Decision of the Competition and Markets Authority

Competition Act 1998

Supply of products to the furniture industry (drawer fronts)

Case CE/9882-16

27 March 2017

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

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 Names have been replaced by a general descriptor of the individual's role.

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1. INTRODUCTION AND EXECUTIVE SUMMARY

1.1 By this decision (the 'Decision'), the Competition and Markets Authority (the 'CMA') has concluded that the following undertakings (each a 'Party', together the 'Parties') have infringed the prohibition imposed by section 2(1) (the 'Chapter I prohibition') of the Competition Act 1998 (the 'Act') and/or Article 101(1) of the Treaty on the Functioning of the European Union ('Article 101 TFEU'):

(a) Thomas Armstrong (Timber) Limited ('TATL') and its parent company Thomas Armstrong (Holdings) Limited ('TAHL') (together, 'TA');

(b) Hoffman Thornwood Limited ('HTL') and its parent company Consolidated Timber Holdings Limited ('CTHL'), (together, 'HT').

1.2 The CMA has concluded that:

(a) between July 2006 and September 2008 ('Relevant Period (a)'), HT and TA infringed the Chapter I prohibition and/or Article 101 TFEU by participating in a single continuous infringement through an agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of chipboard and MDF based drawer fronts to customers in the UK ('Infringement (a)');

(b) between at least September 2011 and October 2011 ('Relevant Period (b)'), HT and TA infringed the Chapter I prohibition and/or Article 101 TFEU by participating in an infringement through an agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of chipboard and MDF based drawer fronts to customers in the UK ('Infringement (b)').

1.3 The CMA finds that Infringements (a) and (b) together formed a single repeated infringement (the 'Infringement').

1.4 By this Decision, the CMA is imposing financial penalties under section 36 of the Act.

2. FACTUAL BACKGROUND

A. Industry overview

Drawer fronts

2.1 The Infringement concerns the supply of drawer fronts to the bedding furniture industry in the UK.

2.2 A drawer front is the outward facing panel of a drawer.

2.3 The Infringement concerns drawer fronts made from chipboard or MDF. Such drawer fronts may have a surface component (for example they may be laminated with either a white or décor paper);[1] and they have additional workings such as dowel holes, handle holes, and edging.[2]

2.4 The principal raw material for a drawer front's production is chipboard.[3]

2.5 A number of factors influence the pricing of drawer fronts, including: the current and expected future costs of raw materials; the size of the component; the quality of the decorative face; currency fluctuations; processing costs; geography and haulage costs; quantities ordered; production capacity and availability; the financial standing and credit risk of the customer; the attractiveness of the customer (for example, in terms of potential future quantities and a long term trading relationship); the aggressiveness of the customer's purchasing team; payment terms; possible reciprocal trade opportunities; and competitor activity.[4]

2.6 There is no 'standard' drawer front. Drawer fronts are tailor-made and vary according to customer requirements.[5]

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[1] HTL's response dated 20 May 2016 to the CMA's section 26 notice dated 30 March 2016, question 2(a) URN H0102.
[2] Transcript of an interview with [TATL senior employee] on [✂], page 10 URN 6062.
[3] Transcript of an interview with [TATL senior employee] on [✂], page 10 URN 6062.
[4] TATL's response dated 27 April 2016 to the CMA's section 26 notice dated 30 March 2016, questions 7 and 10 URN H0036; transcript of an interview with [TATL senior employee] on [✂], page 11 URN 6062; HTL's response dated 20 May 2016 to the CMA's section 26 notice dated 30 March 2016, question 10 URN H0102.
[5] HTL's response dated 20 May 2016 to the CMA's section 26 notice dated 30 March 2016, question 2(b) URN H0102.

2.7 During Relevant Periods (a) and (b) there were a number of manufacturers of drawer fronts in the UK.[6] There was also some (limited) competition from manufacturers based outside the UK, most notably Belgium.[7]

B. The Parties

TA

2.8 TATL is a limited liability company registered in England and Wales, with company number 00818914. It was incorporated on 9 September 1964. Its registered address is Workington Road, Flimby, Maryport, Cumbria, CA15 8RY.[8]

2.9 TATL is a manufacturer and supplier of chipboard based drawer fronts, as well as other timber based components, to the furniture industry.[9] During Relevant Periods (a) and (b), TATL supplied drawer fronts to customers such as Silentnight, Sealy UK, Rest Assured, Hypnos Ltd and Dreams.[10]

2.10 The directors of TATL:

(a) during Relevant Period (a) were [✂], [✂], [✂] and [✂];[11]

(b) during Relevant Period (b) were [✂], [✂], [✂] and [✂].[12]

2.11 The current directors of TATL are [✂], [✂]and [✂].[13]

2.12 TATL is, and was throughout Relevant Periods (a) and (b), owned by TAHL (3998 ordinary shares), and [✂] (2 ordinary shares).[14]

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[6] Transcript of an interview with [TATL senior employee] on [✂], pages 11 and 13 to 14 URN 6062.
[7] TATL's response dated 27 April 2016 to the CMA's section 26 notice dated 30 March 2016, question 7 URN H0036; HTL's response dated 20 May 2016 to the CMA's information request dated 30 March 2016, question 7 URN H0102; witness statement of [Dreams employee 1] dated [✂], paragraph 5 URN 10722.
[8] TATL Annual Return dated 29 March 2016.
[9] TATL's response dated 27 April 2016 to the CMA's section 26 notice dated 30 March 2016, question 2 URN H0036; http://www.thomasarmstrong.co.uk/divisions/timber-division/our-products/.
[10] TATL's response dated 27 April 2016 to the CMA's section 26 notice dated 30 March 2016, question 9 URN H0036.
[11] TATL Annual Returns dated 29 March 2007, 29 March 2008 and 29 March 2009.
[12] TATL Annual Return dated 29 March 2012.
[13] TATL Annual Return dated 29 March 2016.
[14] TATL's response dated 27 April 2016 to the CMA's section 26 notice dated 30 March 2016, question 1 URN H0036. TATL Annual Returns dated 29 March 2007, 29 March 2008, 29 March 2009, 29 March 2012 and 29 March 2016.

2.13 TAHL is a limited liability company registered in England and Wales, with company number 00244751.[15] It was incorporated on 1 January 1930. Its registered address is Workington Road, Flimby, Maryport, Cumbria, CA15 8RY.[16]

2.14 The directors of TAHL:

(a) during Relevant Period (a) were [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂] and [✂];[17]

(b) during Relevant Period (b) were [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], and [✂].[18]

2.15 The current directors of TAHL are [✂], [✂], [✂], [✂], [✂], [✂] and [✂].[19]

HT

2.16 HTL is a limited liability company registered in England and Wales, with company number 01451361. It was incorporated on 28 September 1979. Its registered address is Clock House, Station Approach, Shepperton, Middlesex, TW17 8AN.[20]

2.17 HTL is a producer of wood based panels for industry; in particular, it is a manufacturer and supplier of drawer fronts and drawer bases to the furniture industry.[21] During Relevant Periods (a) and (b), HTL supplied drawer fronts to customers such as Horatio Myer & Co Ltd, Nestledown Beds Ltd, Airsprung Furniture Ltd, Sweet Dreams (Nelson) Ltd and Hypnos Ltd.[22]

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[15] TAHL is the holding company for a group of companies based in the North of England engaged in building, contracting, allied trades, property development and mineral extraction, the manufacture of building materials and timber products and the distribution and sale of such products. TATL was the only company within the Thomas Armstrong corporate group supplying drawer fronts during Relevant Periods (a) and (b): see TATL's response dated 27 April 2016 to the CMA's section 26 notice dated 30 March 2016, questions 1 and 13 URN H0036.
[16] TAHL Annual Return dated 20 April 2016.
[17] TAHL Annual Returns dated 20 April 2007, 20 April 2008 and 20 April 2009. [✂].
[18] TAHL Annual Return dated 20 April 2012; https://beta.companieshouse.gov.uk/officers/iXXMNMLF6L2a7lxsN1d6jC_aLW4/appointments; and https://beta.companieshouse.gov.uk/officers/YAN78yYvTDG3fLy2nny_Z97zYhU/appointments.
[19] TAHL Annual Return dated 20 April 2016.
[20] HTL Annual Return dated 30 November 2015.
[21] HTL's response dated 20 May 2016 to the CMA's section 26 notice dated 30 March 2016, question 2 URN H0102; http://hoffmanthornwood.co.uk/
[22] HTL's response dated 20 May 2016 to the CMA's section 26 notice dated 30 March 2016, question 9 URN H0102.

2.18 The directors of HTL:

(a) during Relevant Period (a) were [✂], [✂], [✂], [✂], and [✂];[23]

(b) during Relevant Period (b) were [✂], [✂], [✂], [✂] and [✂].[24] These individuals are also the current directors of HTL.[25]

2.19 HTL is, and was through Relevant Periods (a) and (b), a wholly owned subsidiary of CTHL.[26, 27] CTHL is a limited liability company registered in England and Wales, with company number 02295212. It was incorporated on 12 September 1988. Its registered address is Clock House, Station Approach, Shepperton, Middlesex, TW17 8AN.[28]

2.20 The directors of CTHL:

(a) during Relevant Period (a) were [✂], [✂], [✂], [✂], [✂], [✂], [✂] and [✂];[29]

(b) during Relevant Period (b) were [✂], [✂], [✂], [✂], [✂], [✂]and [✂].[30]

2.21 The current directors of CTHL are [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂] and [✂].[31]

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[23] HTL Annual Return dated 30 November 2006, 30 November 2007 and 30 November 2008.
[24] HTL Annual Return dated 30 November 2012 and 30 November 2013.
[25] HTL Annual Return dated 30 November 2015.
[26] HTL's response dated 20 May 2016 to the CMA's section 26 notice dated 30 March 2016, question 1 URN H0102. HTL Annual Returns dated 30 November 2006, 30 November 2007, 30 November 2008, 30 November 2012, 30 November 2013 and 30 November 2015. The Annual Returns dated 30 November 2006 and 30 November 2007 state that Hoffman and Co Limited was the 100 per cent parent of HTL. Hoffman and Co Limited's abbreviated accounts dated 31 December 2006 (page 5) and Annual Report and Financial Statements dated 31 December 2007 (page 12) state that its ultimate parent company was CTHL. CTHL's Annual Report and Financial Statements dated 31 December 2006 (page 29) and 31 December 2007 (page 30) state that Hoffman and Co Limited was a holding company, and one of its wholly owned subsidiaries.
[27] CTHL is a holding company with no turnover of its own. During Relevant Periods (a) and (b), HTL was the only company within the Consolidated Timber Holdings group supplying drawer fronts to the bedding furniture industry. The CMA has not seen any evidence that would suggest that CTHL was itself involved in the conduct, or that any of the directors of CTHL other than [HTL senior employee] were aware of the conduct.
[28] CTHL Annual Return dated 8 April 2016.
[29] CTHL Annual Returns dated 22 March 2007, 22 March 2008 and 23 March 2009. [✂]
[30] CTHL Annual Returns dated 22 March 2012.
[31] CTHL Annual Return dated 22 March 2016.

C. The CMA's investigation

Criminal investigation

2.22 The CMA's investigation into suspected cartel conduct in relation to the supply of products to the furniture industry began in November 2011 as a criminal cartel investigation under section 192 of the Enterprise Act 2002 (EA02) into the supply of drawer wraps, following an email to the OFT cartels hotline.[32] This investigation was expanded to include drawer fronts in December 2011.

2.23 Following a thorough investigation, the CMA's criminal investigation was closed in September 2015. Having applied the Code for Crown Prosecutors, the CMA decided not to instigate criminal proceedings under section 188 of the EA02 against any persons in respect of the conduct which was the subject of that investigation.

