school tanks after the 11 July 2012 meeting.<sup>254</sup>

### ***Involvement of Galglass in the information exchange***

3.68 Galglass was not directly represented at the meeting on 11 July 2012. There is clear evidence, however, that [Galglass senior employee 1] was very much involved in organising the meeting and delivering its objectives. He spoke to

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<sup>251</sup> Transcript of 11 July 2012 meeting, pages 73 and 74-75 [URN 8745].

<sup>252</sup> Email dated 11 July 2012 (sent at 12.49) [URN 2239] attaching pricelist, quote number 53243A [URN 2240].

<sup>253</sup> See Annex 3 of Balmoral's Response to the Statement of Objections dated 29 July 2016 [URN 8627], quote number Q-12-2892 on page 67. This quote was revised three times.

<sup>254</sup> See internal Franklin Hodge email from [Franklin Hodge senior employee 2] dated 19 July 2012 [URN 2640], giving the reason for the change (which is an update to an earlier email from June 2012 with suggested margins/prices) as 'further to recent developments'. While prices are revised down, it is clear that Franklin Hodge was still quoting prices on the basis of the Gold/Silver customer allocation after the 11 July 2012 meeting.

the other participants before and after the meeting, and was also in contact (by text) on the morning of the meeting as set out below.

- 3.69 [Balmoral Tanks senior employee 1] did not recall who invited Balmoral Tanks to the meeting on 11 July 2012, but he believes it would have been [Galglass senior employee 1], 'as most of the contact was now coming from him.'<sup>255</sup> This is confirmed by contemporaneous text messages, and [Galglass senior employee 1] texted [Balmoral Tanks senior employee 1] on 5 July 2012 to confirm the date of the meeting and let him know that he would book the room.<sup>256</sup>
- 3.70 The afternoon prior to the meeting, [Galglass senior employee 1] texts [Kondea senior employee], [Franklin Hodge senior employee 1] and [Balmoral Tanks senior employee 1] to say he is unwell and therefore unable to attend, but that he supports the objectives of the meeting, 'Hi guys, unfortunately I have a bout of [X<] at the moment so I won't be able to get in the morning. You all know my points and want to fully support us all moving forwards together. Let me know how it all goes. Appologies [sic] again. [Galglass senior employee 1]'.<sup>257</sup>
- 3.71 [Galglass senior employee 1] sends another text to [Franklin Hodge senior employee 1] at 6.36am on the morning of the meeting, stating: 'Thanks [Franklin Hodge senior employee 1]... Lets see what [Balmoral Tanks senior

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<sup>255</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 87 [URN 5007].

<sup>256</sup> See text messages between [Galglass senior employee 1] and [Balmoral Tanks senior employee 1] on 4, 5, 6, July 2012: schedule of live text messages on [Galglass senior employee 1]'s iPhone [URN 1366]; list of non-live text messages between [Galglass senior employee 1] and [Balmoral Tanks senior employee 1] from [Galglass senior employee 1]'s iPhone mobile device [URN 6474]; list of non-live text messages between [Galglass senior employee 1] and [Balmoral Tanks senior employee 1] from [Galglass senior employee 1]'s iPhone [URN 6475], and list of non-live text messages between [Galglass senior employee 1] and [Franklin Hodge senior employee 1] from [Galglass senior employee 1]'s iPhone [URN 6479]. See also email on behalf of [Galglass senior employee 1] dated 6 July 2012 making the room booking [URN 2399]. Galglass is also invoiced for the room: See room booking invoice [URN 2401].

<sup>257</sup> [URN 1366]; [URN 6474]; and [URN 6475].

employee 1] has to say... hope its positive from his side.’<sup>258</sup> [Kondea senior employee] also promised to update Galglass after the meeting.<sup>259</sup>

3.72 As well as contacting [Franklin Hodge senior employee 1] prior the meeting,<sup>260</sup> [Galglass senior employee 1] also had a phone conversation with [Balmoral Tanks senior employee 1] the night before the meeting, where, [Balmoral Tanks senior employee 1] explains, they discussed the low pricing in the market.<sup>261</sup>

3.73 Galglass’ absence is commented on several times at the meeting, with [Kondea senior employee] saying that he will contact [Galglass senior employee 1] after the meeting.<sup>262</sup>

3.74 Both [Kondea senior employee]<sup>263</sup> and [Franklin Hodge senior employee 1]<sup>264</sup> then had telephone conversations on 11 July 2012 with [Galglass senior employee 1], following the meeting.

#### **D. Contact between the Parties between July and November 2012**

3.75 The CMA has not seen evidence that further information was exchanged following the 11 July 2012 meeting. There was some (limited) contact with Franklin Hodge, Galglass and Kondea continuing to contact [Balmoral Tanks

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<sup>258</sup> [URN 1366] and [URN 6479]. [Franklin Hodge senior employee 1] explains ‘the positive outcome was reference to our agreed agenda for the meeting, the positive outcome would have been if Balmoral had joined the arrangement and basically accepted a smaller market in return for higher, better prices. This is what everybody wanted and viewed as a positive outcome.’ See [Franklin Hodge senior employee 1] witness statement, 6 June 2014, paragraph 165 [URN 6526].

<sup>259</sup> Text message from [Kondea senior employee], 10 July 2012, ‘Sorry about that, hope you get better fast. I’ll be in touch after the meeting.’ [URN 6429B]. [Kondea senior employee] does contact [Galglass senior employee 1] after the meeting, see footnote 264 below.

<sup>260</sup> [Franklin Hodge senior employee 1] explains that ‘[Galglass senior employee 1]’s absence did not alter the agreed agenda or purpose of the meeting with [Balmoral Tanks senior employee 1]. Prior to the meeting I had a further conversation with [Galglass senior employee 1] during which he wished us luck with [Balmoral Tanks senior employee 1] and asked to be updated afterwards.’ [Franklin Hodge senior employee 1] witness statement, 6 June 2014, paragraph 161 [URN 6526].

<sup>261</sup> Transcript of 11 July 2012 meeting, page 18 [URN 8745].

<sup>262</sup> Transcript of 11 July 2012 meeting, page 45 [URN 8745].

<sup>263</sup> Immediately after the meeting on 11 July 2012, [Kondea senior employee] sends a text (at 10:14am) to [Galglass senior employee 1] saying: ‘Hi [Galglass senior employee 1], give us a call’. [Galglass senior employee 1] replies at 10:29am saying: ‘Am free’. Telephone records confirm that [Kondea senior employee] called [Galglass senior employee 1] at 11.31am (lasting 5mins 20secs), 11.37am (lasting 4 secs) and 11.38am (lasting 3 secs and 3mins 13secs) [URN 1366], [URN 6429B], [URN 6475].

<sup>264</sup> [Franklin Hodge senior employee 1] witness statement, 6 June 2014, paragraph 181-183 [URN 6526] and [URN 2642A].



senior employee 1], including contact from Kondea in October 2012 seeking to arrange a further meeting, before the OFT inspections intervened.<sup>265</sup> However, [Balmoral Tanks senior employee 1] confirms that he told [Kondea senior employee] he was happy to meet in public ‘over a meal and discuss issues in the industry’ but not to attend another meeting in a hotel, which is consistent with evidence from other witnesses.<sup>266</sup>

3.76 [Balmoral Tanks senior employee 1] confirms that after the 11 July 2012 meeting, he continued to receive some calls and texts from the [others], although these ‘began to peter out.’ He notes that there continued to be legitimate contact between the parties to the information exchange, for example in relation to industry issues addressed by the ATCM and British Automatic Fire Sprinkler Association.<sup>267</sup>

3.77 This is supported by phone records which show contacts between [Balmoral Tanks senior employee 1] and [Kondea senior employee] on five different days in the period between the meeting on 11 July 2012 and the OFT’s inspections on 27 November 2012 as set out below.

**19 September 2012:** 09:04 [Kondea senior employee] calls [Balmoral Tanks senior employee 1] – 26 sec<sup>268</sup>; 10:26 [Balmoral Tanks senior employee 1] calls [Kondea senior employee] – 7 mins 20 sec.<sup>269</sup>

**3 October 2012:** 16:22 [Kondea senior employee] calls [Balmoral Tanks senior employee 1] – 24 sec<sup>270</sup>; 16:59 [Balmoral Tanks senior employee 1] calls [Kondea senior employee] – 4 sec<sup>271</sup>; 16:59 [Balmoral Tanks senior employee 1] calls [Kondea senior employee]

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<sup>265</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 98 [URN 5007]. See also [Franklin Hodge senior employee 1] witness statement, 6 June 2014, paragraph 185 [URN 6526], where he explains: ‘This idea never got any further than an ‘idea’ because before it could be arranged the OFT raided the offices of Franklin Hodge amongst others and we were arrested.’

<sup>266</sup> See [Franklin Hodge senior employee 1] witness statement, 6 June 2014, paragraph 185 [URN 6526], where he explains: ‘Someone mentioned a Christmas lunch or dinner where we could all sit around a large table, in the open, clearly in public and discuss general matters.’

<sup>267</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 98-99 [URN 5007].

<sup>268</sup> [URN 6429C].

<sup>269</sup> [URN 1258A].

<sup>270</sup> [URN 6429D].

<sup>271</sup> [URN 1259A].

– 25 sec<sup>272</sup>; 17:01 [Kondea senior employee] calls [Balmoral Tanks senior employee 1] – 6 mins 19 sec.<sup>273</sup>

**9 October 2012:** 08:45 [Balmoral Tanks senior employee 1] calls [Kondea senior employee] – 23 sec<sup>274</sup>; 08:59 [Kondea senior employee] calls [Balmoral Tanks senior employee 1] – 5 mins 31 sec.<sup>275</sup>

**30 October 2012:** 11:43 [Balmoral Tanks senior employee 1] calls [Kondea senior employee] – 26 sec<sup>276</sup>; 11:47 [Kondea senior employee] calls [Balmoral Tanks senior employee 1] – 5 mins 23 sec.<sup>277</sup>

**1 November 2012:** 17:21 [Kondea senior employee] calls [Balmoral Tanks senior employee 1] – 26 sec<sup>278</sup>; 17:23 [Balmoral Tanks senior employee 1] calls [Kondea senior employee] – 13 min 18 sec<sup>279</sup>; 17:47 [Balmoral Tanks senior employee 1] calls [Kondea senior employee] – 1 min 30 sec.<sup>280</sup>

3.78 There is also evidence of one contact during this period from Galglass, with a text from [Galglass senior employee 1] on 5 August 2012 asking [Balmoral Tanks senior employee 1] to visit him if he is in the area the following week. [Balmoral Tanks senior employee 1] replies the following day saying he will not make it.<sup>281</sup>

3.79 On the basis of the evidence available to it, the CMA does not therefore find that the information exchange infringement continued after July 2012.

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<sup>272</sup> [URN 1259A].

<sup>273</sup> [URN 6429D].

<sup>274</sup> [URN 1259B].

<sup>275</sup> [URN 6429D].

<sup>276</sup> [URN 1259C].

<sup>277</sup> [URN 6429E].

<sup>278</sup> [URN 6429E].

<sup>279</sup> [URN 1260A].

<sup>280</sup> [URN 1260A].

<sup>281</sup> See [URN 1366]: [Galglass senior employee 1] to [Balmoral Tanks senior employee 1] (copied to [Franklin Hodge senior employee 1]) 5 August 2012: 'Hi [Balmoral Tanks senior employee 1], don't forget to give me a buzz if you are anywhere near next week. Cheers, [Galglass senior employee 1].' [Balmoral Tanks senior employee 1] to [Galglass senior employee 1] 6 August 2012: 'Hi [Galglass senior employee 1], I will not make this week. Probably towards the end of August now. I will drop a note nearer the time & see how you are fixed.'

## 4. Legal Assessment

- 4.1 This section sets out the CMA's legal assessment of the Parties' conduct in light of the evidence set out at section 3.
- 4.2 The CMA finds that in July 2012 Franklin Hodge, Kondea, Galglass and Balmoral Tanks shared commercially sensitive information regarding their current pricing and future pricing intentions in respect of CGSTs. The information exchanged at a meeting on 11 July 2012 (and subsequent to the meeting in the case of Galglass) related both to specific contracts and to generic pricing strategies for certain types of CGSTs.
- 4.3 The information-sharing is evidenced by an audio-visual recording of the meeting on 11 July 2012 where the information exchange took place, supported by other witness and contemporaneous evidence.
- 4.4 For the reasons set out below, the CMA finds that this exchange of commercially sensitive information regarding current pricing and future pricing intentions constituted a concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of CGSTs in the UK in breach of the Chapter I prohibition and Article 101 TFEU.

### A. Concerted practice

#### Key legal principles

- 4.5 A concerted practice is 'a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition'.<sup>282</sup>
- 4.6 The concept of a concerted practice must be understood in light of the principle whereby each economic operator must determine its policy on the market independently.<sup>283</sup> Although the requirement of independence does not

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<sup>282</sup> Judgment in *ICI Ltd v Commission*, C-48/69, EU:C:1972:70, paragraph 64. See also judgment in *T-Mobile Netherlands and Others v NMa*, EU:C:2009:343, paragraph 26 and *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 151 to 153.

<sup>283</sup> Judgment in *Suiker Unie v. Commission*, EU:C:1975:174, paragraph 173; Followed in Judgment in *Commission of the European Communities v Anic Partecipazioni SpA*, C-49/92 p, EU:C:1999:356, paragraph 116 and *Hüls AG v*

deprive undertakings of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does preclude 'any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market'.<sup>284</sup>

- 4.7 In *T-Mobile Netherlands*, the CJ confirmed that a meeting on a single occasion between competitors may, in principle, constitute a sufficient basis to find a concerted practice.<sup>285</sup> What matters is not so much the number of meetings held between the participating undertakings as whether the meeting or meetings which took place afforded them the opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question.<sup>286</sup> This will depend on the subject matter of the concerted action and the particular market conditions.<sup>287</sup>
- 4.8 Although the existence of a concerted practice requires the existence of reciprocal contact, this condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it.<sup>288</sup> Thus, the mere receipt of information may

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*Commission of the European Communities*, EU:C:1999:358, paragraph 159. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, paragraphs 198 and 206(iv) (followed in *Makers UK Limited v Office of Fair Trading* [2007] CAT 11, paragraphs 102 and 103(iv)).