Civil investigation

2.24 The CMA's civil investigation under the Act was opened on 30 March 2016 and covered conduct in relation to:

(a) the supply of chipboard and MDF based drawer wraps by BHK (UK) Limited ('BHK UK')[33] and TATL; and

(b) the supply of chipboard and MDF based drawer fronts by TATL and HTL.

2.25 This Decision relates only to the civil investigation into an infringement of the Chapter I prohibition and/or Article 101 TFEU in relation to drawer fronts: the Infringement.

2.26 Material obtained during the criminal investigation and considered relevant to the civil investigation under the Act was placed on the civil case file. This includes documents seized pursuant to warrants issued under section 194 of the EA02, information and documents obtained under section 193 of the EA02, interview transcripts and witness statements.

2.27 During the course of the civil investigation, the CMA sent TATL and HTL notices requiring the production of documents and information under section

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[32] Email from [✂] to the cartels hotline [✂] URN H0121.

[33] BHK UK is a limited liability company registered in England and Wales, with company number 02195429. It was incorporated on 18 November 1987. BHK UK's registered address is Davy Drive, North West Industrial Estate, Peterlee, County Durham, SR8 2JF. See: BHK UK Annual Return dated 25 October 2015.

26 of the Act, and letters to BHK UK requesting documents and information without recourse to the CMA's formal powers.

2.28 The following paragraphs describe the nature of the evidence concerning the individuals who the CMA considers were the key participants in the Infringement.

TATL

2.29 [✂][34]

2.30 [✂]. Whilst [TATL senior employee] denied the cartel conduct [✂], he changed his stance in an interview on [✂].[35] This later evidence is consistent with the documentary evidence in relation to the Infringement.[36]

HTL

2.31 [✂][37]

2.32 [✂]

Settlement

2.33 Both TA and HT expressed an interest in exploring settlement with the CMA.

2.34 In accordance with the CMA's settlement policy, on 4 November 2016, the CMA provided TA and HT with a draft Statement of Objections[38] together with access to the documents referred to in the draft Statement of Objections and a list of the documents on the CMA's file. On 11 November 2016, the CMA provided TA and HT with a draft penalty calculation.

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[34] [✂]
[35] [[✂].
[36] Whilst HT accepts that [TATL senior employee]'s evidence is sufficient to establish that the cartel conduct took place, it does not consider that [TATL senior employee]'s evidence can be relied upon as credible evidence of the relative roles of HTL and TATL. HT considers that [TATL senior employee] is seeking to mitigate the gravity of his own involvement in the Infringement at the expense of HTL. The CMA does not consider it necessary for the purposes of this case to reach a conclusion as to the reliability of [TATL senior employee]'s evidence specifically in relation to the relative responsibility of HTL and TATL for the Infringement.
[37] [✂]
[38] Under paragraph 14.13 of the CMA's guidance, *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8), a business in settlement discussions will be presented with a Summary Statement of Facts. In the present case, as a draft Statement of Objections was already in preparation, TA was provided with the draft Statement of Objections.

2.35 Both TA and HT provided the CMA with written representations on the draft Statement of Objections and the draft penalty calculation, and made oral representations on those documents in settlement meetings held on 30 November 2016.

2.36 TA and HT, on 11 January 2017 and 12 January 2017, respectively:

(a) admitted that they had infringed the Chapter I prohibition and Article 101 TFEU (in the terms set out in a revised draft of the Statement of Objections dated 6 January 2017 that took account of the Parties' representations);

(b) agreed to accept a maximum penalty in the amount of the draft penalty calculation (as set out in a revised draft penalty calculation dated 6 January 2017 that took account of the Parties' representations); and

(c) agreed to cooperate in expediting the process for concluding the investigation.

2.37 On 19 January 2017, the CMA announced that it had settled the case with TA and HT.

2.38 On 25 January 2017, the CMA issued a Statement of Objections to the Parties. The Parties made no representations on the Statement of Objections.

Decision in relation to drawer wraps

2.39 In addition to the Infringement, the CMA has found in a separate decision that TA was also involved in an infringement which had as its object the prevention, restriction or distortion of competition in relation to the supply of chipboard and MDF based drawer wraps to customers in the UK (the 'Drawer Wrap Infringement').

2.40 A decision concerning the Drawer Wrap Infringement is being issued at the same time as this Decision. The financial penalty that the CMA is imposing for TA's involvement in the Drawer Wrap Infringement has been taken into consideration in assessing the level of the penalty for TA's involvement in the Infringement (see paragraphs 6.43 to 6.45 below).

3. THE RELEVANT MARKET

A. Introduction

3.1 When applying the Chapter I prohibition and/or Article 101 TFEU, the CMA is obliged to define the relevant market only where it is not possible, without such a definition, to determine whether the agreement and/or concerted practice was liable to affect trade in the UK and/or between Member States, and whether it had as its object or effect the prevention, restriction or distortion of competition.[39]

3.2 No such obligation arises in this case because the Infringement involved an agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition and was by its very nature liable to affect trade and competition in the UK and between Member States.

3.3 However, the CMA has formed 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 the CMA may decide to impose.[40] When assessing the relevant market for these purposes, it is not necessary to carry out a formal analysis: the relevant market may properly be assessed on a broad view of the particular trade affected by the infringement in question.[41]

3.4 The CMA is making a decision on the definition of the product and geographic market in this case for the sole purpose of determining the level of the applicable financial penalty. It does so without prejudice to the CMA's discretion to adopt a different market definition in any subsequent case in light of the relevant facts and circumstances in that case.

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[39] Case T-62/98 Volkswagen AG v European Commission [2000] ECR II-2707 ('*Volkswagen*'), par. 230 and Case T-29/92 SPO and Others v Commission [1995] ECR II-289 ('*SPO*'), par. 74.

[40] *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.

[41] Argos and Littlewoods v OFT and JJB Sports v OFT [2006] ECWA Civ 1318, paragraphs 169 to 173 and 189 and the CAT judgment on penalty, Argos and Littlewoods v OFT [2005] CAT 13, at [176 to 178]. The CAT held that in Chapter I cases, determination of the relevant market is neither intrinsic to, nor normally necessary for, a finding of infringement. It also held that is would be disproportionate to require the [OFT] to devote resources to a detailed market analysis, where the only issue is the penalty.

B. Relevant product market

3.5 The Infringement concerns the supply of chipboard and MDF based drawer fronts to the bedding furniture industry. As set out in paragraph 2.24 above, the CMA's civil investigation also concerned conduct by TATL and BHK UK Limited in relation to the supply of chipboard and MDF based drawer wraps. The CMA has therefore focused its market definition analysis on the following questions:

(a) whether drawer wraps are in the same product market as drawer fronts;

(b) whether the supply of drawer fronts is part of a wider market – the supply of timber based drawer components; and

(c) whether the supply of drawer fronts to the bedding furniture industry is an economic market, given that TATL and HTL only supply drawer fronts to bedding furniture customers.

Are drawer wraps in the same market as drawer fronts?

3.6 From a demand side perspective, a drawer wrap is not a substitute for a drawer front, and nor are drawer fronts interchangeable with any other product. Indeed, as noted in paragraph 2.6 above, drawer fronts, are tailor-made and vary according to customer requirements.[42]

3.7 Witness evidence suggests that customers did, however, consider switching suppliers in response to an increase in price for drawer components (albeit that they might not have ultimately switched supplier).[43]

3.8 From a supply side perspective, the conditions of competition throughout Relevant Periods (a) and (b) were different as between the supply of drawer wraps and the supply of drawer fronts. BHK UK and TATL manufactured drawer wraps for the bedding, domestic and office furniture industries.[44] The CMA understands that, as of early 2006, BHK UK and TATL are the only two

[42] HTL's response dated 20 May 2016 to the CMA's section 26 notice dated 30 March 2016, question 2(b) URN H0102.
[43] See for example, witness statement of [Silentnight employee 1] dated [✂], paragraphs 10 to 12 URN 11216.
[44] TATL's response dated 4 August 2016 to the CMA's section 26 notice dated 27 July 2016, question 1(a) URN H0149; BHK UK's response dated 1 September 2016 to the CMA's information request dated 27 July 2016, question 1 URN H0127; witness statement of [BHK UK employee] dated [✂], paragraph 3 URN 12127.

independent manufacturers of drawer wraps in the UK.[45] TATL and HTL manufactured drawer fronts for the bedding furniture industry only,[46] and there were other manufacturers of drawer fronts who supplied the bedding and/or wider furniture industries.[47] Indeed, [TATL senior employee] has stated that the drawer front market was '*extremely competitive'* and that business was '*difficult to obtain'* given that there were numerous drawer front manufacturers in the UK.[48]

3.9 As regards the ability to switch from producing drawer wraps to drawer fronts in response to a relative increase in price, whilst there is evidence to suggest that the manufacture of drawer fronts is a '*very simple, straightforward process, whereby you need two pieces of machinery to do it: a beam saw to cut the chipboard and a boring unit to machine the chipboard,*'[49] there is also evidence that it is nevertheless a '*completely different process'* from manufacturing drawer wraps, requiring additional capabilities such as edge banding, which is quite expensive.[50]

3.10 These factors appear to have prevented TATL from expanding its supply of drawer fronts more widely, even within the bedding furniture industry. When asked in interview about the steps that he would take to go out and win new drawer front bedding furniture customers, [TATL senior employee] stated:

'…the problem that we have is we've only got one machine, a dated beam saw, one reasonable grooming and boring unit. Our capabilities were very limited as to what we could produce…

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[45] Transcript of an interview with [TATL senior employee] on [✂], point 25 page 15 URN 12371; see, for example, witness statement of [DP Furniture employee] dated [✂], paragraph 4 URN 6299; witness statement of [KD Products employee] dated [✂], paragraphs 6 and 13 URN 12355. On 31 March 2006, the only other independent UK based manufacturer, LMS International Limited ('LMS'), was placed in administration; LMS was dissolved on 10 July 2007: Notice of administrators appointment, Form 2.2B, as filed at Companies House; Notice of dissolution dated 10 April 2007, as filed at Companies House.

[46] Transcript of an interview with [TATL senior employee] on [✂], page 12 URN 6062; TATL's response dated 4 August 2016 to the CMA's section 26 notice dated 27 July 2016, question 1(b) URN H0149; and HTL's response dated 22 August 2016 to the CMA's section 26 notice dated 27 July 2016, question 1 URN H0147.

[47] Transcript of an interview with [TATL senior employee] on [✂], pages 11 and 13 to 14 URN 6062; see also, for example: witness statement of [Customer 1 employee] dated [✂], paragraph 13 URN 10883; and witness statement of [Myers employee] dated [✂], paragraph 9 URN 10885.

[48] Transcript of an interview with [TATL senior employee] on [✂], pages 11, 17 to 18 and 20 URN 6062. See also witness statement of [Shaw Timber employee] dated [✂], paragraph 2 URN 11310.

[49] Transcript of an interview with [TATL senior employee] on [✂], page 10 URN 6062. See also witness statement of [Silentnight employee 1] dated [✂], paragraph 25 URN 11216.

[50] Transcript of an interview with [BHK UK senior employee] on [✂], pages 148 to 150 URN 10652.

…We don't have the edging machinery…We don't have the facilities to do the shaping of drawer fronts…We could only cut down to certain sizes and we could only machine up to certain size as well, so we were very restricted in what we could do, part of that being down to the fact that the machinery that we installed and set up was specifically, in the first instance, to produce Silentnight product.' [51]

3.11 The CMA also notes that, despite being the larger manufacturer of drawer wraps,[52] BHK UK manufactured drawer fronts only to a very limited extent during Relevant Periods (a) and (b), with [BHK UK senior employee] stating that, *'I wouldn't consider ourselves as a manufacturer for fronts. There might be the coincidental profile that ends up as a front, but we're not a manufacturer for fronts.*'[53]

3.12 This supports the argument that despite the straightforwardness of the process, there are nevertheless additional costs in switching production, suggesting that suppliers might not be able to profitably switch to making drawer fronts in response to a small but significant price rise relative to drawer wraps.

3.13 For present purposes, therefore, the CMA is adopting a market definition in which drawer wraps and drawer fronts are in separate markets.

The supply of timber based drawer components

3.14 Throughout Relevant Periods (a) and (b), TATL and HTL manufactured and/or supplied other timber based drawer components such as drawer bases and drawer sides.[54] A further question therefore arises as to the extent to which the relevant product market should be defined more widely, to encompass these other products.

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[51] Transcript of an interview with [TATL senior employee] on [✂], pages 16 and 17 URN 6062.

[52] Witness statement of [DP Furniture employee] dated [✂], paragraph 10 URN 6299: '*Armstrong's makes about 10-15,000 drawer wraps per week but BHK [UK] make much more, up to 80,000 drawers per week dependent on demand'* ; transcript of an interview with [BHK UK senior employee] on [✂], pages 62 and 63 URN10652.

[53] Transcript of an interview with [BHK UK senior employee] on [✂], pages 148 to 152 URN10652. See also, for example, BHK UK Monthly Management Report December 2007, which states that *'…we are not a drawer front producer and need a partner in the business…'* URN 3373.

[54] BHK UK's response dated 20 May 2016 (as amended) to the CMA's information request dated 30 March 2016, question 2 URN H0105; TATL's response dated 27 April 2016 to the CMA's section 26 notice dated 30 March 2016, question 2 URN H0036; HTL's response dated 20 May 2016 to the CM'S section 26 notice dated 30 March 2016, question 2 URN H0102.

3.15 As in the case of drawer fronts, there is no demand-side substitutability for different timber based drawer components. As regards supply-side substitutability, the restrictions noted above may also apply to manufacturers of other timber based drawer components. For example, [BHK UK senior employee] has stated that, for BHK UK, the manufacture of bases has '*always been a sideline to the business'* and that the market for the manufacture of bases is, '*…a completely different structure, which has never really been competitive.*'[55]

3.16 This suggests that the supply of drawer fronts may not be part of a wider market. Taking a conservative approach, therefore, the CMA concludes, for the purpose of determining the level of any financial penalty in this case, that the relevant product market should not be defined so as to include other timber based drawer components.

The supply of drawer fronts to the bedding furniture industry

3.17 A question arises as to whether the relevant product market for drawer fronts should be defined narrowly, that is: in relation to supply to the bedding furniture industry, rather than the wider bedding, domestic and office furniture industries.

3.18 The CMA notes that during Relevant Periods (a) and (b) TATL and HTL only supplied drawer fronts to the bedding furniture industry.[56] This seems to suggest that the conditions of competition were different for the supply of drawer fronts to the bedding furniture industry as compared with the supply of drawer fronts to other customer types.

3.19 Whilst there appears to be a large number of drawer front manufacturers, it is unclear the degree to which they supply to the bedding furniture industry and/or to the domestic and office furniture industries. The more they supply to all three industries, the more similar will be the conditions of competition in the supply of drawer fronts to those industries. This, in turn, would suggest that the supply of drawer fronts to the bedding, domestic and office furniture industries is an economic market.

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[55] Transcript of an interview with [BHK UK senior employee] on [✂], pages 138 to 141 URN 10652.

[56] Transcript of an interview with [TATL senior employee] on [✂], page 12 URN 6062; TATL's response dated 4 August 2016 to the CMA's section 26 notice dated 27 July 2016, question 1(b) URN H0149; HTL's response dated 22 August 2016 to the CMA's section 26 notice dated 27 July 2016, question 1 URN H0147.

3.20 On the other hand, TATL's and HTL's cartel conduct, if established as set out in this Decision, suggests that they faced limited competitive constraints from other suppliers, which suggests that the supply of drawer fronts to the bedding furniture industry is an economic market.

3.21 In any event, defining the relevant market as the supply of drawer fronts to the bedding furniture industry or to the bedding, domestic and office furniture industries makes no difference to the level of the financial penalty in this case given that, during Relevant Periods (a) and (b), TATL and HTL supplied drawer fronts only to the bedding furniture industry. The CMA therefore concludes, for the purpose of determining the level of any financial penalty in this case, that the relevant product market for drawer fronts is the market for the supply of chipboard and MDF based drawer fronts to the bedding furniture industry.

Conclusions on the relevant product market

3.22 For the reasons set out above, the CMA is of the view that, for the purpose of determining the level of any financial penalty in this case, the relevant product market is the supply of chipboard and MDF based drawer fronts for supply to the bedding furniture industry.

C. Relevant geographic market

3.23 In determining the boundaries of the geographic market, the CMA has considered the demand and supply side constraints from both outside and within the UK.

Constraints from outside the UK

3.24 As set out below, whilst manufacturers/suppliers based outside the UK made sales of drawer fronts into the UK during the relevant periods, in practice, such suppliers appear not to have exerted any significant competitive pressure on drawer front prices in the UK.

3.25 The evidence suggests that, although possible, it was rare for customers to source drawer fronts from outside the UK[57] due to logistical difficulties and high transport costs.[58]

3.26 HTL has stated that suppliers of drawer fronts based outside the UK did not, from its perspective, have much of a presence in the UK.[59]

3.27 As regards supply by UK companies to customers overseas, the CMA notes that whilst TATL supplied customers in other parts of the EU, its turnover figures suggest that it did so to a relatively limited extent.[60]

3.28 HTL has stated that it has no EU based sales outside the UK.[61]

3.29 Thus, adopting a conservative approach for the purposes of determining the relevant turnover of the Parties, the CMA takes the view that, for the purpose of determining the level of any financial penalty in this case, the geographic market for the supply of drawer fronts is no wider than the UK.

Constraints from inside the UK – regional segmentation

3.30 TATL has stated that it supplies drawer fronts throughout the UK;[62] and HTL has stated that it considers the geographic market for the supply of drawer fronts to be England, Scotland and Wales.[63]

3.31 Even though HTL has a more limited view of the scope of the geographic market than TATL, the CMA notes that the top 10 customer lists provided by

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[57] Witness statement of [Dreams employee 1] dated [✂], paragraph 5 URN 10722; witness statement of [NPB employee 3] dated [✂], paragraph 6 URN 2987.
[58] Witness statement of [Silentnight employee 2] dated [✂], paragraph 46 URN 11215.
[59] HTL's response dated 20 May 2016 to the CMA's section 26 notice dated 30 March 2016, question 7 URN H0102.
[60] TATL's response dated 4 August 2016 to the CMA's section 26 notice dated 27 July 2016, question 1 URN H0149; TATL's response dated 27 April 2016 to the CMA's section 26 request dated 30 March 2016, question 11 URN H0036; BHK UK's response dated 1 September 2016 to the CMA's information request dated 27 July 2016, question 1(a) URN H0127; BHK UK's response dated 20 May to the CMA's information request dated 30 March 2016, question 11 URN H0105.
[61] HTL's response dated 20 May 2016 to the CMA's section 26 notice dated 30 March 2016, question 11 URN H0102; HTL's response dated 22 August 2016 to the CMA's section 26 request dated 27 July 2016, question 1 URN H0147.
[62] TATL's response dated 27 April 2016 to the CMA's section 26 notice dated 30 March 2016, question 3 URN H0036.
[63] HTL's response dated 20 May 2016 to the CMA's section 26 notice dated 30 March 2016, question 3 URN H0102.

TATL and HTL show that, during the relevant periods, customers for drawer fronts were based across the whole of the UK, including Northern Ireland.[64]

3.32 Whilst there are some indications of geographic focus to the extent that pricing takes into account haulage costs,[65] there is no evidence to suggest that TATL or HTL sought to organise themselves along regional lines on this basis.

3.33 Thus, the CMA concludes that the geographic market in this case is not split along regional lines.

Conclusions on the relevant geographic market

3.34 For the reasons set out above, the CMA therefore finds that, for the purpose of determining the level of any financial penalty in this case, the relevant geographic market is the UK.

D. Conclusions on the relevant market

3.35 For the reasons set out above, the CMA finds that for the purpose of determining the level of any financial penalty in this case, the relevant market is the supply of chipboard and MDF based drawer fronts to the bedding furniture industry in the UK.

[64] TATL's response dated 27 April 2016 to the CMA's section 26 notice dated 30 March 2016, question 9 URN H0036; HTL's response dated 20 May 2016 to the CMA's section 26 notice dated 30 March 2016, question 9 URN H0102.

[65] Witness statement of [Silentnight employee 1] dated [✂], paragraph 32 URN 11216; witness statement of [Simmons employee] dated [✂], paragraph 10 URN 10741.

4. CONDUCT

A. Introduction

4.1 The CMA finds that between July 2006 and September 2008, and between at least September 2011 and October 2011, HT and TA infringed the Chapter I prohibition and/or Article 101 TFEU by participating in a single repeated infringement through an agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of drawer fronts to customers in the UK.

4.2 This section sets out the evidence found by the CMA of contacts between HTL and TATL relating to the supply of drawer fronts during those periods.

B. The origins of the drawer fronts arrangement – the Newcastle meeting

4.3 The arrangement between HTL and TATL in relation to drawer fronts was put in place at a meeting between [TATL senior employee] and [HTL senior employee] on or around 25 July 2006[66] at Newcastle airport (the 'Newcastle meeting').[67]

4.4 According to [TATL senior employee]:

'…in the course of the meeting at Newcastle, on the basis of [HTL senior employee]'s suggestion, we came to an understanding that if he agreed not to attack our customers we would agree not to attack his. In reality we were not in a position to target his customers anyway because of the raw material shortages and our limited production line. It was discussed how this would work in practice, and it was agreed that if Silentnight requested prices from him, the best approach was for him not to respond. I do recall at some point later receiving a call from [HTL senior employee], who said that Silentnight had been onto him and were very insistent that he provide a price; that he couldn't simply not respond to Silentnight's request for prices for various

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[66] Transcript of an interview with [TATL senior employee] on [✂], pages 70 to 71 URN 6062.

[67] In a prepared statement read out during interview, [TATL senior employee] has stated that in June 2006 he received an unsolicited phone call from [HTL senior employee], asking him to meet with him and discuss the state of the market; the meeting took place at Newcastle Airport, which was a convenient meeting place for both: transcript of an interview with [TATL senior employee] on [✂], points 65 and 66, page 32 URN 12371.

reasons. It is possible that this was also raised in the Newcastle Airport meeting. It was agreed therefore that I would provide him with our prices with a view to him then quoting a significantly higher price to Silentnight such that they wouldn't get the business.'[68]

4.5 [TATL senior employee] has stated that '*I was pleased with what I had achieved and anxious to record this in my trading report for August 2006.'*[69] In that trading report,[70] prepared for a meeting in September 2006, [TATL senior employee] wrote the following:

'*Our main customer, Silentnight, has not been busy but we expect things to improve shortly. The writer met with [HTL senior employee] to discuss price levels. I made it perfectly clear to him that his prices were way below what was achievable and he agreed not to respond to Silentnight's request for prices.'*

C. The drawer fronts arrangement - 2006 to 2008

4.6 Examples of the arrangement in action during Relevant Period (a) are set out below.

Silentnight

4.7 Silentnight was one of TATL's most important customers. [TATL senior employee] explains:

'…*the drawer front department was set up in 1986 at the request of Silentnight Group, and the major customer by far was Silentnight Group.*'[71]

4.8 On 3 October 2007, [HTL senior employee] sent an email to [HTL employee 3], stating, '*Please find Armstrong prices to Silentnight Group.'*[72] Attached to the email was a document *ABF Price Check.doc* which was a schedule of Silentnight, Rest Assured and Sealy drawer front specifications and corresponding prices per 100 units.