<sup>284</sup> Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 117 (followed in *Hüls AG v Commission of the European Communities*, EU:C:1999:358, paragraphs 159 to 160 and judgment in *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co KG and Others v Commission*, T-9/99, EU:T:2002:70, paragraph 212). See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, paragraphs 198 and 206(v) (followed in *Makers UK Limited v Office of Fair Trading* [2007] CAT 11, paragraphs 102 and 103(v)).

<sup>285</sup> Judgment in *T-Mobile Netherlands and Others v Commission*, EU:C:2009:343, paragraphs 58-59. See also the Advocate General's opinion in *Dole* that the frequency and regularity with which information having an anti-competitive object was exchanged was only relevant, if at all, to the amount of any fine (*Dole Food Co. v Commission* (*Bananas*), C-286/13 P, EU:C:2015:184, paragraph AG125).

<sup>286</sup> Judgment in *T-Mobile Netherlands and Others v Commission*, EU:C:2009:343, paragraph 61.

<sup>287</sup> Judgment in *T-Mobile Netherlands and Others v Commission*, EU:C:2009:343, paragraph 60.

<sup>288</sup> Judgment in *Cimenteries CBR SA and Others v Commission of the European Communities*, EU:T:2000:77, Joined Cases T-25/95 etc *Cimenteries CBR SA and Others v Commission of the European Communities* [2000] ECR II-491, paragraphs 1849 and 1852. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, paragraphs 206(vii) and 206(viii) (followed in *Makers UK Limited v Office of Fair Trading* [2007] CAT 11, paragraphs 103(vii) and 103(viii)).

be sufficient to give rise to a concerted practice.<sup>289</sup> It is irrelevant whether the exchange of information constituted the main purpose of the contact between competitors.<sup>290</sup>

- 4.9 Where it is established that an undertaking participates in a meeting of a manifestly anti-competitive nature, it is for the undertaking to adduce evidence to establish that it indicated its opposition to the anti-competitive arrangement to its competitors.<sup>291</sup> The concept of public distancing is to be interpreted narrowly.<sup>292</sup> Absent evidence that the undertaking manifestly opposed the arrangement, there is a presumption that the undertaking's participation in the meeting was unlawful.<sup>293</sup> As the CJ has held, 'a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery [...] That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable..'.<sup>294</sup>
- 4.10 Public distancing must be perceived as such by the other participants.<sup>295</sup> The General Court ('GC') has held that: 'the communication that is intended to constitute a public distancing from an anti-competitive practice must be expressed firmly and unambiguously'.<sup>296</sup>
- 4.11 The concept of a concerted practice implies, in addition to undertakings acting in concert with one another, conduct on the market pursuant to those collusive

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<sup>289</sup> *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17 paragraph 658. See judgment in *Tate & Lyle and Others v Commission*, T-202/98, EU:T:2001:185, ('Tate & Lyle'), paragraph 58 (citing *Rhône-Poulenc v Commission*, T-1/89, EU:T:1991:56, paragraphs 122 to 123). See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, paragraph 200; *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17, paragraph 159 and *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, paragraph 155.

<sup>290</sup> Advocate General's opinion in *Dole Food Co. v Commission (Bananas)*, C-286/13 P, EU:C:2015:184, paragraph AG122 relying on the CJ's judgments in *IAZ International Belgium and Others v Commission*, 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82, EU:C:1983:310, paragraph 25; *General Motors v Commission*, C-551/03 P, EU:C:2006:229, paragraph 64; and *Beef Industry Development Society and Barry Brothers*, C-209/07, EU:C:2008:643, paragraph 21.

<sup>291</sup> Judgment in *Hüls AG v Commission*, EU:C:1999:358, paragraph 155 and judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 96.

<sup>292</sup> Judgment in *Westfalen Gassen Nederland BV v Commission*, EU:T:2006:374, paragraph 103.

<sup>293</sup> Judgment in *Toshiba Corporation v Commission*, EU:C:2016:26, paragraphs 61 and 71.

<sup>294</sup> Judgment in *Aalborg Portland A/S v. Commission*, EU:C:2004:6, paragraph 84.

<sup>295</sup> Judgment in *Toshiba Corporation v Commission*, EU:C:2016:26, paragraph 71.

<sup>296</sup> Judgment in *Comap SA v European Commission* EU:T:2011:108; paragraph 76.

practices and a relationship of cause and effect between the two.<sup>297</sup> However, this does not mean that the conduct should produce the concrete effect of restricting, preventing or distorting competition.<sup>298</sup> A concerted practice which has as its object the prevention, restriction or distortion of competition will infringe competition law even where there is no effect on the market.<sup>299</sup>

- 4.12 Where an undertaking participating in a concerted arrangement remains active on the market, there is a presumption that it will take account of information exchanged with its competitors when determining its own conduct on the market.<sup>300</sup> The burden is on the parties concerned to adduce evidence to rebut this presumption.<sup>301</sup>

## Assessment

- 4.13 The CMA finds that, as a result of the exchange of information about their current pricing and future pricing intentions at a meeting on 11 July 2012 (and subsequently in the case of Galglass), the Parties reduced uncertainty as to their intended conduct on the market and substituted practical cooperation between them for the risks of competition.
- 4.14 The evidence obtained by the CMA, as described in paragraphs 3.32 to 3.60, shows that there was direct contact between Franklin Hodge, Kondea and Balmoral Tanks at the meeting on 11 July 2012. Although Galglass was not present at that meeting, [Galglass senior employee 1] helped to arrange the meeting and understood the objective of the meeting.<sup>302</sup> [Kondea senior

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<sup>297</sup> Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 118 and judgment in *Hüls AG v Commission of the European Communities*, EU:C:1999:358, paragraph 161. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, paragraph 206(ix) (followed in *Makers UK Limited v Office of Fair Trading* [2007] CAT 11, paragraph 103(ix)).

<sup>298</sup> Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 124. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, paragraph 206(xi) (followed in *Makers UK Limited v Office of Fair Trading* [2007] CAT 11), paragraph 103(xi)).

<sup>299</sup> Judgment in *Hüls AG v Commission of the European Communities*, EU:C:1999:358, paragraphs 163 to 164 and judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 123. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, paragraph 201.

<sup>300</sup> Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 121; judgment in *Hüls AG v Commission of the European Communities*, EU:C:1999:358, paragraph 162 and judgment in *Cimenteries CBR SA and Others v Commission of the European Communities*, EU:T:2000:77, paragraphs 1865 and 1910. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, paragraph 206(x) (followed in *Makers UK Limited v Office of Fair Trading* [2007] CAT 11, paragraph 103(x)). Judgment in *T-Mobile Netherlands BV and others v NMa*, C-8/08, EU:C:2009:343, paragraphs 58 to 59, the ECJ held that this presumption of a causal connection applies even where the concerted action was the result of a meeting held by the participating undertakings on a single occasion.

<sup>301</sup> Judgment in *Dole Food Co. v Commission (Bananas)*, C-286/13 P, EU:C:2015:184, paragraph 127.

<sup>302</sup> See paragraphs 3.68 to 3.72.

employee] promised [Galglass senior employee 1] to update him following the meeting<sup>303</sup> and commented to the others during the meeting that he would contact [Galglass senior employee 1] after the meeting.<sup>304</sup> The evidence also demonstrates that both Kondea and Franklin Hodge had telephone conversations with [Galglass senior employee 1] following the meeting.<sup>305</sup> In light of this, and given the existing relationship between the parties to the main cartel, the pricing discussions which regularly took place between them as part of that arrangement and their express purpose in arranging the meeting with [Balmoral Tanks senior employee 1] on 11 July, the CMA infers that the information exchanged at the meeting was shared with Galglass following the meeting.

- 4.15 On the part of Franklin Hodge, Kondea and Galglass the purpose of this contact was to influence Balmoral Tanks' conduct on the CGST market and to encourage it to join the existing cartel arrangements.<sup>306</sup> These parties made it clear well before the meeting on 11 July 2012 that they thought Balmoral Tanks' prices were too low.<sup>307</sup> On the part of Balmoral Tanks, the evidence, at paragraphs 3.3 to 3.30 shows that by July 2012 it must have been aware of its competitors' objectives, even if not the detail of the cartel arrangements. However, even if it had not been aware prior to the meeting on 11 July 2012, as alleged by Balmoral,<sup>308</sup> Balmoral Tanks was made aware early on during the meeting that its competitors were involved in customer allocation.<sup>309</sup> Despite this and its intention to end the contact, Balmoral Tanks remained at the meeting and continued to exchange information on recent past bids, current pricing and future pricing intentions.<sup>310</sup>
- 4.16 The information shared at the meeting on 11 July 2012 was sufficient to reduce uncertainties as to the participants' pricing intentions in respect of

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<sup>303</sup> See paragraph 3.71.

<sup>304</sup> See paragraph 3.73.

<sup>305</sup> See paragraph 3.74.

<sup>306</sup> See paragraphs 3.33 to 3.34.

<sup>307</sup> See paragraphs 3.22 to 3.24.

<sup>308</sup> See paragraph 4.7 of Balmoral's response to the Statement of Objections [URN 8627].

<sup>309</sup> The exchange about customer allocation took place between 08.47 and 08.48. [Balmoral Tanks senior employee 1] remained at the meeting until 10.08. See paragraph 3.44 and footnote 226.

<sup>310</sup> See paragraphs 3.46 to 3.60.

CGSTs for schools and 135m<sup>3</sup> CGSTs generally and in respect of dealings with Compco, Tyco and Hall & Kay specifically.<sup>311</sup>

- 4.17 Balmoral has acknowledged that the exchange of information at a single meeting can give rise to an infringement, but has sought to distinguish the *T-Mobile* case, arguing that, in the particular circumstances of the CGST market, a single meeting was insufficient to achieve a collusive outcome.<sup>312</sup> The CMA recognises that one meeting may have been insufficient had the Parties wanted to fix the prices for specific bids on an ongoing basis. However, the CMA is not alleging that the Parties entered into a price-fixing agreement at the meeting on 11 July 2012. The nature of the infringement in this case is that the Parties exchanged information about their current and future pricing intentions which reduced uncertainty as to their future conduct on the market. In a market where there were pre-existing cartel arrangements between all but one of the market participants, the extent of competition on the market was already limited. In these circumstances, the exchange of information about the prices that the Parties were charging their customers and the price bands within which the Parties would seek to charge going forward, was clearly capable of reducing uncertainty about their future pricing.
- 4.18 Balmoral has submitted that Balmoral Tanks publicly distanced itself from the anti-competitive conduct engaged in by the other parties and that this was understood by the other parties.<sup>313</sup>
- 4.19 The CMA accepts that Balmoral Tanks made clear its refusal to participate in the pre-existing customer allocation arrangements, but the evidence does not support a finding that Balmoral Tanks publicly distanced itself from the information exchange, whether at the meeting on 11 July 2012 or subsequently. Nor does the evidence indicate that the other parties understood Balmoral Tanks' conduct at the meeting to amount to an opposition to the information exchange. [Franklin Hodge senior employee 1] made the following comment towards the end of the meeting: 'So in summary then we've got some agreement on bands'. Although Balmoral has noted that

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<sup>311</sup> For example, in relation to Compco, see paragraph 3.52, in relation to Tyco see paragraphs 3.42 and 3.46 and in relation to Hall & Kay see paragraph 3.53. See also paragraphs 4.45 to 4.70 below where the nature of the information and why it was capable of reducing uncertainty in the market is discussed in more detail.

<sup>312</sup> Balmoral's response to the Statement of Objections, paragraphs 4.36 to 4.39 [URN 8627].

<sup>313</sup> Balmoral's response to the Statement of Objections, paragraphs 4.13 to 4.32 [URN 8627] and letter from Balmoral dated 27 September 2016 [URN 8686].



[Balmoral Tanks senior employee 1] did not agree with this statement,<sup>314</sup> he did not express his disagreement.

- 4.20 None of the parties present at the meeting on 11 July 2012 expressed any reservations or objections to each other in relation to the provision or receipt of the information provided. On the contrary, the transcript of the meeting shows all attendees taking an active role in sharing and soliciting information.<sup>315</sup>
- 4.21 Balmoral has pointed to various ways in which, it alleges, [Balmoral Tanks senior employee 1] distanced himself from the discussions during the meeting.<sup>316</sup> These include [Balmoral Tanks senior employee 1] arriving late at the meeting and leaving early, steering the conversation to other topics and his evasiveness and body language during the meeting. Balmoral has also referred to specific comments made by [Balmoral Tanks senior employee 1] during the meeting which, it says, indicated Balmoral's intention to compete and the fact that it did not want to collude with the other parties.<sup>317</sup> As explained at paragraph 4.10 above, public distancing must be expressed firmly and unambiguously. None of the examples referred to by Balmoral constitute a firm and unambiguous distancing by [Balmoral Tanks senior employee 1] from the exchange of information during the meeting.
- 4.22 In the *Replica Football Kits* case, JJB argued before the CAT that it had distanced itself from the alleged price-fixing agreement. The CAT rejected such argument, noting that JJB's Chairman had 'ample opportunity' to withdraw from a meeting with JJB's competitors once it became clear who the other attendees were, but 'remained for about twenty minutes in a discussion about retail prices with his two competitors'.<sup>318</sup> In the *Copper Plumbing Tubes* case, the European Commission found that in order for an undertaking to

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<sup>314</sup> Balmoral's response to the Statement of Objections, page 20 [URN 8627].

<sup>315</sup> See paragraphs 3.40 to 3.60.

<sup>316</sup> See Balmoral's response to the Statement of Objections, paragraph 3.14 [URN 8627] and Balmoral's letter of 27 September 2016 [URN 8686].

<sup>317</sup> Balmoral refers to the following comments by [Balmoral Tanks senior employee 1] during the meeting: "Balmoral pushing in"; "I don't talk to the sales guys...they push on...what do you expect them to do, roll over when you walk in"; "We've gone in aggressive and you've gone in more aggressive"; "What I'm trying to say is, the way Balmoral works is different from how you guys have worked"; "we are professional...we're coming in aggressive on the basis of trying to establish ourselves"; and "there's never a deal on the table that can't be beaten". See pages 15, 16, 17, 20 and 23 of Transcript of 11 July 2012 meeting [URN 8745].

<sup>318</sup> *JJB Sports v Office of Fair Trading* [2004] CAT 17, paragraphs 791 and 831.

publicly distance itself, it must 'entirely withdraw from cooperation with respect to all of its competitors' and refuse to 'engage in any future cartel activities'.<sup>319</sup>

- 4.23 After making clear his opposition to the pre-existing customer allocation arrangements at the 11 July 2012 meeting, [Balmoral Tanks senior employee 1] nevertheless remained at the meeting for a further hour and ten minutes, during which time he continued to exchange information about current and future prices with the other parties.<sup>320</sup>
- 4.24 As noted by the CAT in the *Replica Football Kits* case: 'The fact of having attended a private meeting at which prices were discussed and pricing intentions disclosed, even unilaterally, is in itself a breach of the Chapter I prohibition, which strictly precludes any direct or indirect contact between competitors having, as its object or effect, either to influence future conduct in the market or to disclose future intentions'.<sup>321</sup>
- 4.25 Balmoral not only attended the 11 July 2012 meeting at which information about prices and pricing intentions were discussed, but [Balmoral Tanks senior employee 1] shared views on what the pricing should be for specific tanks and volunteered the current price at which Balmoral was selling school tanks and 135m<sup>3</sup> tanks.<sup>322</sup> He also indicated a desire for prices of CGSTs to stabilise and, eventually, increase.<sup>323</sup>
- 4.26 In addition, as set out at paragraph 3.55, when asked by [Franklin Hodge senior employee 1] what should happen if a party were to deviate from the bands, [Balmoral Tanks senior employee 1] made the suggestion that the parties 'pick up the phone' to each other. Balmoral has argued that this comment was [Balmoral Tanks senior employee 1]'s attempt to 'kick the discussion into the long grass'.<sup>324</sup> Whether or not that was his intention, it was not a firm and unambiguous expression of him distancing himself from the discussions. In his witness statement [Balmoral Tanks senior employee 1] explained: 'What I meant by this, I wanted Balmoral to be considered a credible competitor in the market, and if there was a legitimate discussion to

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<sup>319</sup> *Copper Plumbing Tubes* COMP/E-1/38.069 OJ [2006] L192/21, recitals 464 and 479.

<sup>320</sup> See paragraph 3.45.

<sup>321</sup> *JJB Sports v Office of Fair Trading* [2004] CAT 17, paragraph 873.

<sup>322</sup> See paragraphs 3.46, 3.47, 3.51, 3.56 and 3.57.

<sup>323</sup> See paragraph 3.43, 3.47, 3.57 and 3.59.

<sup>324</sup> Balmoral's response to the Statement of Objections, page 13 [URN 8627].

be had with competitors then I would be happy to have that discussion.’<sup>325</sup> When questioned about it in interview, [Balmoral Tanks senior employee 1] said:

‘What I mean by that as I’ve said before is about being a-a credible player in the market. I-I err object to the price war again, we don’t want to start a price war we want to be sensible we’re a-a-a strong company, we’re not going to shake them out on price and vice-versa so let’s go and compete. And what I mean by that is just pick the phone up, if-if err why not pick the phone up if-if err I don’t want to say Balmoral’s erm misbehaving but the bottom line is to say you know... we have to go in there and sensibly compete... And erm there will be other, there will be other reasons why we pick the phone up and have a chat, so then I don’t want to kill off all contact from err, from the correct sense of err speaking to competitors.” When asked whether he may have been giving mixed messages in making this comment, he replied: “Yeah, yeah I-I-I think when I’ve read it I could have been erm... I suppose to a degree not deliberately but leading-leading them on, leading them on a touch, but the bottom line of that is to say not-not not to fix prices, to go and sensibly compete.’<sup>326</sup>

- 4.27 Balmoral has argued that [Balmoral Tanks senior employee 1]’s non-participation in any further meetings with the other parties after the 11 July 2012 meeting was an act of ‘continued denunciation’ of the sort required by the concept of public distancing.<sup>327</sup> It relies on the GC’s judgment in the *Westfalen* case<sup>328</sup> to argue that ‘significant evidential importance’ is attached by the Courts and the European Commission to the fact that an undertaking does not attend further meetings.<sup>329</sup> In the *Westfalen* case, the GC held that an argument that an undertaking had publicly distanced itself from anti-competitive arrangements was undermined by the undertaking’s attendance at a subsequent meeting. The GC did not hold, however, that a failure by an undertaking to attend further cartel meetings, in itself, represents a form of public distancing. For the reasons set out at paragraph 4.17 above, the CMA

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<sup>325</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 96 [URN 5007]. See also paragraph 3.55.

<sup>326</sup> [Balmoral Tanks senior employee 1] interview transcript 10 December 2013 [URN 6487], CD2, p.63-66 (p.136-138 of pdf).

<sup>327</sup> Balmoral’s response to the Statement of Objections, paragraph 4.28 [URN 8627].

<sup>328</sup> Judgment in *Westfalen Gassen Nederland v. Commission*, T-303/02, EU:T:2006:374.

<sup>329</sup> Balmoral’s response to the Statement of Objections, paragraph 4.29 [URN 8627].

considers that, in this case, the exchange of information at the meeting on 11 July 2012 was sufficient to reduce uncertainty about the parties' future pricing, and no further meeting was required. In these circumstances, non-participation in any further meetings with the other parties cannot be regarded as public distancing.

- 4.28 Balmoral has submitted that the meeting on 11 July 2012 was 'merely a failed attempt to convince Balmoral to join the cartel and/or to increase its prices',<sup>330</sup> that its objection to the main cartel must be understood as being an objection to any form of cooperation with the cartel<sup>331</sup> and that it would be artificial to distinguish between Balmoral Tanks' refusal to join the main cartel and its conduct in relation to the pricing discussion. The CMA does not agree. It was acknowledged early on during the meeting that Balmoral Tanks did not want to participate in the customer allocation arrangements,<sup>332</sup> but the parties continued to exchange information about their current pricing and future pricing intentions during the remainder of the meeting.
- 4.29 Given that the parties to the information exchange remained active on the market following the 11 July 2012 meeting, there is a presumption that information exchanged at the meeting was taken into account by the Parties.<sup>333</sup>
- 4.30 Moreover, there is also evidence that the information provided by Balmoral Tanks to the other parties was disseminated within at least Franklin Hodge and that both general and contract-specific information was taken into account by Franklin Hodge as part of the process for establishing prices to be quoted when bidding for contracts to supply CGSTs to one customer in particular.<sup>334</sup> This shows that the information provided by Balmoral Tanks was regarded by at least Franklin Hodge as of interest and immediate value and reduced uncertainty as to Balmoral's intended conduct on the market.
- 4.31 Balmoral has argued that [Franklin Hodge senior employee 1] was speculating about how much Balmoral would bid for the Compco contract when speaking to his colleagues following the 11 July 2012 meeting.<sup>335</sup> Even if [Franklin

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<sup>330</sup> Balmoral's letter dated 24 October 2016 [URN 8722].

<sup>331</sup> Balmoral's response to the Statement of Objections, paragraph 4.26 [URN 8627].

<sup>332</sup> See paragraph 3.44.

<sup>333</sup> See paragraph 4.12.

<sup>334</sup> See paragraphs 3.61 to 3.67.

<sup>335</sup> Balmoral's response to the Statement of Objections, paragraph 4.44 [URN 8627].

Hodge senior employee 1] may not have known exactly the amount that Balmoral Tanks would bid for the contract, [Balmoral Tanks senior employee 1] did give an indication at the meeting of what he would price at. When asked by [Kondea senior employee] during the meeting how much he would quote at that time for a 135m<sup>3</sup> tank, [Balmoral Tanks senior employee 1] stated 'somewhere between 15 and 17' and 'A one off tank, I would be surprised if it is less than 16'.<sup>336</sup>

- 4.32 Balmoral has asserted that Balmoral Tanks did not take into account the information exchanged and continued to determine its commercial policy independently using the same method of cost plus margin, noting, in particular, that the price Balmoral Tanks quoted for the Compco tender was £14,900, which was below the pricing band discussed during the meeting.<sup>337</sup>
- 4.33 Even if Balmoral did not take into account the information provided to it during the meeting, that would not be sufficient to undermine the existence of an infringement, given that Balmoral Tanks also provided information about its current prices and future pricing intentions to other parties and such information was taken into account by at least Franklin Hodge. Even the one way exchange of information can constitute a concerted practice.<sup>338</sup>
- 4.34 In any event, the fact that Balmoral Tanks quoted a price for the Compco tender, and for some subsequent tenders, that was below the band discussed at the meeting is not sufficient evidence to demonstrate that Balmoral Tanks did not use or take into account the information provided during the meeting when deciding how much to bid for that specific tender or more generally.<sup>339</sup> [Balmoral Tanks senior employee 1] made notes at the meeting, including the bands for school tanks and 135m<sup>3</sup> tanks, and has said that he would generally have passed this type of information on within Balmoral Tanks as market intelligence.<sup>340</sup> Moreover, some of the prices quoted by Balmoral Tanks after the 11 July 2012 meeting were within the bands.<sup>341</sup> Accordingly, Balmoral has

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<sup>336</sup> See paragraph 3.51.

<sup>337</sup> Balmoral's response to the Statement of Objections, paragraph 4.41 and 4.42 [URN 8627].

<sup>338</sup> See paragraph 4.8 and the case law cited at footnote 290.

<sup>339</sup> The fact that an undertaking does not abide by the outcome of a meeting which has an anti-competitive purpose is not such as to relieve it of responsibility for a concerted practice. See *Cimenteries v. Commission*, EU:T:2000:77, paragraph 1389 and *Marlines SA v Commission*, T-56/99, EU:T:2003:333, paragraph 61.

<sup>340</sup> [Balmoral Tanks senior employee 1] interview transcript, 10 December 2013, pages 34-35 [URN 6487].

<sup>341</sup> In respect of 135m<sup>3</sup> tanks (band £15,000 – £17,000), Balmoral Tanks quoted £16,300 on a Hall & Kay project in Durham on 30 July 2012. In respect of school tanks (band £9,500 - £10,500), Balmoral Tanks quoted £9,679.64 for an Emtec Balgarthno Primary School Dundee project in Glasgow on 30 July 2012, £10,414.80 for Compco's

not done enough to rebut the presumption that Balmoral Tanks took into account information provided to it during the meeting in determining its subsequent conduct on the market.

## B. Restriction of competition by object

### Key legal principles

- 4.35 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'.
- 4.36 Object infringements are those forms of coordination between undertakings that can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.<sup>342</sup> It is settled case law, at both UK and EU levels, that if an agreement has as its object the prevention, restriction or distortion of competition, it is not necessary to prove that the agreement has had, or would have, any anti-competitive effects in order to establish an infringement.<sup>343</sup>
- 4.37 In order to determine whether an agreement has the object of restricting competition, regard must be had to the content of its provisions, its objectives and the legal and economic context.<sup>344</sup> When determining that context, it is

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Ashmount School project on 2 August 2012, £9,600 for an Ashvale project in Barrow in Furness on 13 August 2012, £9,944.16 on Jaydee Heating's Kilgraston Primary School project on 23 October 2012, £9,718.67 on Customer 2's Mearns Castle project on 26 October 2012, £9,944.16 on Grafton Merchanting Kilgraston Primary School on 30 October 2012, £9,757.32 for a 29m<sup>3</sup> tank for Compco's The Deepening Peterborough project on 2 November 2012. See Annex 3 to Balmoral's Response to the Statement of Objections [URN 8627].

<sup>342</sup> Judgment in *Dole Food Co. v Commission (Bananas)*, EU:C:2015:184, paragraph 114; judgment in *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 50; and judgment in *Allianz Hungária Biztosító Zrt and Others*, C-32/11, EU:C:2013:160, paragraph 35; and judgment in *H. Lundbeck A/S v. Commission*, T-472/13, EU:T:2016:449, paragraph 340.

<sup>343</sup> See, for example: judgment in *Consten and Grundig v Commission*, C - 56/64 & 58/64, EU:C:1966:41 page 342; judgment in *Portland A/S and Others v Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 261; judgment in *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, C-105/04 P, EU:C:2008:8, paragraph 125; judgment in *Competition Authority v Beef Industry Development Society Ltd*, C-209/07, EU:C:2008:643, paragraph 16; judgment in *Expedia Inc v Autorité de la concurrence and Others* EU:C:2012:795, paragraph 35; judgment in *Groupement des Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 51; judgment in *Dole Food Co. v Commission (Bananas)*, C-286/13 P, EU:C:2015:184, paragraph 115; and judgment in *H. Lundbeck A/S v. Commission*, T-472/13, EU:T:2016:449, paragraph 339.