4.9 The CMA infers that TATL's pricing information had been disclosed to HTL, in accordance with the Newcastle arrangement, for the purpose of enabling HTL

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[68] Transcript of an interview with [TATL senior employee] on [✂], point 67, page 33 URN 12371.
[69] Transcript of an interview with [TATL senior employee] on [✂], point 71, page 34 URN 12371.
[70] URN 0264.
[71] Transcript of an interview with [TATL senior employee] on [✂], page 12 URN 6062.
[72] URN 9131.

to submit a tactical (high) price in respect of Silentnight, thereby allowing TATL to retain Silentnight's business.

Dura Beds

4.10 Dura Beds Ltd makes non-branded beds for the retail trade, such as Bensons, Carpetright and Grattam Freeman.[73] Dura Beds purchase drawer fronts from TATL's distributor, Northern Paper Board, Global Components (UK) Ltd, and more recently (i.e. from around June 2012) HTL.[74]

4.11 An email from [HTL senior employee] to [TATL senior employee] dated 16 February 2007 stated, *'Do you please have the Durabeds prices as they are chasing us.'*[75] Whilst [TATL senior employee] has stated that he does not recall this contact, or the reasons for it,[76] the CMA considers it reasonable to conclude that this pricing information was requested (in accordance with the arrangement reached at the Newcastle meeting) in order to enable HTL to submit a tactical (high) price, thereby allowing TATL to retain Dura Beds' business.

4.12 Evidence from [Dura Beds employee], is consistent with such an arrangement being in place. He recalls trying to obtain quotations for drawer fronts from HTL on about four occasions between 2002 and 2011, but on each occasion he '*either received no reply or received a very high quotation*'; his impression was that Dura Beds '*had been black-listed in some way*'.[77]

NPB

4.13 NPB was TATL's distributor (and competitor to HTL's distributor for drawer fronts, Ultimate[78]).

4.14 On 31 August 2007, [TATL senior employee] sent a fax to [NPB employee 1] and [NPB employee 2] of NPB on the subject of beige drawer fronts, attaching a price list. The fax reads:

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[73] Witness statement of [Dura Beds employee] dated [✂], paragraph 1 URN 10690.
[74] Witness statement of [Dura Beds employee] dated [✂], paragraphs 2 and 7 URN 10690.
[75] URN 3069.
[76] Transcript of an interview with [TATL senior employee] on [✂], pages 47 to 48 URN 6062.
[77] Witness statement of [Dura Beds employee] dated [✂], paragraph 4 URN 10690.
[78] Transcript of an interview with [TATL senior employee] on [✂], page 19 URN 6062.

'Further to our telecom discussions last week, confirm our requirement to increase beige drawer fronts without delay.

We have had to take on board 12% increase in cost of raw material and as stated we are told that your competitor is buying at £1.02 ea.

Please see attached revised prices…'[79]

4.15 Neither [NPB employee 2] nor [NPB employee 1] are able to confirm with certainty the identity of '*your competitor',* but [NPB employee 2] has stated that *'they are speaking to someone which is probably Hoffman's',* and [NPB employee 1] suggests that it could refer to Global Components or Ultimate Imports.[80] When considered in the light of other witness and documentary evidence of the arrangement between HTL and TATL, the CMA considers it reasonable to conclude that [TATL senior employee] was referring to HTL or its distributor, Ultimate.

4.16 On 7 December 2007 [HTL employee 3] sent an email to [HTL senior employee] stating,

'*[Ultimate employee]*[81] *has been on saying Armstrong/Northern P & Board have been discounting their prices, he says he is losing business.'*[82]

4.17 [HTL senior employee] replied on 14 December: '*I have had a long chat with [TATL senior employee], please talk to me*.'[83]

4.18 The CMA considers it reasonable to conclude that this 'chat' would have sought to address the issue of TATL's and HTL's pricing levels to their respective distributors, in accordance with the arrangement reached at the Newcastle meeting.

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[79] URN 5422.
[80] Witness statement of [NPB employee 1] dated [✂], paragraph 28 URN 12132; transcript of an interview with [NPB employee 2] on [✂], page 169 URN 12843.
[81] '[✂]' is short for [Ultimate employee], [✂]. See witness statement of [HTL employee 2] dated [✂], paragraph 10 URN 11300.
[82] URN 9790.
[83] URN 9790.

Nestledown

4.19 Simmons Bedding Group Plc ('Simmons') comprises three bedding companies: Sleepeezee, Cumfilux and Nestledown.[84] Simmons sourced all its drawer fronts from HTL (although TATL may have occasionally supplied Cumfilux, possibly in about 2006).[85]

4.20 At 08.50 on 16 June 2008, [Simmons employee] sent an email to [TATL senior employee] setting out a proposed change in drawer front specification.[86]

4.21 At 09.26 on 16 June 2008, [HTL senior employee] sent an email to [HTL employee 3] stating:

'FYI I have passed [TATL senior employee] prices for Nestledown as [Simmons employee] has been pestering him for a quote.'[87]

4.22 At 11.28 on 16 June 2008, [TATL senior employee] responded to [Simmons employee] setting out TATL stock levels and chipboard availability.[88]

4.23 At 16.15, [Simmons employee] responded setting out Simmons' current drawer front sizes in order of usage. The hard copy of this email has been annotated (apparently by [TATL senior employee]) with prices next to each specification.[89]

4.24 On the back of this email was [TATL senior employee]'s handwritten list of drawer front specifications and prices; this list is headed '*Nestledown white'* and is annotated '*quoted by [HTL senior employee] 16/06/08.'* [90] The prices which appear on this sheet are the same as those which appear in an HTL price list '*for all deliveries as from 3 September 2007*'.[91]

4.25 On 17 June 2008, [TATL senior employee] sent an email to [Simmons employee] providing TATL's prices.[92] The prices quoted in this email are the

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[84] Witness statement of [Simmons employee] dated [✂], paragraph 1 URN 10741.
[85] Witness statement of [Simmons employee] dated [✂], paragraph 9 URN 10741.
[86] URN 5411.
[87] URN 10148.
[88] URN 5411.
[89] URN 5411.
[90] URN 5411.
[91] Exhibit DPM/4 URN 10745, attached to the witness statement of [Simmons employee] dated [✂]URN 10741.
[92] URN 8421, URN 8420, and exhibit DPM/6 URN 10747 attached to the witness statement of [Simmons employee] dated 12 June 2013 URN 10741.

same as those annotated on the hard copy of the email from [Simmons employee] (described in paragraph 4.23 above) and higher than the handwritten list of HTL's prices (described in paragraph 4.24 above).

4.26 The CMA infers from this that [TATL senior employee] took the prices supplied to him by [HTL senior employee] and used them to submit a tactical (high) price to [Simmons employee].

4.27 As a result of TATL's high quote, [Simmons employee] did not place an order with TATL.[93] [Simmons employee] has stated that he was unaware that TATL and HTL were sharing pricing information in this way. He has further stated that, '*If I had known about it, I would have looked for an alternative quote from a different supplier.*'[94]

4.28 In interview, [TATL senior employee] admitted to seeking and obtaining pricing information from HTL. He explains:

'We also had contact with [Simmons employee] at Simmons Beds, also known as Nestledown Beds. I had sent him some samples of our drawer fronts. [Simmons employee] showed interest. I contacted HT[L] and got from them their prices for the tender. I believe I said that [Simmons employee] had been pestering me for a quote so that I could then find out what HT's prices were. They no doubt gave us their prices, expecting that we would quote much higher, as per the understanding made at Newcastle Airport, or shortly after.'[95]

4.29 [TATL senior employee] also stated that in this instance, *'I actually thought that I could win this business and therefore prepared a quote which stood a chance of winning us the tender*. *Owing to our higher costs, however, our price ended up being higher.*'[96]

4.30 Nevertheless, and regardless of [TATL senior employee]'s ultimate expectations as to whether TATL could win the business, the evidence clearly suggests that competitively sensitive pricing information was disclosed from HTL to TATL and taken into account by the latter when submitting its quote to Simmons Beds.

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[93] Witness statement of [Simmons employee] dated [✂], paragraphs 12 and 13 URN 10741.
[94] Witness statement of [Simmons employee] dated [✂], paragraph 15 URN 10741.
[95] Transcript of an interview with [TATL senior employee] on [✂], point 75, pages 35 and 36 URN 12371.
[96] See transcript of an interview with [TATL senior employee] on [✂], point 75, page 36 URN 12371.

Internal reports and memos

4.31 There is a small amount of further documentary evidence in the form of an internal note and an internal report that is suggestive of contact between TATL and HTL in relation to the pricing of drawer fronts:

(a) during the OFT's searches, a handwritten note was found in [HTL senior employee]'s desk at HTL premises. It is dated 20 October 2006 and appears to contain TATL's costing system for drawer fronts.[97]

(b) A TATL Trading Report, dated February to May 2008, provides evidence of contact between TATL and HTL. It states, in relation to drawer fronts:

'discussions with our competitor indicate that they are suffering also.'[98]

Email of 23 September 2008

4.32 A draft email recovered from [TATL senior employee]'s computer was created on 23 September 2008[99] and addressed to [HTL senior employee].[100] It reads as follows:

'Dear [HTL senior employee]

I am under increasing pressure from my colleagues at Thomas Armstrong ltd to look to try and gain more drawer front business from within the bed manufacturing industry.

As you are aware we have in the past supplied a number of your customers with fronts and the vast majority of those customers approach us frm (sic) time to time to seek prices for fronts. It is somewhat difficult and embarrassing for us to have to go back to them with prices that are above the norm.

As a result of the ever reducing volumes coming out of Silentnight Group, coupled with our inability to gain any form of price increase from them, we are finding it impossible to accept our current position.

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[97] URN 4145.
[98] URN 0277.
[99] See metadata: URN 11957.
[100] URN 3066.

Following our meeting in 2006 I do believe that the understanding prompted by yourself was weighted heavily in your favour, in particular, with regards to the volume of sales turnover allocated to each party.

We must, therefore, inform you that it is our intention to respond to competitive prices to any enquiries that are forthcoming from bed manufacturers, many of whom are keen for us to supply a combination of wraps and fronts…

I realize that you will not be best pleased with our decision. It is a decision which we have thought long and hard about but one which we must make in order to preserve the department.'

4.33 The draft email provides a further insight into the nature of the arrangement reached at the Newcastle meeting, and the way in which it operated. In particular, it shows that as a result of the arrangement TATL had deliberately been providing high quotes to customers of HTL in order to enable HTL to retain those customers. It also reflects the fact that the arrangement struck in 2006 inevitably involved an allocation of sales turnover between the parties.

4.34 As regards this draft email, [TATL senior employee] has stated that,

'There came a point where I thought it was likely to become obvious to HT[L] that we were attempting to poach their clients, and therefore I thought about emailing them to tell them that the original understanding we had reached was no longer sustainable. I even went as far as to draft an email to this effect. My thinking was that if I sent it they would think we had in fact been turning down requests from their customers for quotes over the last couple of years, which we hadn't, and in return they would refrain from trying to attack our customer base. However, as this had not actually happened, it was pretty clear I could not send the email, and sending it would risk annoying them even more, and therefore I didn't send it.'[101]

4.35 The CMA considers that [TATL senior employee]'s witness evidence supports the CMA's finding that an arrangement was reached between HTL and TATL at the Newcastle meeting. [TATL senior employee]'s assertion that he had not been acting in accordance with the arrangement is at best only partly supported by the evidence set out above.

[101] Transcript of an interview with [TATL senior employee] on [✂], point 81, pages 37 and 38 URN 12371.

4.36 However, the draft email does suggest that by September 2008 TATL was under pressure to start competing with HTL (at least for Silentnight) and that [TATL senior employee] intended to bring the arrangement to an end, albeit that the draft email does not appear to have been sent and there is no evidence that either TATL or HTL explicitly brought the arrangement to an end, or sought to distance themselves from the arrangement at any time.