<sup>344</sup> Judgment in *Dole Food Co. v Commission (Bananas)*, EU:C:2015:184, paragraph 117; judgment in *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 53; judgment in *Allianz Hungária Biztosító Zrt and Others*, EU:C:2013:160, paragraph 36. See also judgment in *GlaxoSmithKline Unlimited v Commission*, EU:C:2009:610 at paragraph 58, judgment in *Competition Authority v Beef Industry Development Society Ltd*,

also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.<sup>345</sup>

- 4.38 Anti-competitive subjective intentions on the part of the parties can also be taken into account in the assessment, but they are not a necessary factor for a finding that there is an anti-competitive restrictive object.<sup>346</sup>
- 4.39 An agreement, decision or concerted practice may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives.<sup>347</sup>
- 4.40 The case law is clear that both the Chapter I prohibition and Article 101 TFEU will apply to any form of agreement or concerted practice which might restrict or dampen price competition, either directly or indirectly.
- 4.41 In certain circumstances, the exchange of pricing information among competitors may amount to a restriction of competition by object. In *Tate & Lyle*, the GC held that an exchange of information regarding future pricing allowed the parties to 'create a climate of mutual certainty as to their future pricing policies' and amounted to a restriction of Article 101 TFEU by object.<sup>348</sup>
- 4.42 This was also confirmed by the CJ in its recent judgment in *Dole*, in which the CJ confirmed that 'the exchange of information between competitors is liable to be incompatible with the competition rules 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.'<sup>349</sup> In that case, the parties had not exchanged actual prices, but information regarding price setting factors, price trends and/or indications of quotation prices. According to the CJ, this 'made it possible to reduce uncertainty for each of the participants as to the foreseeable conduct of competitors,...and therefore gave rise to a

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EU:C:2008:643, paragraphs 16 and 21 and judgment in *Football Association Premier League and Others*, C-403/08, EU:C:2011:631 at paragraph 136.

<sup>345</sup> Judgment in *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 53; judgment in *Allianz Hungária Biztosító Zrt and Others*, EU:C:2013:160, paragraph 36; and judgment in *H. Lundbeck A/S v. Commission*, T-472/13, EU:T:2016:449, paragraph 343.

<sup>346</sup> Judgment in *Allianz Hungária Biztosító Zrt and Others*, EU:C:2013:160, paragraph 37; judgment in *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 54.

<sup>347</sup> Judgment in *General Motors BV v Commission*, C-551/03, EU:C:2006:229, paragraph 64.

<sup>348</sup> Judgment in *Tate & Lyle and Others v Commission*, EU:T:2001:185, paragraphs 58 and 60. See also judgment in *Rhone Poulenc v European Commission*, EU:T:1991:56, paragraphs 122 to 124.

<sup>349</sup> Judgment in *Dole Food Co. v Commission (Bananas)*, EU:C:2015:184, paragraph 121.

concerted practice having as its object the restriction of competition within the meaning of Article [101] EC'.<sup>350</sup>

- 4.43 In Advocate General Kokott's Opinion in *Dole*, she stated that, in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between the information exchanged and prices. It is 'sufficient for a finding of anti-competitive object that information is exchanged between competitors about factors relevant to their respective pricing policy or – more generally – to their conduct on the market.'<sup>351</sup> She went on to note that 'market signals, market trends and/or indications as to the intended development of banana prices could be inferred from the quotation prices exchanged by the parties.'<sup>352</sup>
- 4.44 The disclosure of pricing information replaces 'the risks of competition and the hazards of competitors' spontaneous reactions by cooperation.'<sup>353</sup> The sharing of such information reduces uncertainties inherent in the competitive process and facilitates the co-ordination of the parties' conduct on the market.<sup>354</sup> The European Commission has explicitly stated that '[i]t is contrary to the provisions of Article [101] [...] for a producer to communicate to his competitors the essential elements of his price policy'.<sup>355</sup>

## Assessment

- 4.45 The CMA considers that, having regard to its content, objectives and legal and economic context, the exchange of commercially sensitive information between the Parties about their current pricing and future pricing intentions had the object of preventing, restricting or distorting competition.
- 4.46 The information comprised both generic and contract-specific information in the form of price bands and prices quoted for specific contracts. This information was useful and of practical value, as demonstrated by the fact that it was disseminated internally at Franklin Hodge immediately after the meeting

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<sup>350</sup> Judgment in *Dole Food Co. v Commission (Bananas)*, EU:C:2015:184, paragraph 134.

<sup>351</sup> Advocate General's Opinion in *Dole Food Co. v Commission (Bananas)*, EU:C:2015:184, paragraph 113.

<sup>352</sup> Advocate General's Opinion in *Dole Food Co. v Commission (Bananas)*, EU:C:2015:184, paragraph 116.

<sup>353</sup> Judgment in *Imperial Chemical Industries Ltd v Commission of the European Communities*, C-48-69, EU:C:1972:70, ('*Dyestuffs*'), paragraph 119.

<sup>354</sup> See generally *P Thyssen Stahl v Commission*, Case C-194/99 [2003] ECR I-10821, paragraph 81.

<sup>355</sup> Commission Decision 74/292/EEC of 15 May 1974 relating to proceedings under Article 85 of the EEC Treaty (IV/400–*Agreements between manufacturers of glass containers*)(OJ 1974 L 160/1), paragraph 43.



and was used by Franklin Hodge to put in a revised bid for a specific contract just below the middle of the price band for 135m<sup>3</sup> tanks where it thought Balmoral would bid, but 'not crazily below'.<sup>356</sup> It reduced uncertainty as to the Parties' future conduct on the market and highlighted to Franklin Hodge, Kondea and Galglass that there would be less downward pressure on their prices than they might otherwise have expected. As such, the exchange of this information can be regarded, by its very nature, as injurious to the proper functioning of normal competition.

- 4.47 The information exchange took place in circumstances where there were pre-existing anti-competitive arrangements in place between Franklin Hodge, Kondea, CST and Galglass. Whilst Balmoral Tanks may not have been fully aware of the detail of those arrangements prior to the 11 July 2012 meeting, it was aware prior to the meeting that its competitors met on a regular basis to discuss the industry. As early as 6 January 2012 Balmoral Tanks ([Balmoral Tanks senior employee 1]) was told by Kondea ([Kondea senior employee]) that its competitors met on a regular basis to discuss markets.<sup>357</sup> [Balmoral Tanks senior employee 1] has also acknowledged that he had suspicions on the 'cosiness of their relationship' and this made him 'uneasy'.<sup>358</sup>
- 4.48 Witnesses from Balmoral Tanks explained that it continued to engage with its competitors because it was concerned that ending all contact might jeopardise its supply of vortex inhibitors.<sup>359</sup> However, this does not explain why Balmoral Tanks attended the 11 July 2012 meeting given that it received accreditation for its own vortex inhibitor in May 2012, with the last vortex inhibitors purchased from CST UK delivered in June 2012;<sup>360</sup> nor why, having joined the meeting, it participated in the discussion in the way it did, rather than expressing reservations or objections to the discussion and distancing itself from it. Even if [Balmoral Tanks senior employee 1] was not aware of the full details of the existing anti-competitive arrangements prior to the meeting, it was made explicit during the meeting that the parties were engaged in customer allocation.<sup>361</sup> Nevertheless, [Balmoral Tanks senior employee 1]

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<sup>356</sup> See paragraphs 3.61 to 3.67.

<sup>357</sup> See paragraph 3.13 and 3.14.

<sup>358</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraphs 63 and 65 [URN 5007]. See paragraph 3.19 to 3.20.

<sup>359</sup> See paragraphs 3.5, 3.20, 3.25 and 3.30 above referring to the evidence of [Balmoral Tanks senior employee 1] and [Balmoral Group senior employee 1].

<sup>360</sup> See paragraph 3.31.

<sup>361</sup> See paragraph 3.44.

remained at the meeting and exchanged information about current prices and future pricing intentions.<sup>362</sup>

- 4.49 As set out at paragraphs 3.33 and 3.43, for Franklin Hodge, Galglass and Kondea the primary purpose of the meeting was to persuade Balmoral Tanks to join the cartel. When [Franklin Hodge senior employee 1] was asked in interview why he and [Kondea senior employee] had shared pricing information with [Balmoral Tanks senior employee 1], he explained ‘...to come to a better arrangement on price so it was to sort of get a bit more of a better understanding of where prices was and I was trying to explore with [Balmoral Tanks senior employee 1], you know, sort of I was trying to get out of [Balmoral Tanks senior employee 1] exactly where he was going with some of his, some of his pricing policy’.<sup>363</sup>
- 4.50 In contrast, Balmoral has argued that the purpose of the 11 July 2012 meeting from [Balmoral Tanks senior employee 1]’s perspective was ‘to draw a line under any further communications and to make it clear once and for all that Balmoral would continue to be a competitive force in the market’.<sup>364</sup>
- 4.51 Although [Balmoral Tanks senior employee 1] made it clear during the meeting that he did not want to participate in the customer allocation arrangements between the parties, other comments made by [Balmoral Tanks senior employee 1] during the meeting show that his objective when discussing prices was for prices to stabilise towards the higher end of the bands being discussed at the meeting. [Balmoral Tanks senior employee 1] noted during the meeting that: ‘the thing for me is to get it stabilised because if we keep going even lower from my point of view as well, we’re hitting rock bottom

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<sup>362</sup> See paragraphs 3.45 to 3.60.

<sup>363</sup> See paragraph 3.33 to 3.34. [Franklin Hodge senior employee 1] interview transcript dated 3 December 2013 [URN 4976], p.34-35 in relation to the purpose of the meeting:

‘[Franklin Hodge senior employee 1]: It was really to sort of talk amongst ourselves what the sort of typical price levels were for different capacities of tank. So that’s why the figures came up.

Q: Would you have considered that in the normal scheme of things sensitive?

[Franklin Hodge senior employee 1]: Yes.

Q: So what was the reason behind giving those figures?

[Franklin Hodge senior employee 1]: Well the reason behind it was so, because so that we could get a feel for – well so we could try, because obviously the object of the meeting was to come to a better arrangement on price so it was to sort of get a bit more of a better understanding of where pricing was and I was trying to explore with [Balmoral Tanks senior employee 1], you know, sort of I was trying to get out of [Balmoral Tanks senior employee 1] exactly where he was going with some of his, some of his pricing policy.’

<sup>364</sup> Balmoral’s response to the Statement of Objections, paragraphs 2.5, 3.14, 4.2 and 4.6 [URN 8627]. See also paragraph 3.35 to 3.36.

rather quickly'.<sup>365</sup> He then later notes: 'Better near the top of the band than the bottom of the band for sure.'<sup>366</sup> In addition, when asked by [Franklin Hodge senior employee 1] if Balmoral Tanks 'want to try to squeeze the price and get up as quickly as you can?', [Balmoral Tanks senior employee 1] answered, 'Yes....Pushing that band up, the top end rather than the bottom'.<sup>367</sup> [Balmoral Tanks senior employee 1] also said in interview that Balmoral Tanks was trying to avoid a 'price war'.<sup>368</sup>

4.52 Balmoral has disputed that the information exchanged at the meeting was capable of reducing or removing uncertainty.<sup>369</sup> Balmoral has put forward various reasons in support of this argument, which are discussed further below.<sup>370</sup>

4.53 First, Balmoral has noted the fact that the information discussed at the meeting related to just two types of tank sizes: schools (28m<sup>3</sup>) and 135m<sup>3</sup> which, it argued, made up only a small part of the market and only a small proportion of Balmoral's CGST sales.<sup>371</sup> The suggestion that these tanks were not significant in the context of the overall market is not consistent with [Balmoral Tanks senior employee 1]'s own comments when interviewed, where he noted that: 'You get lots of one-offs, but the supermarkets and the schools are the higher number by demand.'<sup>372</sup> In any event, the market coverage of the information exchanged would only be relevant if the CMA were assessing the effect of the information exchanged on competition. The

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<sup>365</sup> See paragraph 3.43 above, referring to the Transcript of 11 July 2012 meeting, page 16 [URN 8745].

<sup>366</sup> Transcript of 11 July 2012 meeting, page 53 [URN 8745].

<sup>367</sup> See paragraph 3.58 above.

<sup>368</sup> See paragraph 3.35.

<sup>369</sup> Balmoral's response to the Statement of Objections, paragraphs 3.1 to 3.14 and 5.9 to 5.13 [URN 8627].

<sup>370</sup> Balmoral refers to paragraphs 86 to 94 of the Commission's guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements, OJ (2011) C11/1. These paragraphs list various factors which are relevant in assessing the likely restrictive *effect* of an information exchange on competition. However, as noted at paragraph 4.36 above, in the case of a restriction of competition by object, it is not necessary to consider its effect on competition. Paragraph 74 of the Commission's horizontal co-operation guidelines state that 'information exchanges between competitors of individualised data regarding intended future prices or quantities should therefore be considered a restriction of competition by object. In addition, private exchanges between competitors of their individualised intentions regarding future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities'.

<sup>371</sup> Balmoral's response to the Statement of Objections, paragraph 3.7 [URN 8627]. Balmoral said that these sizes constituted 7.4% and 6.5% respectively of Balmoral's CGST quotes between August 2011 and August 2013. However, Annex 3 to Balmoral's Response to the Statement of Objections [URN 8627] also shows that tanks supplied to schools (ranging in size from 27-30m<sup>3</sup>) constituted at least 20% of Balmoral Tanks' CGST sales by volume in the period covered. See also paragraph 2.5 above in relation to typical tank sizes.

<sup>372</sup> See transcript of [Balmoral Tanks senior employee 1] interview on 27 November 2012 [URN1315], p.52, lines 10-14.

CMA's view is that the information exchange constitutes a restriction of competition by object, such that it is not necessary to examine its actual effect on competition. As explained at paragraph 4.72 below, a restriction of competition by object is regarded by its very nature as having an appreciable impact on competition.

- 4.54 Balmoral has submitted that the price bands discussed at the meeting were aggregated data which referred to average pricing by all suppliers in the market for a specific size of tank, not to pricing by individual companies.<sup>373</sup> The CMA does not accept that the price bands were aggregated data (i.e. that they were averaged prices across the industry). As explained at paragraph 4.56 below, the price bands were effectively target price ranges. However, even if the price bands referred to average market pricing, in a market which was already cartelised average prices provide a meaningful indication of competitors' pricing.
- 4.55 Given that prices for CGSTs vary from contract to contract, based on the costs involved, information about the price bands within which the parties would charge was potentially more useful than information about individual prices.
- 4.56 In particular, the price bands served as targets for the parties to stick within. This was acknowledged by [Balmoral Tanks senior employee 1] during the meeting: 'Better near the top of the band than the bottom of the band for sure. [inaudible]. Somehow that's the area the target price.'<sup>374</sup> [Balmoral Tanks senior employee 1] also stated during the meeting: '...that's why I think you've got to have the bands to work with, to keep as the market price there is a market price for everything give or take. [?] if you're feeling a bit hungry you'll go here and if you're feeling a bit flush and you're not under pressure then you might squeeze it up, but if you take everyone low it's a disaster, you've got to have a mixture of jobs [?].'<sup>375</sup> He notes with regard to a price that [Franklin Hodge senior employee 1] is proposing to bid for a future contract: 'if it's falling out the bands, that's the concern'.<sup>376</sup>

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<sup>373</sup> This is consistent with the explanation provided by [Balmoral Tanks senior employee 1] at the criminal trial. See Livenote transcript 11 June 2015, page 68-69 [URN 6615].

<sup>374</sup> See paragraph 3.57 above, referring to the Transcript of 11 July 2012 meeting, page 53 [URN 8745].

<sup>375</sup> See paragraph 3.57 above, referring to the Transcript of 11 July 2012 meeting, page 43 [URN 8745].

<sup>376</sup> See paragraph 3.57 above, referring to the Transcript of 11 July 2012 meeting, page 50 [URN 8745].

- 4.57 Balmoral has argued that most of the information exchanged at the 11 July 2012 meeting related to prices charged for tenders already awarded, which was by definition historic data.<sup>377</sup>
- 4.58 Some of the prices discussed during the meeting, although relating to past bids, were clearly current prices. For example, [Balmoral Tanks senior employee 1] clarified that the prices he quoted for school tanks and 135m<sup>3</sup> tanks<sup>378</sup>, were current prices: 'we're selling at that price, we are now below it'.<sup>379</sup> This is corroborated by [Balmoral Tanks senior employee 1]'s interview transcript in which he confirmed that these prices were current prices: 'Well, I think, with those tanks, you could... 15,000 to £17,000 would be probably roughly where we would be as a price for that size of product.'<sup>380</sup>
- 4.59 Some of the information exchanged also related to future pricing intentions, not just past bids. For example, when asked by [Kondea senior employee] how much Balmoral Tanks would bid for 135m<sup>3</sup>, if a new tender came out, [Balmoral Tanks senior employee 1] responded 'Say somewhere between 15 and 17'. He then went on to clarify: 'A one off tank, I would be surprised if it is less than 16'<sup>381</sup> [Franklin Hodge senior employee 1] informs the other parties that Franklin Hodge intends to bid to win future Compco contracts and will 'bid close to but under' what Balmoral Tanks has offered.<sup>382</sup> [Franklin Hodge senior employee 1] also gives a price range that Franklin Hodge will quote for school tanks on the future Compco contracts: 'I'm going to have to go closer to the 9 and a half than 10 and a half, on schools....'<sup>383</sup>
- 4.60 Moreover, the information exchanged about past bids was still commercially sensitive, as it was indicative of future pricing intentions. The context in which past bids were discussed was that the price quoted was regarded as being too low, indicating a desire for higher prices in the future. For example:

<p>'[Balmoral Tanks senior employee 1]</p>	<p>You see I've seen some at £10.2. I've seen £8.6 which is was a disaster</p>
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<sup>377</sup> Balmoral's response to the Statement of Objections, paragraph 3.9 [URN 8627].

<sup>378</sup> 'The schools and the 135 are very similar 9 and a half, 10 and a half, 15 to 17', quoted at paragraph 3.47 above.

<sup>379</sup> See paragraph 3.47.

<sup>380</sup> See [Balmoral Tanks senior employee 1]'s quotes at paragraph 3.51 above. See also [Balmoral Tanks senior employee 1] interview transcript dated 30 May 2013 [URN1674], tape 2, p. 9-10.

<sup>381</sup> Transcript of 11 July 2012 meeting, page 49 [URN 8745].

<sup>382</sup> Transcript of 11 July 2012 meeting, page 22 [URN 8745].

<sup>383</sup> Transcript of 11 July 2012 meeting, page 50 [URN 8745].

[Franklin Hodge senior employee 1]

Yeah we've not done 8 6

[Balmoral Tanks senior employee 1]

I've seen below that 9 2 or 9 3, even that's low. Nine-and-a-half, 10 and half is a target. If I hear anything from our guys that's anything above that will be exciting or anything below that would be a concern which is why I heard 14 6 we didn't win it, we didn't win at 14650, we bid that.

[Franklin Hodge senior employee 1]

You bid that, aah, sorry I misunderstood I thought you'd said that's fine. That's cheap.

[Balmoral Tanks senior employee 1]

That's was that far out even in my mind was far from what it should be in my mind.<sup>384</sup>

4.61 [Balmoral Tanks senior employee 1] also talks about a bid for 135m<sup>3</sup> tanks for three Morrison stores tendered by Tyco, which was won by Galglass at a price of £14,650 per tank.<sup>385</sup> [Franklin Hodge senior employee 1] comments later in the conversation: 'As we know from the conversation last time, we weren't making obscene gross margins, what we expect is a cap is a cap at mid 30s so, so 14650 is just unsustainable, I think you just said that, you can't run a business on that can you.'<sup>386</sup> [Balmoral Tanks senior employee 1] comments later that: 'When we start getting below 15 and two big guys are battling over a Tyco at 14 6 and we're losing it at 14 6. It's bonkers.'<sup>387</sup>

4.62 [Franklin Hodge senior employee 1] tells the others the price Franklin Hodge has recently agreed with Hall & Kay for a specific tender: 'Erm, for the deal we've done with Hall and Kay on the Sainsburys jobs it was 16 8'. He then specifies: 'And that was a deal done on the basis that we get a minimum of 15 tanks this year. Well, we're not going to get that, [?] not going to get that'.

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<sup>384</sup> This exchange is quoted in full at paragraph 3.56.

<sup>385</sup> Transcript of 11 July 2012 meeting, page [14], [URN 8745].

<sup>386</sup> Transcript of 11 July 2012 meeting, page [19], [URN 8745].

<sup>387</sup> Transcript of 11 July 2012 meeting, page [22], [URN 8745].

[Franklin Hodge senior employee 1] and [Kondea senior employee] both agree that £16 800 is still a reasonable price for a 135m<sup>3</sup> tank.<sup>388</sup>

- 4.63 [Balmoral Tanks senior employee 1] acknowledged the sensitivity of historic pricing information in his interview: 'I would not supply a competitor with Balmoral historical product pricing information, as this may be used by them to form their own pricing strategy'.<sup>389</sup> In his witness statement, [Franklin Hodge senior employee 1] describes the information provided to Balmoral Tanks as commercially sensitive: '[Kondea senior employee] and I gave [Balmoral Tanks senior employee 1] detailed information on our pricing policies for the various types of tanks, and discussed with him typical pricing. Ordinarily, such information might be commercially sensitive, but was part of the arrangement and we shared the information with [Balmoral Tanks senior employee 1]'.<sup>390</sup>
- 4.64 [Franklin Hodge senior employee 1] also confirmed when interviewed that he would consider the figures provided by him and [Kondea senior employee] at the meeting to be commercially sensitive and to reflect current pricing intentions, and that he was trying in the meeting to obtain information from [Balmoral Tanks senior employee 1] regarding Balmoral's pricing policy.<sup>391</sup>
- 4.65 Balmoral has suggested that to the extent that there were references to future prices, these were quoted as 'broad' bands and therefore too vague to reduce or remove uncertainty.<sup>392</sup> This is contradicted by comments made by [Balmoral Tanks senior employee 1] himself in the 11 July 2012 meeting: 'Those two, they're not big bands 15-17, couple of grand. I expect a big margin, on that one'.<sup>393</sup> Moreover, as noted above, the price bands were useful because they provided a target for the Parties to stick within, with the lower end of the range effectively indicating a price floor.
- 4.66 Balmoral has submitted that its pricing was based on a 'cost-plus' model and that, without information about Balmoral's costs or its preferred margins, which were not discussed at the 11 July 2012 meeting, its competitors could not have had any real knowledge of Balmoral's future pricing behaviour.<sup>394</sup> The fact that Balmoral Tanks used a 'cost-plus' model does not prevent the

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<sup>388</sup> Transcript of 11 July 2012 meeting, page [26] [URN 8745].

<sup>389</sup> [Balmoral Tanks senior employee 1] witness statement, 27 February 2014, paragraph 57 [URN 5007].

<sup>390</sup> [Franklin Hodge senior employee 1] witness statement, 6 June 2014, paragraph 169 [URN 6526].

<sup>391</sup> See paragraph 4.49 and full quote at footnote 364 above.

<sup>392</sup> Balmoral's response to the Statement of Objections, paragraph 3.14, 3.16, 4.10, 5.9 and 7.2 [URN 8627].

<sup>393</sup> Transcript of 11 July 2012 meeting, page 50 [URN 8745].

<sup>394</sup> Balmoral's response to the Statement of Objections, paragraph 4.11 [URN 8627].

information exchanged from being commercially useful. Even if the cost, and hence the final price, of each tank varies, information about Balmoral's current prices and future pricing intentions still reduced uncertainty in the market. As noted at paragraph 4.56 above, the price bands discussed during the meeting reflected target prices, with the bottom end of the band effectively indicating a price floor.

- 4.67 Balmoral has argued that, in circumstances where competition in the CGST market took place through tendering processes, any collusion between competitors would be impossible without frequent and regular monitoring of specific bidding data.<sup>395</sup> As noted at paragraph 4.17 above, the CMA acknowledges that the exchange of information at a single meeting would likely have been insufficient had the Parties wanted to fix prices on an ongoing basis. However, the CMA is not alleging an ongoing price fixing agreement. The fact that competition takes place through tendering does not prevent the exchange of information between competitors about their current prices and future pricing intentions, even if only at a single meeting, from reducing uncertainty about those competitors' future conduct on the market.
- 4.68 Balmoral has argued that the prices paid by public bodies such as schools could be obtained through a Freedom of Information Act request.<sup>396</sup> Moreover, it submitted that CGST customers commonly tell a supplier what price they have been quoted by competing suppliers.<sup>397</sup> It is not necessarily the case that pricing information could be obtained as a result of a Freedom of Information Act request.<sup>398</sup> However, even if this were the case or the parties could obtain such information during commercial negotiations with CGST customers, this does not necessarily mean that the information obtained at the meeting was readily accessible and, hence, not commercially sensitive.<sup>399</sup> The meeting provided an opportunity for the Parties to confirm their understanding of what prices were being charged for particular tanks directly from their competitors and, moreover, to gain a better understanding of what prices their competitors

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<sup>395</sup> Balmoral's response to the Statement of Objections, paragraph 3.10 [URN 8627].

<sup>396</sup> Balmoral's response to the Statement of Objections, paragraph 3.11 [URN 8627].

<sup>397</sup> Balmoral's response to the Statement of Objections, paragraph 3.12 [URN 8627].

<sup>398</sup> It is not self-evident that a public authority would disclose such information pursuant to a request under the Freedom of Information Act 2000. There is a qualified exemption from the obligation to disclose information under section 43 of the Freedom of Information Act for information the disclosure of which would, or would be likely to, prejudice the commercial interests of any person. A public authority may decide that information about the prices payable under a contract with a CGST supplier would prejudice the commercial interests of the supplier and therefore refuse to disclose such information.

<sup>399</sup> Judgment in *Tate & Lyle v Commission*, EU:T:2001:185, paragraph 60. See also the Commission's guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements, OJ (2011) C11/1, paragraph 92.



might charge in the future, information which would not be readily available in other ways.

- 4.69 For all of the reasons set out at paragraphs 4.45 to 4.68 above, the CMA finds that in the particular market context, the exchange of information between the Parties had the objective of, and was capable of, reducing uncertainty as to the Parties' pricing intentions and their future conduct on the market.
- 4.70 Accordingly, the CMA concludes that the information exchange constitutes a restriction of competition by object, contrary to Article 101(1) TFEU and the Chapter I prohibition.

### C. **Appreciability**

#### **Key legal principles**

- 4.71 An agreement, concerted practice or decision by an association of undertakings will not infringe Article 101(1) TFEU or the Chapter I prohibition if its impact on competition is not appreciable.<sup>400</sup>
- 4.72 However, the CJ has held that 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.<sup>401</sup> The CMA considers that, pursuant to section 60(2) of the Act<sup>402</sup>, this principle also applies when assessing appreciability under the Chapter I prohibition.

#### **Assessment**

- 4.73 Given that the concerted practice between the Parties had as its object the prevention, restriction or distortion of competition and involved the exchange of commercially sensitive information as to the Parties' current prices and future pricing intentions, it is considered by the CMA to have had by its nature

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<sup>400</sup> Judgment in Case 5/69 *Völk v Vervaecke*, C-5/69, EU:C:1969:35 [1969] ECR 295, paragraph 7. See also *North Midland Construction plc v. Office of Fair Trading* [2011] CAT 14 [45], [52ff].

<sup>401</sup> Judgment in *Expedia Inc v Autorité de la concurrence and Others* EU:C:2012:795, paragraph 37; and *Notice on Agreements of Minor Importance* at paragraphs 2 and 13.