4.37 Moreover, there is evidence that the arrangement reached at the Newcastle meeting was in operation between at least September 2011 and October 2011, albeit that the CMA has found no evidence of the arrangement's operation between September 2008 and September 2011. This suggests that whilst the arrangement may have been discontinued at some point between September 2008 and September 2011, it had at the very least by September 2011 been revived.

D. The drawer fronts arrangement - 2011

4.38 The CMA has found evidence of the arrangement in action during Relevant Period (b) in relation to the customer Silentnight. As set out in paragraphs 4.45 to 4.49 below, this evidence must be understood against the background of the earlier conduct.

Silentnight

4.39 On 30 August 2011, an internal HTL email from [HTL employee 2] states:

> *'Pricing for [Silentnight employee 1] @ Silentnight on bases and fronts – tactical fronts price?'*[102]

4.40 [HTL employee 2] has explained that, *'I knew that Armstrong's supplied the fronts and I was asking the question as to whether it made sense to try and win that drawer fronts business at a small margin or no margin at all with the result that Armstrong's lose that business and then for them go (sic) after some of our other accounts.'*[103]

4.41 On 27 September 2011, [TATL senior employee] sent an email to [HTL senior employee] stating:

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[102] URN 10286.

[103] Witness statement of [HTL employee 2] dated [✂], paragraph 63 URN 11300.

'Suggest you go in at the following prices or above,

R230012 – 837 x 197.5mm plain front – £0.66 ea

…

Terms – 2.5% M/A

Any questions, just give me a call.'[104]

4.42 [HTL senior employee] replied the same day, '*Will do thanks.'*[105] HTL used the figures supplied by [TATL senior employee] in the quotation provided to Silentnight on 3 October 2011.[106]

4.43 [TATL senior employee] has admitted to disclosing this pricing information to HTL, stating that,

'Towards the end of September 2011 I was contacted by [HTL senior employee]. He told me that he had been approached by [Silentnight employee 1]. He told me she was quite persistent in seeking to obtain a quote for a tender. Quite apart from the Newcastle understanding, it was apparent that Hoffman Thornwood really didn't want Silentnight Group's business…

…

Hoffman Thornwood were loath to be seen to dismiss Silentnight Group outright. HIG Europe were a large company, and falling out with them would not be wise. [HTL senior employee] therefore wanted to find a reasonable way to get Hoffman Thornwood off the hook. He therefore contacted me and asked me to provide him with prices that he could put to [Silentnight employee 1], which I did.'[107]

4.44 The CMA is not convinced by [TATL senior employee]'s explanation as regards the reasons for this disclosure of pricing information, noting that it would have been possible for HTL to put in a high quote without colluding with TATL. In any event and regardless of the parties' reasons for it, [TATL senior

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[104] URN 3067.
[105] URN 3068.
[106] URN 5038. See also witness statement of [Silentnight employee 1] dated [✂], paragraphs 48 and 49 URN 11216.
[107] Transcript of an interview with [TATL senior employee] on [✂], point 84, page 38 and point 89, page 39 URN 12371.

employee] accepts that he provided HTL with a price for the latter to use when quoting to Silentnight.

4.45 As stated above, this evidence must be understood against the background of the earlier conduct, together with the apparent general understanding within HTL at least of the principles behind the arrangement that was put in place at the Newcastle meeting by [TATL senior employee] and [HTL senior employee], namely that they should avoid targeting each other's customers, if not of the arrangement itself.

4.46 This general understanding within HTL is reflected in an internal email sent by [HTL employee 2] to [HTL senior employee] and [HTL employee 1] on 17 June 2011 regarding the customer Highgate beds,[108] stating:

'Here are the details of the ottoman panels I would like to price up for Highgate Beds

…

Should we also quote on their drawer fronts even though this is Armstrongs? Could maybe put in a high prices on this but a better price on bases?'[109]

4.47 [HTL employee 2]'s explanation of this email is that [HTL senior employee] had previously indicated to him that HTL should not seek to win drawer front customers from TATL. [HTL employee 2] states:

'I wrote the reference to Armstrong's in respect of drawer fronts because [HTL senior employee] had in the past expressed a concern to us that Armstrong's, like Hoffman, were a big volume manufacturer and substantial supplier of drawer fronts. His concern was that if we went after one of their customers, Armstrongs might come after our customers in retaliation. Such a situation could cause a price war and the question I was asking in the email was whether we wanted to rock the boat.

[108] Highgate Beds is a family business based in Dewsbury. It is a bed and mattress manufacturer which sells to independent retailers and chains such as Carpetright, as well as wholesalers. In the main, Highgate Beds purchased drawer fronts from TATL, but as a back-up would purchase from TATL's distributor, NPB. It also occasionally purchased from HTL's distributor, Ultimate, if it had run short or if a delivery had not turned up. See witness statement of [Highgate Beds employee] dated [✂], paragraphs 1 to 3 URN 10724.
[109] URN 9173.

[HTL senior employee] has said in the past that it wouldn't make business sense to win a customer off Armstrong's because they would go and win one of our customers.'[110]

4.48 Similarly, in relation to another customer, Dreams,[111] [HTL employee 2] sent an email on 9 January 2012 to [HTL employee 1] stating:

'Here are the D/F and D/B information [Dreams employee 2] @ Dreams has given for prices prior to our meeting next week.

…

In October 2008 we priced the items below at the following prices:

…

The feedback we got back then was that our D/B was 20% too high, and our D/F prices was about 8% too high. We know Armstrong supply the Fronts so this was a tactical price from [HTL senior employee].'[112]

4.49 Again, [HTL employee 2]'s explanation in his witness evidence of his use of the phrase '*tactical price'* shows an understanding of the principles behind the arrangement that was put in place at the Newcastle meeting:

'I meant that we were quoting higher than Armstrong's. As with the customer Silentnight, we knew that Armstrong's supplied Dreams with the drawer fronts and the prices quoted in 2008 were perhaps on the high side, reflecting the fact that we didn't really want to win the drawer fronts business. This was because of the concern that Armstrong's might then target some of our customers or because of the fact that if we were to quote at price levels under Armstrong's, we would not be making sufficient money.'[113]

E. The end of the drawer fronts arrangement

4.50 It is not clear from the evidence when the arrangement in relation to drawer fronts came to an end.

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[110] Witness statement of [HTL employee 2] dated [✂], paragraphs 46 and 47 URN 11300.

[111] Dreams Ltd is a bed manufacturer in the UK. It was a public limited company but went into pre-pack administration in March 2013 and reopened as a limited company. It purchased drawer fronts from TATL from at least June 2007. See witness statement of [Dreams employee 1] dated [✂], paragraphs 2 and 4 URN 10722.

[112] URN 8944.

[113] Witness statement of [HTL employee 2] dated [✂], page 82 URN 11300.

4.51 The CMA has found no evidence of the drawer fronts arrangement in operation after October 2011, however.

5. LEGAL ASSESSMENT

A. Introduction

5.1 This section sets out the CMA's legal assessment of the conduct set out in Section 4, in light of the factual background set out in Sections 2 and 3. The key legal principles, including references to the relevant case law and primary and secondary legislation, are also included in this section.

5.2 The CMA has assessed the evidence in this case by reference to the civil standard of proof, namely whether it is sufficient to establish on the balance of probabilities that an infringement occurred.[114]

B. General

5.3 For present purposes, the CMA's findings are made by reference to the following provisions of the UK and EU competition rules:

(a) the Chapter I prohibition[115] prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK. This prohibition applies unless an applicable exclusion is satisfied or the agreements in question are exempt in accordance with the provisions of the Act. References to the UK are to the whole or part of the UK;[116]

(b) Article 101 TFEU prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the EU, unless they are exempt in accordance with Article 101(3) TFEU.

5.4 For the reasons set out below, the CMA's findings are that TA and HT have infringed the Chapter I prohibition and/or Article 101 TFEU. [117]

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

[115] Section 2 of the Act

[116] Section 2(1) and (7) of the Act.

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

5.5 When applying the Chapter I prohibition to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 101 TFEU which may affect trade between Member States within the meaning of that provision, the CMA must also apply Article 101 TFEU to such agreements, decisions or concerted practices. [118]

C. Undertakings

Legal principles

5.6 For the purposes of the Chapter I prohibition and Article 101 TFEU, the term 'undertaking' covers *'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'*.[119]

5.7 An entity is engaged in *'economic activity*' where it conducts any activity *'of an industrial or commercial nature by offering goods and services on the market'.*[120]

5.8 The term 'undertaking' also designates an economic unit, even if in law that unit consists of several natural or legal persons.[121]

Application to the Infringement

5.9 During Relevant Periods (a) and (b), TATL and HTL were engaged in an economic activity, namely the supply of timber based components, including drawer fronts.

5.10 The CMA therefore concludes that TATL and HTL constitute undertakings for the purposes of the Chapter I prohibition and Article 101 TFEU. As discussed

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[118] Article 3(1) of the Modernisation Regulation. In addition, section 60 of the Act provides that, so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising in relation to UK competition law should be dealt with in a manner which is consistent with the treatment of corresponding questions under EU competition law. Further, the CMA (i) must act (so far as it is compatible with the provisions of Part I of the Act) with a view to securing that there is no inconsistency with the principles laid down by the TFEU, the Court of Justice (the '*Court of Justice*') and the General Court (the '**GC**') (together, the 'European Courts') and any relevant decision of the European Courts; and (ii) must have regard to any relevant decision or statement of the European Commission.

[119] Judgment of 23 April 1991, *Klaus Höfner and Fritz Elser v Macrotron GmbH*, C-41/90, EU:C:1991:161, paragraph 21.

[120] Judgment of 16 June 1987, *Commission v Italian Republic*, C-118/85, EU:C:1987:283, paragraph 7.

[121] Judgment of 10 September 2009, *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 55.

in paragraphs 5.79 to 5.88 TAHL and CTHL are considered to form part of the same undertaking as, and to be jointly and severally liable for the conduct of, their respective subsidiaries.

D. Agreements between undertakings and concerted practices

Legal principles

5.11 The Chapter I prohibition and Article 101 TFEU apply to agreements between undertakings and concerted practices.[122]

5.12 It is not necessary, for the purpose of finding an infringement, to distinguish between agreements and concerted practices, or to characterise conduct as exclusively an agreement, a concerted practice or a decision by an association of undertakings.[123] Nothing turns on the precise form taken by each of the elements comprising the overall agreement and/or concerted practice. As explained by the Court of Justice, '*it is settled case-law that, although Article [101 TFEU] distinguishes between 'concerted practice', 'agreements between undertakings' and 'decisions by associations of undertakings', the aim is to have the prohibition of that article catch different forms of coordination between undertakings of their conduct on the market* […] *and thus to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they coordinate their conduct'.*[124]

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[122] Section 2(1) of the Act and Article 101(1) of the TFEU.

[123] *Argos, Littlewoods and JJB*, at [21]. See also Judgment of 17 December 1991, *Hercules Chemicals v Commission* T-7/89, EU:T:1991:75*,* paragraph 264; Judgment of 24 October 1991, *Rhône-Poulenc v Commission* T-1/89, EU:T:1991:56, paragraph 127; Judgment of 8 July 1999, *Commission v Anic Partecipazioni* C-49/92 P, EU:C:1999:356, paragraphs 131 and 132; and also *Roofing Felt*, in which the conduct of the undertakings was found to be an agreement as well as a decision of an association.

[124] Judgment of 11 September 2014, *MasterCard and Others v Commission* C-382/12 P, EU:C:2014:2201; *Judgment in MasterCard and Others v Commission, EU:C:2014:2201*, paragraph 63 and the case law cited. See Judgment of 20 March 2002, *HFB and Others v Commission* T-9/99, EU:T:2002:70, paragraphs 186 to 188; Judgment of 23 November 2006, *ASNEF-EQUIFAX C-238/05*, EU:C:2006:734, paragraph 32. See also *Judgment of 20 April 1999, LVM v Commission, joined cases T-305/94, T-306/94, etc., EU:T:1999:80*, paragraph 696: '*In the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [101] of the Treaty*.'

Agreements

5.13 The Chapter I prohibition and Article 101 TFEU are intended to catch a wide range of agreements, including oral agreements and *'gentlemen's agreements*'.[125] An agreement may be express or implied by the parties, and there is no requirement for it to be formal or legally binding, nor for it to contain any enforcement mechanisms.[126] An agreement may consist of either an isolated act or a series of acts or a course of conduct.[127] The key question is whether there has been '*a concurrence of wills between at least two parties, the form in which it is manifested being unimportant, so long as it constitutes the faithful expression of the parties' intention'*.[128]

5.14 Although it is necessary to show the existence of a joint intention to act on the market in a specific way in accordance with the terms of the agreement, the CMA is not required to establish a joint intention to pursue an anti-competitive aim.[129]

Concerted practices

5.15 The concepts of '*agreements'* and '*concerted practices*' are intended to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves.[130]

5.16 The Court of Appeal has noted that *'concerted practices can take many different forms, and the courts have always been careful not to define or limit what may amount to a concerted practice for [the] purpose'* of determining

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[125] Judgment of 15 July 1970, *ACF Chemiefarma v Commission* C-41/69, EU:C:1970:71, paragraphs 106 to 114.
[126] *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, at [658]; Commission Decision of 9 December 1998, *Greek Ferries*, Case IV/34466, paragraph 141 (upheld on appeal).
[127] Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 81.
[128] Judgment of 26 October 2000, *Bayer v Commission* T-41/96, EU:T:2000:242, paragraph 69 (upheld on appeal in Judgment of 6 January 2004, *BAI and Commission v Bayer*, joined cases C-2/01 P and C-3/01 P, EU:C:2004:2, paragraphs 96 and 97) and Judgment in *Hercules Chemicals v Commission*, EU:T:1991:75, paragraph 256.
[129] Judgment of 27 September 2006, *GlaxoSmithKline Services Unlimited v Commission*, T-168/01, EU:T:2006:265, paragraph 77 (upheld on appeal in Judgment of 6 October 2009, *GlaxoSmithKline Services Unlimited v Commission*, Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610).
[130] Judgment of 4 June 2009, *T-Mobile Netherlands and Others* C-8/08, EU:C:2009:343, paragraph 23; see also Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 131 and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, [206(ii)].

whether there is consensus between the undertakings said to be party to a concerted practice.[131]

5.17 For present purposes, the following key points arise from the case law on the concept of a concerted practice:

(a) the concept of a concerted practice must be understood in light of the principle that each economic operator must determine independently the policy it intends to adopt on the market, including the choice of the persons and undertakings to which it makes offers or sells;[132]

(b) 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.'*[133] The Court of Justice has added that: '*By its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants;'*[134]

(c) the coordination comprises '*any direct or indirect contact*' between undertakings which has the object or effect of influencing the conduct on the market of an actual or potential competitor[135] thereby creating conditions of competition which do not correspond to the normal conditions of the market in question;[136]

(d) it follows that '*a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two*'.

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[131] *Argos, Littlewoods and JJB*, at [22].

[132] Judgment of 16 December 1975, *Suiker Unie and Others v Commission* C-40/73, EU:C:1975:174, paragraph 173. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(iv)].

[133] Judgment of 14 July 1972, *ICI v Commission* C-48/69, EU:C:1972:70, paragraph 64. See also Judgment in *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 26 and *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at [151] to [153].

[134] Judgment in *ICI v Commission*, EU:C:1972:70, paragraph 65. See also *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at [151].

[135] Judgment in *Suiker Unie and Others v Commission*, EU:C:1972:70, paragraph 174. See also Judgment in *T-Mobile Netherlands and Others*, EU:C:2009:343, at paragraph 33; and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(v)]. The case law provides that a concerted practice also arises in the situation in which the object or effect of the direct or indirect contact is to disclose to a competitor the course of conduct which the disclosing party has decided to adopt or contemplates adopting on the market.

[136] Judgment of 14 July 1981, *Züchner v Bayerische Vereinsbank* C-172/80, EU:C:1981:178, paragraph 14; Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 117; and Judgment in *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 33.

However, that does not necessarily mean that the conduct should produce the concrete effect of restricting, preventing or distorting competition. [137]

Application to the Infringement

5.18 On the basis of the facts and evidence set out above, the CMA finds that there was a concurrence of wills between TATL and HTL sufficient to amount to an agreement and/or a concerted practice in relation to the supply of drawer fronts to customers in the UK.

5.19 The evidence shows that an arrangement was put in place at the Newcastle meeting, whereby TATL and HTL agreed not to compete with each other so as to maintain their respective customer bases.[138]

5.20 During Relevant Periods (a) and (b), TATL and HTL cooperated in accordance with the proposals put forward at the Newcastle meeting. In support of that conclusion, the CMA has had regard to documentary and witness evidence of collaboration and the disclosure of pricing information in respect of customers such as Silentnight, Dura Beds, NPB, Nestledown, Highgate Beds, and Dreams.[139]

5.21 This evidence shows that TATL and HTL shared pricing information (including on request), and relied upon that information for the purposes of submitting tactical quotes to customers. By their actions, TATL and HTL were in a position to maintain their respective customer bases, and were also aware that there would be less downward pressure on prices than would otherwise be expected.

5.22 There is no evidence to suggest that TATL or HTL expressed any reservations or objections to such collaboration during Relevant Periods (a) or (b). Indeed, the CMA notes the agreement and/or concerted practice was referred to in positive terms in a TATL internal report.[140]

5.23 Thus, the evidence above demonstrates a concurrence of wills between TATL and HTL. They had expressed their joint intention to conduct themselves on the market in a specific way, and had a shared understanding of how they

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[137] Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 124. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(xi)].

[138] See paragraphs 4.3 to 4.5 of this Decision.

[139] See paragraphs 4.7 to 4.49 of this Decision.

[140] See paragraph 4.5 of this Decision.

would behave in relation to particular customers. Through their contacts, they knowingly substituted practical cooperation as regards the maintenance of their customer bases for the risks of competition.

5.24 The CMA therefore concludes that there was a concurrence of wills between TATL and HTL sufficient to amount to an agreement and/or that they engaged in a concerted practice within the meaning of the Chapter I prohibition and Article 101 TFEU. As discussed in paragraphs 5.79 to 5.88, TAHL and CHTL are considered to form part of the same undertaking as, and to be jointly and severally liable for the conduct of, their respective subsidiaries.

E. Object of preventing, restricting or distorting competition

Legal principles

5.25 The Chapter I prohibition and Article 101 TFEU prohibit agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition. The term 'object' in this regard refers to the 'aim', 'purpose', or 'objective' of the coordination between the undertakings in question. The Court of Justice has held that agreements and concerted practices that have the object of preventing, restricting or distorting competition 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.[141]

5.26 The object of an agreement is to be identified primarily from an examination of objective factors, such as the content of its provisions, its objectives and the

[141] Judgment of 14 March 2013, *Allianz Hungária Biztosító* and Others, C-32/11, EU:C:2013:160, paragraph 35. This has been affirmed in Judgment in *Groupement des cartes bancaires and Europay International v Commission*, joined Cases T-39/92, T-40/92, EU:C:2014:2204, paragraph 50 and Judgment in *MasterCard and Others v Commission*, EU:C:2014:2201, paragraph 185. Both in Judgment in *Groupement des cartes bancaires and Europay International v Commission*, EU:T:1994:20, and Judgment in *MasterCard and Others v Commission*, EU:C:2014:2201, the Court of Justice stated that it is apparent from the case law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (Judgment in *Groupement des cartes bancaires and Europay International v Commission*, EU:T:1994:20, paragraphs 49 and 57; Judgment in *MasterCard and Others v Commission*, EU:C:2014:2201, paragraph 184). It went on to state that that case law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (Judgment in *Groupement des cartes bancaires and Europay International v Commission*, EU:T:1994:20, paragraph 50; Judgment in *MasterCard and Others v Commission*, EU:C:2014:2201, paragraph 185).

legal and economic context of the agreement.[142] When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.[143] Where appropriate, the way in which the coordination (or collusive behaviour) is implemented may be taken into account.[144] The object of an agreement and/or concerted practice is not assessed by reference to the parties' subjective intentions when they enter into it.[145]

5.27 Anti-competitive subjective intentions on the part of the parties can, however, be taken into account in the assessment, but they are not a necessary factor for a finding that the object of the conduct was anti-competitive.[146]

5.28 Where the obvious consequence of an agreement or concerted practice is to prevent, restrict or distort competition, that will be its object for the purpose of the Chapter I prohibition and Article 101 TFEU, even if the agreement or concerted practice had other objectives.[147]

5.29 The fact that an agreement pursues other legitimate objectives does not preclude it from being regarded as having a restrictive object.[148]

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[142] Judgment in *Allianz Hungária Biztosító* and Others, EU:C:2013:160, paragraph 36 and Judgment in *Groupement des cartes bancaires and Europay International v Commission*, EU:C:2014:2204, paragraph 53. See also Judgment in Judgment in *GlaxoSmithKline Services Unlimited v Commission*, EU:C:2009:610, paragraph 58; Judgment of 20 November 2008, *Competition Authority v Beef Industry Development Society and Barry Brothers*, C-209/07, EU:C:2008:643, paragraphs 16 and 21; Judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08, EU:C:2011:631, paragraph 136.

[143] Judgment in *Groupement des cartes bancaires and Europay International v Commission*, EU:C:2014:2204, paragraph 53 and Judgment in *Allianz Hungária Biztosító* and Others, EU:C:2013:160, paragraph 36.

[144] *Cityhook Limited v OFT* [2007] CAT 18 ('*Cityhook Limited v OFT*'), at [268] which noted the provisions of paragraph 22 of the Commission Notice: *Guidelines on the application of Article 81(3) of the Treaty* (now Article 101(3) TFEU), OJ C 101/97, 27 April 2004 ('*Article 101(3) Guidelines*'). Paragraph 22 provides that '*the way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect*'.

[145] Judgment of 28 March 1984, *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission*, joined cases 29/83 and 30/83, EU:C:1984:130, paragraphs 25 and 26.

[146] Judgment in *Allianz Hungária Biztosító* and Others, EU:C:2013:160, paragraph 37 and Judgment in *Groupement des cartes bancaires and Europay International v Commission*, EU:C:2014:2204, paragraph 54.

[147] For example, Judgment of 8 November 1983, *NV IAZ International Belgium and others v Commission of the European Communities*, joined cases 96-102, 104, 105, 108 and 110/82, EU:C:1983:310, paragraphs 22 to 25.

[148] Judgment in *Competition Authority v Beef Industry Development Society and Barry Brothers*, EU:C:2008:643, paragraph 21. See also Judgment in *Groupement des cartes bancaires and Europay International v Commission*, EU:C:2014:2204, paragraph 70.