<sup>402</sup> Section 60(2) of the Act provides that, when determining a question in relation to the application of Part I of the Act (which includes the Chapter I prohibition), the court (and the CMA) must act with a view to securing that there is no inconsistency with any relevant decision of the CJ in respect of any corresponding question arising in EU law.

an appreciable effect on competition for the purposes of Article 101 TFEU and the Chapter I prohibition.

- 4.74 As noted at paragraph 4.53, Balmoral has highlighted that the information exchanged at the meeting related to only two tank sizes, which only account for a small proportion of the CGST market. Even if the CMA were required to demonstrate an appreciable effect on competition, which for the reason set out above the CMA does not accept, the CMA does not regard the fact that the infringement only applied to a small proportion of the overall market, nor the fact that the information was exchanged at a single meeting, as indicating that the appreciability threshold would not be met. Between them, the Parties accounted for nearly all sales of CGSTs in the UK.<sup>403</sup> Although the infringement in this case related only to information exchanged in relation to two tank sizes at a single meeting, the CAT has recognised previously that collusion relating to a single contract could have potential effects on similar contracts in the future and could contribute to the creation of a climate of anti-competitive cooperation between the parties involved.<sup>404</sup>

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

### **Key legal principles**

- 4.75 Article 101 TFEU applies to agreements and/or concerted practices which may affect trade between EU Member States. Such an effect on trade must be appreciable.<sup>405</sup>
- 4.76 An effect on trade means 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.<sup>406</sup>

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<sup>403</sup> The CMA has not seen evidence that suppliers based outside the UK (with the possible exception of IIT) made sales of GSTs for sprinkler systems in the UK. See paragraphs 2.34 to 2.36 above in section 2 referring to the relevant geographic market.

<sup>404</sup> *North Midland Construction plc v Office of Fair Trading*, [2011] CAT 14, paragraph 56. The CAT held that 'We do not therefore agree with North Midland's submission that in relation to the appreciability of effects on competition an individual cover pricing arrangement should be viewed as amounting to no more than a single telephone call, with one party doing the other a favour by providing price information in respect of an isolated tender. The potential effects inherent in the conduct in question are wider and more significant than that characterisation would imply.'

<sup>405</sup> Judgment in *Béguelin Import Co. v S.A.G.L. Import Export*, EU:C:1971:113, paragraph 16.

<sup>406</sup> Judgment in *Société Technique Minière v Maschinenbau Ulm GmbH*, EU:C:1966:38, page 249.

- 4.77 For the purposes of assessing whether an agreement, decision or concerted practice may affect trade between EU Member States the CMA follows the approach set out in the Commission's published guidance.<sup>407</sup>
- 4.78 According to this guidance, horizontal cartels covering a whole Member State are normally capable of affecting trade between EU Member States, provided the product covered by the agreement or concerted practice is susceptible to imports.<sup>408</sup>

## **Assessment**

- 4.79 As the Parties supplied CGSTs across the UK, and (except for Kondea) exported CGSTs to other countries in Europe, the CMA considers that the concerted practice covered the whole of the UK and was capable of having an appreciable effect on trade between Member States within the meaning of Article 101 TFEU.

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

### **Key legal principles**

- 4.80 By virtue of Section 2(1)(a) of the Act, the Chapter I prohibition applies to agreements which '...may affect trade within the United Kingdom'.
- 4.81 The CAT has held that effect on trade within the UK is a purely jurisdictional test to demarcate the boundary line between the application of EU competition law and national competition law and that there is no requirement that the effect on trade within the UK should be appreciable.<sup>409</sup>

## **Assessment**

- 4.82 The concerted practice was at the very least capable of reducing competition in the supply of CGSTs in the UK and, thus, altering the pattern of trade within the UK. The CMA therefore considers that the requirement, within the meaning

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<sup>407</sup> Commission *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* (2004/C 101/07).

<sup>408</sup> Commission Notice 2004/C101/07, OJ C101/81, at paragraphs 78 to 80 and footnotes thereto.

<sup>409</sup> *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11, at paragraphs 459 and 460. The CAT considered this point also in *North Midland Construction plc v. Office of Fair Trading* [2011] CAT 14, at paragraphs 48 to 51 and 62 but considered that it was 'not necessary [...] to reach a conclusion'.

of the Chapter I prohibition, that an agreement and/or concerted practice may affect trade within the UK is satisfied in this case and that, insofar as required, such effect is appreciable.

## **F. Exclusion or exemption**

### **Key legal principles**

- 4.83 Agreements or concerted practices which satisfy the criteria set out in Article 101(3) TFEU benefit from an exemption to Article 101(1) TFEU. Similarly, those which satisfy the criteria set out in section 9 of the Act benefit from exemption from the Chapter I prohibition.
- 4.84 It is for the parties wishing to rely on these provisions to adduce evidence that the exemption criteria are satisfied.<sup>410</sup> The CMA will consider this evidence against the likely impact of the restrictive agreement on competition when assessing whether the criteria in section 9 of the Act and in Article 101(3) TFEU are satisfied.

### **Assessment**

- 4.85 No Party has sought to argue that the concerted practice engaged in by them is exempted from the Chapter I prohibition by operation of section 9 of the Act, or from Article 101 TFEU by the operation of Article 101(3) TFEU. Notwithstanding that it is for the Parties to provide evidence that the conditions for exemption are satisfied, the CMA considers it most unlikely that the conditions would be met in this case. In particular, it is hard to see how the exchange of commercially sensitive information regarding current pricing and future pricing intentions in relation to the supply of CGSTs could be said to have contributed to improving the production of or distribution of goods, promoting technical or economic progress or how consumers could be said to have benefitted.
- 4.86 There is also no block exemption order under section 6 of the Act that would exempt the conduct of the Parties from the Chapter I prohibition. Nor is there any applicable EU Council or Commission Regulation by virtue of which the conduct of the Parties would be exempt from Article 101 TFEU or would

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<sup>410</sup> Section 9(2) of the Act.

benefit from a parallel exemption from the Chapter I prohibition under section 10 of the Act.

- 4.87 Finally, none of the exclusions from the Chapter I prohibition provided for by section 3 of the Act applies in this case.

## **5. The CMA's action**

### **A. The CMA's decision**

- 5.1 In light of the above, the CMA has made a decision that in July 2012, the Parties participated in a concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of CGSTs in the UK and thereby infringed the Chapter I prohibition and Article 101 TFEU. The infringement took the form of an exchange amongst the Parties of commercially sensitive information about their current pricing and future pricing intentions.
- 5.2 The Parties other than Balmoral have admitted their involvement in, and liability for, both the main cartel infringement and information exchange infringement.
- 5.3 The CMA considers that it is appropriate for a financial penalty to be imposed in respect of the information exchange infringement. In accordance with the terms of settlement agreed, the CMA has not imposed an additional penalty on the Settling Parties in respect of their participation in the information exchange infringement taking into account the particular circumstances of the case.

### **B. Directions**

- 5.4 Section 32(1) of the Act provides that if the CMA has made a decision that an agreement 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. The CMA has decided not to impose any directions on the Parties in the circumstances of this case as the information exchange infringement is no longer continuing.

### **C. Financial penalties**

#### **General points**

- 5.5 Section 36(1) of the Act provides that on making a decision that an agreement has infringed the Chapter I prohibition, the CMA may require an undertaking which is party to the agreement concerned to pay the CMA a penalty in respect of the infringement. In accordance with section 38(8) of the Act, the

CMA must have regard to the guidance on penalties in force at the time when setting the amount of the penalty (the 'Penalties Guidance').<sup>411</sup>

- 5.6 The CMA has decided that it is appropriate in the circumstances of this case to exercise its discretion under section 36(1) of the Act to impose a penalty on Balmoral in respect of the information exchange infringement, given the seriousness of the infringement and in order to deter similar conduct in the future.

*The CMA's margin of appreciation in determining the appropriate penalty*

- 5.7 Provided the penalties it imposes in a particular case are (i) within the range of penalties permitted by section 36(8) of the Act<sup>412</sup> and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000,<sup>413</sup> and (ii) the CMA has had regard to the Penalties Guidance in accordance with section 38(8) of the Act, the CMA has a margin of appreciation when determining the appropriate amount of a penalty under the Act.<sup>414</sup> The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.<sup>415</sup> Rather, the CMA makes its assessment on a case-by-case basis<sup>416</sup> having regard to all relevant circumstances and the objectives of its policy on financial penalties. Each case is specific to its own facts, and it cannot be assumed that the level of penalty appropriate for a particular party in one case (or the manner in which the Penalties Guidance has been applied) will necessarily be the same in respect of another party in another case. In line with statutory requirements and the twin objectives of its policy on financial penalties, the CMA will also have 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 breaches the

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<sup>411</sup> *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board.

<sup>412</sup> Section 36(8) is addressed at paragraph 5.54 and 5.56 below.

<sup>413</sup> SI 2000/309, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

<sup>414</sup> *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at [168] and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, at [102].

<sup>415</sup> See, for example, *Eden Brown and Others v OFT* [2011] CAT 8 (*Eden Brown*), at [78].

<sup>416</sup> See, for example, *Kier Group and Others v OFT* [2011] CAT 3, at [116] where the CAT noted that 'other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent'. See also *Eden Brown*, 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'.

Chapter I prohibition (as well as other prohibitions under the Act and the TFEU as the case may be).<sup>417</sup>

### *Small agreements*

- 5.8 The CMA considers that section 39 of the Act (which provides for limited immunity from penalties in relation to the Chapter I prohibition) does not apply in the present case on the basis that the combined applicable turnover of the Parties exceeded the relevant threshold.<sup>418</sup> Moreover, section 39 of the Act does not apply in respect of infringements of Article 101 TFEU.

### *Intention/negligence*

- 5.9 The CMA may impose a penalty on an undertaking which has infringed the Chapter I prohibition only if it is satisfied that the infringement has been committed intentionally or negligently.<sup>419</sup> However, the CMA is not obliged to specify whether it considers the infringement to be intentional or merely negligent.<sup>420</sup>

- 5.10 The CAT has defined the terms ‘intentionally’ and ‘negligently’ as follows:

‘...an infringement is committed intentionally for the purposes of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition’.<sup>421</sup>

- 5.11 This is consistent with the approach taken by the CJ which has confirmed:

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<sup>417</sup> Section 36(7A) of the Act and Penalties Guidance, paragraph 1.4.

<sup>418</sup> Regulation 3 of the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 provides that the category of agreements for which no penalty may be imposed under section 39 of the Act comprises ‘all agreements between undertakings the combined applicable turnover of which for the business year ending in the calendar year preceding one during which the infringement occurred does not exceed £20 million’ (SI/2000/262). The combined applicable turnover of the Parties in the business year ending in 2011 exceeded £20 million.

<sup>419</sup> Section 36(3) of the Act.

<sup>420</sup> *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, paragraphs 453 to 457; see also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at 221.

<sup>421</sup> *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at 221.



‘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’.<sup>422</sup>

- 5.12 The circumstances in which the CMA might find that an infringement has been committed intentionally include the situation in which the agreement or conduct in question has as its object the restriction of competition.<sup>423</sup> For the reasons set out at paragraphs 4.15 and 4.46 to 4.70, the CMA considers that the information exchange infringement had as its object the prevention, restriction or distortion of competition and that the Parties must therefore have been aware (or could not have been unaware) and at the very least ought to have known that their conduct was capable of harming competition. In respect of Balmoral specifically, [Balmoral Tanks senior employee 1] has acknowledged that supplying a competitor with historic pricing information ‘may be used by them to form their own pricing strategy’.<sup>424</sup> He therefore must have been aware that exchanging information about current or future prices with Balmoral’s competitors was capable of harming competition. The CMA therefore concludes that the information exchange infringement was committed intentionally or, at the very least, negligently.
- 5.13 Ignorance or a mistake of law does not prevent a finding of intentional infringement even where such ignorance or mistake is based on independent legal advice.<sup>425</sup>

### Calculation of penalty

- 5.14 As noted at paragraph 5.5 above, when setting the amount of the penalty the CMA must have regard to the guidance on penalties in force at that time. The Penalties Guidance sets out a six-step approach for calculating the penalty.

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<sup>422</sup> Case 280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555, paragraph 124.

<sup>423</sup> See *OFT’s Guidance on Competition law application and Enforcement* (OFT407, December 2004), adopted by the CMA Board, paragraph 5.9.

<sup>424</sup> See paragraph 3.15 above.

<sup>425</sup> See Case C-681/11 *Bundeswettbewerbsbehörde v Schenker & Co. AG*, EU:C:2013:404, paragraph 38. See also *Enforcement* (OFT407, December 2004), adopted by the CMA Board, paragraph 5.10.

## Step 1 – starting point

- 5.15 The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated having regard to the relevant turnover of the undertaking and the seriousness of the infringement.<sup>426</sup>

### *Relevant turnover*

- 5.16 The ‘relevant turnover’ is the turnover of the undertaking in the relevant market affected by the infringement in the undertaking’s last business year.<sup>427</sup> As explained in section 2B above, the relevant market for these purposes is the supply of CGSTs for water storage used in sprinkler systems in the UK.<sup>428</sup> The ‘last business year’ is the undertaking’s financial year preceding the date when the infringement ended<sup>429</sup>, which in Balmoral’s case is the financial year running from 1 April 2011 to 31 March 2012.
- 5.17 Balmoral Tanks was a new entrant with limited business in the CGST market at the time of the alleged infringement. It entered the CGST market in late 2011, delivering its first certified CGST in February 2012.<sup>430</sup> Relevant turnover during the two month period from February to 31 March 2012 (the end of Balmoral’s financial year) was only **£19,200**.<sup>431</sup> However, turnover for the next full financial year, which includes the period when the alleged infringement took place (1 April 2012 to 31 March 2013) had risen significantly to **£1,932,355**,<sup>432</sup> suggesting that applying the relevant turnover from the period indicated by the Penalties Guidance would not be an accurate reflection of Balmoral Tanks’ real economic situation at the time of the infringement.<sup>433</sup>

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<sup>426</sup> Penalties Guidance, paragraphs 2.3 to 2.11.

<sup>427</sup> Penalties Guidance, paragraph 2.7. The CMA notes the observation of the Court of Appeal in *Argos Ltd and Littlewoods Ltd v Office of Fair Trading and JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318, at paragraph 169 that: ‘[ ] neither at the stage of the OFT investigation, nor on appeal to the Tribunal, is a formal analysis of the relevant product market necessary in order that regard can properly be had to step 1 of the Guidance in determining the appropriate penalty.’ The Court of Appeal considered that it was sufficient for the OFT to ‘be satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement’ (at paragraphs 170 to 173).

<sup>428</sup> See paragraphs 2.20 to 2.40 above.

<sup>429</sup> Penalties Guidance, paragraph 2.7.

<sup>430</sup> See paragraphs 3.3 and 3.4 above.

<sup>431</sup> Information attached to email from K&L Gates dated 24 July 2015 [URN 6101].

<sup>432</sup> Email from K&L Gates dated 29 April 2016 [URN 8381].

<sup>433</sup> See *Kier Group plc v OFT* [2011] CAT 3, paragraphs 126, 132 and 138, where the CAT makes clear that the level of penalty should reflect the undertaking’s real economic situation at the time the infringement was committed.

- 5.18 The CMA has received representations from Balmoral that the appropriate period for the CMA to consider is the financial year ending 31 March 2012,<sup>434</sup> that turnover after the alleged information sharing in July 2012 cannot be relevant to any fine calculation and that only turnover contemporaneous with, or prior to the 11 July 2012 meeting should be considered.<sup>435</sup>
- 5.19 Having had regard to the Penalties Guidance, the CMA considers that a more appropriate approach in the particular circumstances of this case is to use the 12-month period immediately preceding the infringement as a basis for determining relevant turnover. Balmoral Tanks' relevant turnover in this period was **£802,588**.<sup>436</sup>
- 5.20 This gives a more accurate reflection of Balmoral Tanks' economic situation at the time of the infringement, as a new entrant to the CGST market with increasing turnover, as compared to alternative approaches, such as using the previous financial year ending 31 March 2012 (which includes only two months of relevant turnover)<sup>437</sup> or the five month period of turnover up to July 2012 grossed up to a full 12 month period, or using Balmoral's turnover from a later period (such as at the end of the financial year during which the infringement took place).
- 5.21 The CMA has received representations from Balmoral to the effect that the CMA may not depart from the Penalties Guidance in this manner, and that it has used the 12-month period ending with the infringement 'purely on the basis that it enables the CMA to arrive at a penalty of a significantly higher quantum than that envisaged by the Guidance'.<sup>438</sup> The CMA is obliged to have regard to the Penalties Guidance pursuant to section 38(8) of the Act, but the Penalties Guidance is not legally binding and it is permissible for the CMA to depart from the approach set out in the Penalties Guidance where appropriate. The CMA considers that in the circumstances of this particular case, given the significant change in turnover around the time of the infringement, it is appropriate to exercise its discretion in order to give effect to the requirement

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<sup>434</sup> Letter from K&L Gates dated 22 April 2016 [URN 8348].

<sup>435</sup> Email from K&L Gates dated 29 April 2016 [URN 8381] and letter from K&L Gates dated 14 November 2016 [URN 8739].

<sup>436</sup> £19,200 from the period August 2011 to March 2012, plus £783,388 from the period April to July 2012: see email from K&L Gates dated 24 July 2015 [URN 6101] and email from K&L Gates dated 29 April 2016 [URN 8381]).

<sup>437</sup> As envisaged by paragraph 2.18 of the Penalties Guidance.

<sup>438</sup> See letter from K&L Gates dated 14 November 2016 [URN 8739].

that the relevant turnover reflect the undertaking's real economic situation at the time the infringement was committed,<sup>439</sup> and to use turnover from the 12-month period ending with the infringement. If a turnover figure of £19,200 for the period from April 2011 to July 2012 had been used, resulting in a penalty at the end of step 3 of £3,110, the CMA would have considered a significant uplift for deterrence to be appropriate at step 4.

- 5.22 On the basis of the approach above, the CMA therefore considers it appropriate to use the figure of **£802,588** as the relevant turnover.

### *Seriousness of the infringement*

- 5.23 In order to reflect adequately the seriousness of an infringement, the CMA will apply a starting point of up to 30 per cent of the undertaking's relevant turnover.<sup>440</sup> 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.<sup>441</sup>
- 5.24 When making its assessment of the seriousness of the infringement, the CMA will consider a number of factors.<sup>442</sup> The CMA will use a starting point towards the upper end of the range for the most serious infringements of competition law, including hardcore cartel activity.<sup>443</sup> 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.<sup>444</sup>
- 5.25 In assessing the seriousness of the information exchange infringement, the CMA considers that the infringement in question constitutes an infringement

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<sup>439</sup> See footnote 434 above.

<sup>440</sup> Penalties Guidance, paragraph 2.5.

<sup>441</sup> Penalties Guidance, paragraph 2.4.

<sup>442</sup> In accordance with paragraph 2.6 of the Penalties Guidance, these factors include the nature of the product, the structure of the market, the market shares of the undertakings involved in the infringement, entry conditions and the effect on competitors and third parties. The CMA may also take into account other relevant factors.

<sup>443</sup> Penalties Guidance, paragraph 2.5.

<sup>444</sup> Penalties Guidance, paragraph 2.6. See also the CAT's judgment in *Eden Brown* [2011] CAT 8, albeit in relation to a previous version of the Penalties Guidance, at para.78: "*The OFT is not bound by its previous decisions as the Appellants recognise, but we accept that there should be broad consistency in the OFT's approach. However, when it comes to assessment of seriousness in this context, each case is very dependent on its facts. We agree with the OFT that the seriousness percentage is not to be approached as an exercise of box-ticking of various elements, and para 2.5 of the Guidance makes clear that the enumerated factors are not the only considerations.*"

by 'object', and that the nature of the conduct involved (the exchange of commercially sensitive information regarding current pricing and future pricing intentions) is serious and inherently risks creating significant anti-competitive harm.<sup>445</sup>

- 5.26 The information exchange took place between all CGST suppliers on the market at that time (except CST which had by then made a leniency application to the OFT). It also took place in the context of a market which was already subject to a long-running cartel involving price-fixing, market sharing and bid-rigging. Balmoral was not a party to that cartel, and attended the meeting with the intention of making it clear that Balmoral was not prepared to participate in any market sharing or customer allocation.<sup>446</sup> It was, however, made clear during the meeting that the other parties to the information exchange were engaged in cartel activity and Balmoral continued to participate in the meeting, providing and receiving information about current pricing and future pricing intentions.<sup>447</sup>
- 5.27 Although it is not suggested that any agreement to fix prices involving Balmoral was reached at the meeting, the information exchanged was capable of reducing uncertainty regarding competitors' prices in the market.<sup>448</sup>
- 5.28 The infringement is based on the exchange of information at a single meeting, and is not part of an ongoing series of exchanges or regular discussions regarding pricing strategy.
- 5.29 Whilst the exchange of information reduced uncertainty in the market, it did not remove it completely.<sup>449</sup>
- 5.30 In addition, evidence of specific harm to consumers resulting from the exchange of information is limited. There is evidence that one party (Franklin Hodge) revised its prices for specific sizes of tanks and submitted a revised bid for a specific tender immediately after the meeting as a result of the information it received from Balmoral Tanks.<sup>450</sup> However, it is also clear that Balmoral Tanks continued to compete, including on some occasions pricing

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<sup>445</sup> See paragraphs 4.45 to 4.46 above.

<sup>446</sup> See paragraphs 3.35 to 3.36, and paragraph 3.44 above.

<sup>447</sup> See paragraphs 3.37 and 3.45 above.

<sup>448</sup> See paragraphs 4.46 to 4.69 above.

<sup>449</sup> See paragraph 4.69 above.

<sup>450</sup> See paragraphs 3.61-3.67 above.

below the bands discussed at the meeting.<sup>451</sup> There is some evidence from customers that while prices appear to have decreased following the entry of Balmoral Tanks, they fell further following the OFT's inspections in November 2012.<sup>452</sup>

- 5.31 The CMA considers that the appropriate starting point for the information exchange infringement is **18%** of Balmoral's relevant turnover.<sup>453</sup> Applying this percentage to the relevant turnover results in a starting penalty of **£144,466**. Balmoral has suggested using a starting point of 10% or less of Balmoral's relevant turnover.<sup>454</sup> In view of the factors set out above, the CMA considers that such a low starting point is not sufficient, given the serious nature of the infringement and the need to deter other undertakings from engaging in similar conduct in the future.

### *Step 2 – adjustment for duration*

- 5.32 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 less than one year, the CMA will treat that duration as a full year for the purpose of calculating the number of years of the infringement. In exceptional circumstances, the starting point may be decreased where the duration of the infringement is less than one year.<sup>455</sup>
- 5.33 The CMA has applied a multiplier of 1 to the starting point, in line with the Penalties Guidance.
- 5.34 The CMA does not consider that the circumstances of this information exchange infringement require a departure from the standard approach such

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<sup>451</sup> See Annex 3 of Balmoral's Response to the Statement of Objections dated 29 July 2016 [URN 8627].

<sup>452</sup> For example, one customer noted that once Balmoral began to supply CGSTs: 'Vulcan did bring their prices down to match as did Franklin Hodge and the market stabilised through 2012. From January [2013] I have noticed that quotes are coming in lower and when an order is being placed there is more competition between the companies. Prior to this the competing companies would lower their prices to a level but always Vulcan went below that level. Now they are back to aggressively undercutting each other to get orders similar to the situation in 2004 and 2005.' [Hall Fire Protection employee] witness statement, 21 March 2013, paragraphs 13-14 [URN 2415]. See also [Armstrong Priestley senior employee] witness statement, 30 October 2013, page 3 [URN 4936].

<sup>453</sup> Balmoral has suggested that the CMA consider the starting point percentages in the *Access Control and Alarms* case (CA98/03/2013 (CE/9248-10)) and the *Private Ophthalmology* case (CE/9784-13), see letter from K&L Gates dated 14 November 2016 [URN 8739]. The CMA has had regard to these decisions and considers the starting point percentage in the present case to be appropriate in the particular circumstances of this case.

<sup>454</sup> Balmoral's representations on the Draft Penalty Statement dated 14 November 2016, paragraph 13.

<sup>455</sup> Penalties Guidance, paragraph 2.12.

as to warrant a multiplier of less than 1. The practice of rounding up for infringements lasting less than a year aims at ensuring sufficient deterrence for shorter infringements, recognising that even infringements of a very short duration (including those which may take place at a single meeting) may have longer lasting effects.<sup>456</sup> The fact that the infringement is based on an exchange of information which took place at a single meeting is, however, taken into account at Steps 1 and 4.

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

- 5.35 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.<sup>457</sup> A non-exhaustive list of aggravating and mitigating factors is set out in the Penalties Guidance.<sup>458</sup> In the circumstances of this case, the CMA considered at step 3 the factors set out below.

#### *Aggravating factor – [X]*

- 5.36 The involvement of directors or senior management in an infringement can be an aggravating factor.<sup>459</sup>
- 5.37 [Balmoral Tanks senior employee 1] attended the meeting on 11 July 2012 and was directly involved in the information exchange which took place. The CMA therefore considers that an uplift in the penalty is appropriate. However, he did not instigate the meeting and attended with the intention of making it clear that Balmoral Tanks was not willing to take part in customer allocation or market sharing arrangements. Indeed, Balmoral's refusal to participate in the cartel is bound to have played at least some part in bringing the main cartel to

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<sup>456</sup> As recognised by the CAT in *Apex Asphalt and Paving Co Ltd v OFT* [2005] CAT 4: '...the effect of the infringement is not restricted to the short period referred to above but has a potential continuing impact on future tendering processes by the same tenderers. Moreover, in relation to tenders we bear in mind the specific nature of a tender process: once a contract has been awarded following an anti-competitive tender, the anti-competitive effect is irreversible in relation to that tender. The contract has been awarded; the contract works will in all likelihood have commenced. It is readily apparent that this is not a case where ongoing conduct may simply be rectified. We consider, therefore, that the OFT's decision not to make any adjustment for duration in the circumstances of this case was appropriate and reasonable.' (at paragraph 278).

<sup>457</sup> Penalties Guidance, paragraph 2.13.

<sup>458</sup> Penalties Guidance, paragraphs 2.13 – 2.15.

<sup>459</sup> Penalties Guidance, paragraph 2.14.

an end. The CMA considers that an uplift of **5%** is appropriate in the circumstances of this case.

*Mitigating factor – cooperation*

- 5.38 The CMA may decrease the penalty at step 3 for cooperation which enables the enforcement process to be concluded more effectively and/or speedily. The Penalties Guidance provides that, for these purposes, what is expected is cooperation over and above respecting time limits specified or otherwise agreed (which will be a necessary but not sufficient criterion).<sup>460</sup>
- 5.39 The CMA considers that it is appropriate to decrease the penalty for Balmoral at step 3 by **15%** to reflect its significant cooperation in both the civil and parallel criminal investigations, which involved: (i) agreeing to a streamlined access to file process, which led to savings of time and resource; (ii) making witnesses available for interview who provided witness statements, including [Balmoral Tanks senior employee 1] who also gave evidence at the criminal trial; and (iii) allowing the CMA access to electronic material and archive material for the purposes of the criminal investigation.
- 5.40 The CMA would not normally apply such a significant discount for cooperation, but has done so exceptionally in this case to take account of the significant cooperation provided by Balmoral in the context of both the criminal and civil investigations.
- 5.41 Balmoral has suggested in its representations to the CMA that its cooperation discount should be much higher and akin to a leniency discount. The CMA has a specific leniency policy (the ‘Leniency Guidance’).<sup>461</sup> In order to benefit from leniency, an undertaking must fulfil certain conditions, including accepting that it has infringed competition law.<sup>462</sup> Balmoral did not apply for leniency in accordance with the Leniency Guidance.
- 5.42 Applying the percentage increase and the percentage decrease for aggravating and mitigating factors, respectively, results in a penalty at step 3 of **£130,019**.