5.30 There is no need to take account of the actual effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition.[149]

Market sharing

5.31 The Chapter I prohibition and Article 101 TFEU both apply, in particular, to agreements or concerted practices which '*share markets or sources of supply*'.[150]

5.32 Businesses may agree to share markets in a number of different ways. The European Commission and European Courts have found market sharing through the allocation of customers on the basis of existing commercial relationships to be a restriction of competition by object.[151] For example, in the *Pre-Insulated Pipe* case, a market sharing agreement by suppliers to respect each other's '*existing'* customer relationships was found by the European Commission to restrict competition by its very nature.[152] For each supply contract, the existing supplier would inform other participants in the arrangement of the price they intended to quote, and the other suppliers would quote higher prices to ensure the maintenance of the existing customer relationship. The mechanism whereby participants quote elevated prices so as to avoid drawing customers away from agreed supply relationships is a common method of market sharing by customer allocation.[153]

5.33 It is also well established that such a mechanism amounts to an infringement of the Chapter I prohibition. For example, in *West Midland Roofing*

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[149] Judgment of 13 July 1966, *Consten and Grundig v Commission*, C-58/64 (joined Cases C-56/64, C-58/64), EU:C:1966:41, paragraph 342. See also *Cityhook Limited v OFT*, at [269].
[150] Article 101(1)(c); and section 2(2)(c) of the Act.
[151] Commission Decision 83/546/EEC of 17 October 1983 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.064 – *Cast iron and steel rolls*) [1984] 11 CMLR 694; Commission Decision 86/399/EEC of 10 July 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.371 – *Roofing Felt*) (OJ 1991 L 232/15) and Commission Decision 2002/759/EC of 5 December 2001 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/37.800/F3 – *Luxembourg Brewers)* (OJ 2002 L 253/21) (appeals dismissed in Judgment of 27 July 2005, *Brasserie Battin v Commission*, T-51/02 (joined cases T-49/02, T-50/02, T-51/02), EU:T:2005:298).
[152] Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article 85 of the EEC Treaty (Case No IV/35.691/E-4 – *Pre-Insulated Pipe Cartel)* (OJ 1999 L 24/1). See also Commission Decision 2005/566/EC of 9 December 2004 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No C.37.533 – *Choline Chloride*) (OJ 2005 L 190/22).
[153] Commission Decision 2005/566/EC of 9 December 2004 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No C.37.533 – *Choline Chloride*) (OJ 2005 L 190/22).

Contractors[154] the OFT concluded that cover pricing (also referred to as collusive tendering or bid-rigging) amounted to an infringement of the Chapter I prohibition. The OFT described cover pricing as arising when a supplier/bidder submits a price for a contract that is not intended to win the contract; rather it is a price that has been decided upon in conjunction with another supplier/bidder that wishes to win the contract.

Price fixing and the sharing of competitively sensitive information

5.34 The Chapter I prohibition and Article 101 TFEU apply to agreements or concerted practices which '*directly or indirectly fix purchase or selling prices or any other trading conditions*'.[155]

5.35 There are many ways in which prices can be fixed. Price fixing may involve fixing either the price itself or the components of a price, setting a minimum price below which prices are not to be reduced, establishing the amount or percentage by which prices are to be increased, or establishing a range outside which prices are not to move. Price fixing may also take the form of an agreement to restrict or dampen price competition, and an agreement may restrict price competition even if it does not entirely eliminate it.[156]

5.36 The European Commission has previously found that pre-pricing communications discussing factors relevant for setting future prices have the object of reducing uncertainty as to the conduct of the parties with regard to the prices to be set by them, and that such communications concerned the fixing of prices.[157] This will also include an arrangement not to quote a price without consulting potential competitors.[158]

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[154] *West Midland Roofing Contractors*, OFT decision of 17 March 2004. See also *Apex Asphalt and Paving Co Ltd v OFT* [2005] CAT 4

[155] Article 101(1)(a) TFEU; section 2(2)(a) of the Act.

[156] *Guidance on Agreements and Concerted Practices*, paragraphs 3.5 and 3.6.

[157] Commission Decision of 15 October 2008, *Bananas,* Case COMP/39.188, upheld in Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, and Judgment of 24 June 2015, *Fresh Del Monte Produce v Commission and Commission / Fresh Del Monte Produce*, C-293/13 P, EU:C:2015:416. In addition, the Commission Notice: *Guidelines on the applicability of Article 101 of the Treaty of the Functioning of the European Union to horizontal co-operation agreements,* OJ C 11/1, 14 January 2011 (the '*Horizontal Cooperation Agreements Guidelines'*) notes that *"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"*, paragraph 74.

[158] Commission Decision 83/546/EEC of 17 October 1983 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.064 – *Cast iron and steel rolls*) [1984] 11 CMLR 694.

5.37 The CMA considers that agreements and concerted practices which fix prices have as their object the prevention, restriction or distortion of competition.[159]

5.38 The European Courts and the European Commission have held on numerous occasions that agreements or concerted practices which involve the sharing amongst competitors of pricing or other information of commercial or strategic significance restrict competition by object.[160]

5.39 The Court of Justice has therefore held that the exchange of information between competitors is liable to be incompatible with Article 101 TFEU (and EU Member States' equivalent national competition laws) if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted.[161] In particular, an exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anti-competitive object.[162]

Application to the Infringement

5.40 The CMA finds that the Infringement took the form of market sharing and the coordination of commercial behaviour (in particular pricing practices) through bid rigging and the exchange of confidential, competitively sensitive information by TATL and HTL, during the course of Relevant Periods (a) and (b), with the object of dividing the market for the supply of drawer fronts through the allocation of customers and avoiding competition on price, thereby reducing customer choice. The CMA considers that these contacts

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[159] *Guidance on Agreements and Concerted Practices*, paragraphs 3.4 to 3.8. For example, Judgment of 30 January 1985, B*ureau national interprofessionnel du cognac v Guy Clair*, C-123/83, EU:C:1985:33, paragraph 22; and Judgment of 19 April 1988, *SPRL Louis Erauw-Jacquery v La Hesbignonne SC*, C-27/87, EU:C:1988:183, paragraph 15. See also Judgment of 10 March 1992, *Montedipe SpA v Commission*, T-14/89, EU:T:1992:36, paragraphs 246 and 265; and Judgment of 6 April 1995, *Tréfilunion v Commission*, T-148/89, EU:T:1995:68, paragraphs 101 and 109.

[160] See for example: Judgment in *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, paragraphs 113 to 127; Judgment in *T-Mobile Netherlands and Others*, EU:C:2009:343. See also *Horizontal Cooperation Agreements Guidelines*; and *Article 101(3) Guidelines*, paragraph 72 to74.

[161] Judgment in *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, paragraph 121; Judgment of 11 March 1999, *Thyssen Stahl v Commission*, C-194/99 P, EU:C:2003:527, paragraph 81; Judgment in *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 35.

[162] Judgment in *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, paragraph 122; Judgment in T-Mobile Netherlands and Others, EU:C:2009:343, paragraph 41.

can be regarded, by their nature, as being injurious to the proper functioning of normal competition.

5.41 Section 3 describes the economic context in which these practices took place. Paragraphs 5.3 to 5.39 above describe the relevant legal principles establishing that certain forms of conduct amount to infringements of the Chapter I prohibition and/or Article 101 TFEU. As set out in Section 4, the evidence shows that TATL and HTL agreed not to pursue each other's customers (see in particular paragraphs 4.3 to 4.5) and shared pricing information for the purposes of submitting tactical quotes to customers. The pricing information exchanged was competitively sensitive information that one would expect to be kept secret. By their actions, TATL and HTL were in a position to maintain their respective customer bases; and were also aware that there would be less downward pressure on prices than would otherwise be expected.

5.42 The CMA considers that the objective aim of the agreement and/or concerted practice is supported by evidence of TATL's subjective intentions. The evidence cited in Section 4, and in particular at paragraphs 4.4, 4.32 and 4.34, clearly demonstrates the existence and expression of the parties' subjective intention to maintain customer bases.

5.43 In line with the principles set out in paragraphs 5.31 to 5.39 above, the CMA considers that each of the practices identified above, namely the sharing of markets through the allocation of customers and the coordination of commercial behaviour (in particular pricing practices) through bid rigging and the exchange of competitively sensitive information of itself constitutes an obvious restriction of competition and thus also has as its object the prevention, restriction or distortion of competition. Such conduct can be regarded, by its very nature, as being injurious to the proper functioning of normal competition.

5.44 It follows that, for the purposes of establishing an infringement of the Chapter I prohibition and/or Article 101 TFEU in the present case, there is no need for the CMA to show that the agreement and/or concerted practice had an anti-competitive effect.

F. Single and continuous infringement

Legal principles

5.45 Where two or more undertakings engage in a series of anti-competitive actions in pursuit of a common objective or objectives, it is not necessary to divide the conduct by treating it as consisting of a number of separate infringements where there is sufficient consensus to adhere to a plan in pursuit of a single economic aim.[163] Nor is the characterisation of a complex cartel as a single and continuous infringement affected by the possibility that one or more elements of a series of actions, or of a continuous course of conduct, could individually and in themselves constitute infringements.[164]

5.46 Agreements and/or concerted practices may constitute a single continuous infringement notwithstanding that they vary in intensity and effectiveness, or even if the arrangement in question is suspended during a short period.[165]

5.47 When establishing that an undertaking was involved in a single continuous infringement it is necessary to show that: '… *the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk'*.[166]

5.48 Where there is a significant interruption in participation in the cartel, the conduct may be regarded as a single repeated infringement where a single objective is pursued both before and after the interruption. The key difference in such cases lies in the fact that if the infringement is single and repeated, a penalty may not be imposed for the period of the interruption, whereas a penalty may be imposed for the whole period in the case of a single and continuous infringement.[167]

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[163] Judgment in *Rhône-Poulenc v Commission*, EU:T:1991:56, paragraph 126.
[164] Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraphs 111 to 114. See also Commission Decision of 10 December 2003, *Organic peroxides,* Case COMP/E-2/37.857, paragraph 308.
[165] Judgment of 20 March 2002, *LR AF 1998 v Commission*, T-23/99, EU:T:2002:75, paragraphs 106-109.
[166] Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 87.
[167] Case T-147 and 148/09 Trelleborg Industrie v Commission, EU:T:2013:259, paragraph 88.

Application to the Infringement

5.49 Given the apparent gap in the operation of the agreements and/or concerted practices, the CMA has decided not to treat TATL's and HTL's conduct from July 2006 through to October 2011 as one single continuous infringement.

5.50 The CMA has considered whether to treat Infringements (a) and (b) as two parts of a single repeated infringement[168] or as separate but related infringements.[169] For the reasons set out below, the CMA is treating the conduct of TATL and HTL during Relevant Periods (a) and (b) as two parts of a single repeated infringement.[170]

5.51 The conduct of TATL and HTL during Relevant Period (a) constituted a number of anti-competitive contacts in pursuit of a common objective, namely to divide the market for the supply of drawer fronts through the allocation of customers, and to maintain each other's customer base, in order to avoid having to compete for business (for example, by lowering prices). This involved identifying customers that would be 'reserved' to each party and a shared understanding of how they would each behave in relation to the other's customers, and included the disclosure of pricing information for the purposes of enabling each other to submit tactical quotes.

5.52 The conduct of TATL and HTL during Relevant Period (b) constituted anti-competitive contact, in pursuit of the same common objective, namely the allocation of a key customer in order to avoid having to compete for business (for example, by lowering prices). The customer in question had been identified at the Newcastle meeting as 'reserved' to TATL; and there was an apparent shared understanding of how the parties would behave in relation to that customer, which involved the disclosure of pricing information for the purposes of enabling HTL to submit a tactical quote. In this respect, the CMA notes that even if HTL did not wish to win Silentnight's business at this time, it did not need to collude with TATL in order to put in a high quote. The CMA considers that the conduct during Relevant Period (b) taken in conjunction with the conduct in Relevant Period (a) is part of a single repeated infringement.

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[168] Case T-147 and 148/09 Trelleborg Industrie v Commission, EU:T:2013:259, paragraph 88.
[169] Case T-446/05 Amann & Söhne GmbH & Co. KG and Cousin Filterie SAS v Commission EU:T:2010:165.
[170] As discussed in paragraphs 5.79 to 5.88, TATL and HTL each form part of the same undertakings as their respective parent companies, TAHL and CTHL, which the CMA finds jointly and severally liable for the infringing conduct of their respective subsidiaries.