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<sup>460</sup> Penalties Guidance, paragraph 2.15 and footnote 28.

<sup>461</sup> *Applications for leniency and no-action in cartel cases* (OFT1495), adopted by the CMA Board.

<sup>462</sup> Leniency Guidance, paragraph 2.7.



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

- 5.43 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.<sup>463</sup> At step 4, the CMA will assess whether, in its view, the overall penalty is appropriate in the round.<sup>464</sup> Adjustment to the penalty at step 4 may result in either an increase or a decrease to the penalty.
- 5.44 Increases to the penalty 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.<sup>465</sup> 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.<sup>466</sup>
- 5.45 Conversely, where necessary, the penalty may be decreased at step 4 to ensure that the level of penalty is not disproportionate or excessive. In carrying out this assessment of whether a penalty is proportionate, the CMA will have regard to the 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.<sup>467</sup>

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<sup>463</sup> Penalties Guidance, paragraph 2.16.

<sup>464</sup> Penalties Guidance, paragraph 2.20.

<sup>465</sup> Penalties Guidance, paragraph 2.17.

<sup>466</sup> Penalties Guidance, paragraph 2.19. As noted above, there may also be exceptional cases 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. In such cases, the CMA would expect to make more significant adjustments, both for general and specific deterrence at step 4 (*Penalties Guidance*, paragraph 2.18).

<sup>467</sup> Penalties Guidance, paragraph 2.20. In this case, the CMA has considered a range of indicators of the size and financial position of Balmoral, including total worldwide turnover, adjusted net assets (namely, net assets in the last financial year plus three years of dividends), profit after tax and dividends. Unless stated otherwise, the CMA has

- 5.46 Balmoral Tanks is part of a larger undertaking,<sup>468</sup> with approximately 85% of the Balmoral group's turnover in the financial year ending 31 March 2015 generated outside Balmoral Tanks.<sup>469</sup>
- 5.47 Given the size and financial position of Balmoral, the CMA would normally be considering a significant uplift to ensure that the penalty was sufficient to deter the undertaking and others from breaching competition law in the future.
- 5.48 However, in light of the particular circumstances of this case, the CMA does not propose to apply an uplift to the penalty at the end of step 3, having regard to:
- Balmoral's refusal to join the main cartel despite facing significant pressure from other parties to do so; and more generally the overall pro-competitive effect of Balmoral's entry on the market (which prior to Balmoral's entry had been subject to a long-running cartel arrangement between all the UK suppliers of CGSTs) which is bound to have played at least some part in the collapse of the main cartel,
  - the fact that Balmoral did not instigate the meeting at which the information exchange took place, and attended with the intention of making it clear that it was not interested in allocating customers or market sharing,
  - the fact that the information exchange infringement was confined to a single meeting,
  - the time and resources incurred by Balmoral in relation to both the criminal and civil investigations into the main cartel, [X].

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based its assessment on figures contained in Balmoral Group's published annual accounts for the financial years ending 31 March 2013 [URN 8710], 31 March 2014 [URN 8711] and 31 March 2015 [URN 8712].

<sup>468</sup> The Balmoral Group describes itself as 'a diverse privately owned operation specialising in subsea buoyancy, flotation, insulation, elastomer and renewable energy products; civil and environmental engineering liquid storage/treatment solutions and property development.' (Balmoral Group Annual Report and Accounts dated 31 March 2015, page 2)

<sup>469</sup> In the financial year ending 31 March 2015, Balmoral Tanks' turnover was £21,051,785 compared with worldwide turnover for the group of £136,534,000. (See Balmoral Tanks annual accounts ending 31 March 2015, page 4 [URN 8716] and Balmoral Group's annual accounts ending 31 March 2015, page 18 [URN 8712]).

- 5.49 Assessing the penalty in the round, the CMA considers that a penalty of **£130,019** is appropriate in this case for deterrence purposes without being disproportionate or excessive.
- 5.50 This figure represents approximately:
- 0.10% of Balmoral Group's worldwide turnover in the financial year ending 31 March 2015, and 0.14% of average annual worldwide turnover (over a three year period),
  - 0.20% of Balmoral Group's net assets,<sup>470</sup>
  - 0.46% of Balmoral Group's profit after tax for the financial year ending 2015, and 1.09% of Balmoral Group's average annual profit after tax (over the three year period ending 31 March 2015).
- 5.51 Balmoral has submitted that it would infringe the principle of equal treatment for the CMA to impose a penalty on Balmoral in respect of the information exchange infringement, but not also on the Settling Parties.<sup>471</sup> The decision not to impose a separate penalty on the Settling Parties in respect of the information exchange infringement reflects the particular circumstances, including the closeness of the link between the Settling Parties' involvement in the facts underlying the information exchange infringement and the main cartel infringement, and the level of the penalties imposed on the Settling Parties in relation to the main cartel infringement.
- 5.52 In the context of the Main Cartel Infringement, the Settling Parties have been fined for conduct which took place between 29 April 2005 and 27 November 2012, including the 11 July 2012 meeting at which the information exchange infringement took place. In addition, as explained in the Main Cartel Decision, the fines for the Settling Parties have been reduced significantly to ensure that they were not disproportionate given the size and financial position of those undertakings. The fines for two of the three Settling Parties (Galglass, Kernoff, IIT and KW Supplies) were also reduced further to prevent the maximum

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<sup>470</sup> Being net assets in the financial year ending 31 March 2015. Balmoral Group did not pay out dividends in the financial years ending 31 March 2013, 2014 and 2015. Net assets are the same as adjusted net assets for the three year period ending 31 March 2015.

<sup>471</sup> Balmoral's representations on the Draft Penalty Statement dated 14 November 2016, paragraph 2.

penalty being exceeded.<sup>472</sup> These considerations do not apply to Balmoral, as it was not a party to the main cartel.

- 5.53 A direct comparison between the penalties proposed for the Settling Parties in respect of the main cartel, and the penalty proposed for Balmoral in respect of the information exchange would not be appropriate, due to the very different infringements in question. However, the CMA has had regard, in assessing the appropriateness and proportionality of the proposed penalty for Balmoral in the round, to the penalties imposed on the Settling Parties (and the levels of those penalties considered in the light of various financial indicators compared with those for Balmoral set out in paragraph 5.50 above). The CMA considers that the penalty imposed on Balmoral is appropriate and proportionate in the round, taking into account the varying sizes and financial position of the Parties.<sup>473</sup>

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

- 5.54 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.<sup>474</sup>
- 5.55 Based on worldwide turnover in Balmoral Group Holding Limited's Annual report and accounts dated March 2015, no adjustment is required at this step as the proposed penalty does not exceed 10% of Balmoral's applicable turnover.<sup>475</sup>

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<sup>472</sup> See paragraph 5.56 below for an explanation of the statutory cap which applies to penalties imposed by the CMA.

<sup>473</sup> For example, Balmoral Group's worldwide turnover for the financial year to 31 March 2015 was £136,534,000. KW Supplies' turnover for the year ending 31 October 2015 was £309,000; consolidated worldwide turnover of Galglass' relevant parent company, Smyce Holdings Limited, for the financial year ending 31 December 2015 was €11,852,011 (see Smyce Holdings Limited consolidated annual accounts ending 31 December 2015, page 7); that of FHI was £123,352,653 for the year ending 31 December 2014 (see Carter Thermal Industries Limited consolidated annual accounts ending 31 December 2014, page 7).

<sup>474</sup> Section 36(8) of the Act, the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (as amended), and Penalties Guidance, paragraph 2.21.

<sup>475</sup> Balmoral Group's consolidated profit and loss account lists worldwide turnover for the year ended 31 March 2015 as £136,534,000. Balmoral Group Annual Report and Accounts dated 31 March 2015, page 18 [URN 8712].

### *Step 6 – application of reductions for leniency and settlement*

- 5.56 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.<sup>476</sup> Reductions for leniency or settlement are not applicable to Balmoral.

### *Financial hardship*

- 5.57 In exceptional circumstances, the CMA may reduce a penalty where the undertaking is unable to pay the penalty proposed 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.<sup>477</sup>
- 5.58 The CMA considers that in the circumstances of this case, there are no exceptional circumstances such as to warrant making any financial hardship adjustment to the penalty after step 6.

### **Payment of penalty**

- 5.59 In light of the above, the CMA considers a penalty rounded to £130,000 to be appropriate in the circumstances of this case.
- 5.60 The following table sets out the penalty which the CMA requires Balmoral to pay:

Step	Description	Adjustment
	<b>Relevant turnover</b>	<b>£802,588</b>
<b>1</b>	Starting point	18%
	<b>Penalty after Step 1</b>	<b>£144,466</b>
<b>2</b>	Duration multiplier	1
	<b>Penalty after Step 2</b>	<b>£144,466</b>
<b>3</b>	[Director or senior management involvement]	5%

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<sup>476</sup> Penalties Guidance, paragraphs 2.25 and 2.26. See also OFT1495 *Applications for leniency and no-action in cartel cases*.

<sup>477</sup> Penalties Guidance, paragraph 2.27.

	Adjustment for aggravating or mitigating factors	Cooperation	-15%
		<b>Balance</b>	<b>-10%</b>
	<b>Penalty after Step 3</b>		<b>£130,019</b>
<b>4</b>	Adjustment for specific deterrence or proportionality		0%
	<b>Penalty after Step 4</b>		<b>£130,019</b>
<b>5</b>	Adjustment to take account of the statutory maximum penalty		N/A
	<b>Penalty after Step 5</b>		<b>£130,019</b>
<b>6</b>	Application of leniency and/or settlement discounts		0%
	<b>Final Penalty</b>		<b>£130,000</b>

5.61 The penalty will become due to the CMA on 20 February 2017<sup>478</sup> and must be paid to the CMA by close of banking business on that date.<sup>479</sup>

SIGNED:

Simon Polito, Inquiry Chair, for and on behalf of the Competition and Markets Authority

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Gavin Robert, Panel Member, for and on behalf of the Competition and Markets Authority

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<sup>478</sup> The next working day two calendar months from the expected date of receipt of the Decision.

<sup>479</sup> Details on how to pay are set out in the letter accompanying this Decision.

[~~S~~]

George Lusty, Project Director in the Enforcement Directorate, for and on behalf of the Competition and Markets Authority

[~~S~~]

All of whom are the members of, and who together constitute, the Case Decision Group.

19 December 2016

## Annex A – Defined terms

the Act	Competition Act 1998
Article 101 TFEU	Article 101 of the Treaty on the Functioning of the European Union
Balmoral	Balmoral Tanks Limited and its parent company Balmoral Group Holdings Limited
Balmoral Group	Balmoral Group Holdings Limited
Balmoral Tanks	Balmoral Tanks Limited
CGST	cylindrical galvanised steel tank, as defined at paragraph 1.2
the Chapter I prohibition	the prohibition in section 2(1) of the Competition Act 1998
CJ	Court of Justice
CST	CST Industries (UK) Limited and its parent company CST Industries Inc.
CST UK	CST Industries (UK) Limited
EA02	Enterprise Act 2002
FHI	Franklin Hodge Industries Limited and its parent company Carter Thermal Industries Limited
Franklin Hodge	Franklin Hodge Industries Limited
FS Contractors	fire suppression contractors
Galglass	Galglass Limited, in liquidation
GC	General Court
GRPs	glass reinforced plastic tanks
GST	galvanised steel tank, as defined at paragraph 2.1
IIT	Irish Industrial Tanks Limited, parent company of Galglass Limited and Kernoff Limited
Kernoff	Kernoff Limited, parent company of Galglass



Kondea	Kondea Water Supplies Limited, in liquidation
KW Supplies	KW Supplies Limited, economic successor to Kondea
Leniency Guidance	<i>Applications for leniency and no-action in cartel cases</i> (OFT1495), adopted by the CMA Board
LPCB	Loss Prevention Certification Board
Parties	FHI, Galglass, Kernoff, IIT, KW Supplies and Balmoral
Penalties Guidance	<i>Guidance as to the appropriate amount of a penalty</i> (OFT423, September 2012), adopted by the CMA Board
Settling Parties	FHI, Galglass, Kernoff, IIT and KW Supplies
TFEU	the Treaty on the Functioning of the European Union
the Information Exchange Decision	this decision of the CMA in respect of the exchange of commercially sensitive information in relation to the supply of cylindrical galvanised steel tanks for water storage in the UK dated 19 December 2016
the information exchange infringement	the infringement summarised at paragraph 1.2 concerning conduct by the Parties
the Main Cartel Decision	the decision of the CMA in respect of price-fixing, bid rigging and market sharing by way of customer allocation in relation to the supply of cylindrical galvanised steel tanks for water storage in the UK dated 19 December 2016
the main cartel infringement	the infringement summarised at paragraph 1.3 concerning conduct by the Settling Parties and CST
the OFT	the Office of Fair Trading, the CMA's predecessor organisation
the parties to the main cartel	CST UK, Franklin Hodge, Galglass and Kondea, being the companies directly involved in the main cartel
the parties to the information exchange	Franklin Hodge, Galglass, Kondea and Balmoral Tanks, being the companies directly involved in the information exchange
the UK	the United Kingdom