5.53 In finding this conduct to be part of a single repeated infringement, the CMA notes in particular that:

(a) the conduct during Relevant Period (b) involved the same overall plan as first set out in the arrangement entered into during Relevant Period (a) at the Newcastle meeting, and the principles underlying that arrangement appear to have been in the mind of those individuals who were involved in that conduct (see paragraphs 4.39 to 4.49 above);

(b) Infringements (a) and (b) both involve the allocation of customers, and the coordination of prices by way of bid rigging in the form of cover pricing. Indeed, the conduct in relation to the customers Silentnight, Dura Beds and Nestledown during Relevant Period (a) (as set out in paragraphs 4.7 to 4.12 and 4.19 to 4.30 above), takes the same form as the conduct in relation to Silentnight during Relevant Period (b) (as set out in paragraphs 4.39 to 4.44 above); and

(c) Infringements (a) and (b) both involve the same key individuals (namely [TATL senior employee] and [HTL senior employee]), and these individuals appear to have known exactly what was required of them in the circumstances and to have acted accordingly.

5.54 Within the single repeated infringement, the CMA finds that the conduct within Relevant Period (a) constituted a single continuous infringement rather than a series of separate infringements. Having regard to the principles set out at paragraph 5.46 above, the CMA considers there to have been a single continuous infringement within Relevant Period (a), notwithstanding that there may have been occasions on which one of the parties sought to circumvent the agreement and/or concerted practice in question.[171]

5.55 For the reasons set out above, the CMA is therefore treating the conduct of TATL and HTL during Relevant Periods (a) and (b) as two parts of a single repeated infringement. The CMA considers that its findings as regards TATL's and HTL's conduct in this respect are supported by a consistent body of witness and contemporaneous documentary evidence throughout each of the Relevant Periods (a) and (b).[172]

[171] See, for example, paragraphs 4.29 and 4.34 of this Decision.
[172] See paragraphs 4.3 to 4.49 of this Decision.

G. Appreciable restriction of competition

Legal principles

5.56 An agreement and/or concerted practice will only infringe the Chapter I prohibition and/or Article 101 TFEU if it has as its object or effect the appreciable prevention, restriction or distortion of competition[173] within the UK or a part of it, or within the EU internal market, respectively.

5.57 The Court of Justice has clarified that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.[174] In accordance with section 60(2) of the Act,[175] this principle also applies *mutatis mutandis* in respect of the Chapter I prohibition: accordingly, an agreement that may affect trade within the UK and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.

Application to the Infringement

5.58 As set out in paragraph 5.43 above, the CMA has concluded that the agreement and/or concerted practice between TATL and HTL had the object of preventing, restricting or distorting competition by sharing of markets for drawer fronts through the allocation of customers and the coordination of commercial behaviour (in particular pricing practices) through bid-rigging and the exchange of competitively sensitive information.

5.59 As set out in paragraphs 5.64 to 5.66 below, the CMA finds that the agreement and/or concerted practice may affect trade within the UK – in particular the agreement and/or concerted practice applied to the whole of the UK market for drawer fronts.

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[173] It is settled case law that an agreement between undertakings falls outside the prohibition in Article 101(1) TFEU if it has only an insignificant effect on the market: see Judgment of 13 December 2012, *Expedia Inc. v Autorité de la concurrence and Others*, C-226/11, EU:C:2012:795, paragraph 16.

[174] Judgement in *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, paragraph 37; and Commission Notice on agreements of minor importance [2014] OJ C291/01, paragraphs 2 and 13.

[175] Section 60(2) of the Act provides that, when determining a question in relation to the application of Part 1 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 European Court in respect of any corresponding question arising in EU law. See also *Carewatch and Care Services Limited v Focus Caring Services Limited and Others* [2014] EWHC 2313 (Ch), paragraphs 148ff.

5.60 As set out in paragraphs 5.70 to 5.73 below, the CMA finds that the agreement and/or concerted practice may affect trade between Member States.

5.61 Therefore, the CMA has concluded that the agreement and/or concerted practice constitutes by its nature an appreciable restriction of competition.

H. Effect on trade within the United Kingdom

Legal principles

5.62 The Chapter I prohibition applies to agreements and/or concerted practices which '…*may affect trade within the United Kingdom*'.[176]

5.63 As regards the question of whether the effect on trade within the UK should be appreciable, the Competition Appeal Tribunal (CAT) has held in one case that there is no need to import into the Act the rule of '*appreciability'* under EU law, the essential purpose of which is to demarcate the fields of EU law and UK domestic law respectively.[177] In a subsequent case, the CAT held that it was not necessary to reach a conclusion on that question.[178]

Application to the Infringement

5.64 The CMA considers that, by its very nature, an agreement and/or concerted practice between competitors to share markets and exchange competitively sensitive information in relation to the supply of drawer fronts is likely to affect trade within the UK.

5.65 The CMA also notes that drawer fronts were supplied by TATL and HTL to customers who were based across the whole of the UK, and that the agreement and/or concerted practice operated at the national level.[179] Thus the agreement and/or concerted practice was at the very least capable of

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[176] By virtue of section 2(1)(a) of the Act. For the purposes of the Chapter I prohibition, the United Kingdom includes any part of the UK where an agreement and/or concerted practice operates or is intended to operate.
[177] Aberdeen Journals v Director of Fair Trading [2003] CAT 11 at [459] to [461].
[178] *North Midland Construction plc v Office of Fair Trading* [2011] CAT 14 at [48] to [51] and [62]. The CAT stated that it was not necessary to reach a conclusion on the question whether the appreciability requirement extends to the effect on UK trade test as, at least in that case, there was a close nexus between appreciable effect on competition and appreciable effect on trade within the UK, in that if one was satisfied, the other was likely to be so.
[179] See paragraphs 3.30 to 3.33 of this Decision.

altering the structure of competition within the UK by reducing competition in the supply of drawer fronts, thus altering the pattern of trade within in the UK.

5.66 The CMA therefore finds that the requirement, within the meaning of the Chapter I prohibition, that an agreement and/or concerted practice may have an effect on trade within the UK, is satisfied in this case.

I. Effect on trade between EU member states

Legal principles

5.67 Article 101(1) applies where an agreement and/or concerted practice has the potential to affect trade between EU Member States. Such an effect on trade must be appreciable.

5.68 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.[180] In this context, the concept of '*effect on trade*' has a wide scope and is not limited to exchanges of goods and services across borders.[181]

5.69 Trade between Member States may be affected notwithstanding that the relevant market may be national or sub-national in scope.[182] Moreover, horizontal cartels covering a whole Member State are normally capable of affecting trade between Member States.[183] The EU Courts have held in a number of cases that '*an agreement, decision or concerted practice extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about*'.[184]

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[180] First stated in Judgment of 30 June 1966, *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)*, C-56/65, EU:C:1966:38, p.249. See further, for example*, van Landewyck* (fn523), paragraph 12; Judgment of 11 July 1985, *Remia BV and others v Commission of the European Communities*, C-42/84, EU:C:1985:327, paragraph 22. See also Commission Notice (EC) Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C101/07) (the '*Notice on the Effect on Trade'*), paragraph 24.

[181] Judgment in *Züchner v Bayerische Vereinsbank*, EU:C:1981:178, paragraph 18; and see the Notice on the Effect on Trade, paragraph 19.

[182] *Effect on Trade Guidelines*, paragraph 22.

[183] *Effect on Trade Guidelines*, paragraphs 78 to 80.

[184] Judgment of 19 February 2002, *Wouters and Others*, C-309/99, EU:C:2002:98, paragraph 95. See also the *Effect on Trade Guidelines*, paragraph 78. For the purposes of assessing whether an agreement and/or

Application to the Infringement

5.70 The CMA finds that the Infringement may give rise to an effect on trade between Member States to an appreciable extent. The CMA is therefore under a duty to apply Article 101 TFEU to the Infringement.

5.71 The CMA finds that TATL and HTL have engaged in market sharing (including bid rigging) and the sharing of confidential, competitively sensitive information. Such conduct amounts to a horizontal cartel within the meaning of paragraphs 78 to 80 of the *Effect on Trade Guidelines*. The CMA further finds that the relevant market covers the whole territory of the UK.[185] As noted above, horizontal cartels extending over the whole of a Member State are normally capable of affecting trade between Member States.

5.72 In addition, there are international aspects to the supply of drawer fronts. It is noted in particular that during Relevant Periods (a) and (b), TATL supplied drawer fronts to the Republic of Ireland; and that there was some, limited, competition from a number of non-UK businesses, albeit that it was rare for customers to source drawer fronts from businesses overseas.[186]

5.73 As regards appreciability, the CMA notes that TATL and HTL supplied a number of large/well known customers in the bedding furniture market (including Silentnight, Horatio Myer & Co Ltd and Hypnos Ltd), suggesting that they had a strong position in the relevant market.[187] The CMA also notes that TATL has stated that it considered HTL alone to be its principal competitor.[188] Moreover, the CMA finds that TATL and HTL sought to share the market and coordinate their commercial conduct at a national level.

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concerted practice may affect trade between EU Member States to an appreciable extent the CMA follows the approach set out in the European Commission's published guidance.

[185] See paragraphs 3.30 to 3.33 of this Decision.

[186] TATL's response dated 27 April 2016 to the CMA's section 26 notice dated 30 March 2016, questions 3, 6 and 7 URN H0036; and paragraphs 3.24 to 3.27 of this Decision.

[187] TATL's response dated 27 April 2016 to the CMA's section 26 request dated 30 March 2016, question 9 URN H0036; HTL's response dated 20 May 2016 to the CMA's section 26 response dated 30 March 2015, question 9 URN H0102.

[188] TATL's response dated 27 April 2016 to the CMA's section 26 request dated 30 March 2016, question 6 URN H0036.

J. Duration

5.74 The duration of the Infringement is a relevant factor for determining any financial penalties that the CMA may decide to impose in the event of a finding of infringement (see paragraphs 6.24 to 6.26 below).

5.75 The CMA finds that TATL and HTL participated in a single repeated infringement through an agreement and/or concerted practice in relation to drawer fronts:

(a) the first phase of the infringement (Infringement (a)) lasted from 25 July 2006 and continued until 23 September 2008. The duration of Infringement (a) was, therefore, two years and two months;

(b) the second phase of the infringement (Infringement (b)) lasted from at least 27 September 2011 to 3 October 2011. The duration of Infringement (b) was, therefore, 7 days.

K. Exemptions and exclusions

5.76 The Parties have not sought to prove that the arrangements entered into are exempted from the Chapter I prohibition by operation of section 9 of the Act, or from Article 101 by the operation of Article 101(3) TFEU.

5.77 Notwithstanding that the burden of proving that the conditions for exemption under section 9 of the Act or Article 101(3) TFEU would rest with the Parties, the CMA considers it unlikely that the conditions would be met in this case. Agreements which have as their object the prevention, restriction or distortion of competition, are unlikely to benefit from individual exemption as such restrictions generally fail (at least) the first two conditions for exemption: they neither create objective economic benefits, nor do they benefit consumers. Moreover, such agreements generally also fail the third condition (indispensability).[189] However, each case ultimately falls to be assessed on its merits.

5.78 In addition, the CMA finds that none of the exclusions from the Chapter I prohibition provided for by section 3 of the Act apply.

[189] Article 101(3) Guidelines, paragraph 46.

L. Attribution of liability

Identification of the appropriate legal entity

5.79 For each Party which the CMA finds has infringed the Act and/or Article 101 TFEU, the CMA has first identified the legal entity directly involved in the Infringement. It has then determined whether liability for the Infringement should be shared with another legal entity forming part of the same undertaking, in which case each legal entity's liability will be joint and several.

5.80 The conduct of a subsidiary undertaking[190] may be imputed to its parent company where, although having a separate legal personality, the subsidiary did not decide independently upon its conduct on the market, but carried out, in all material respects, the instructions of its parent company.[191] Where a subsidiary is wholly owned by its parent company, the CMA is entitled to presume that the parent exercised decisive influence over the commercial policy of the subsidiary; this presumption also applies if ownership of the subsidiary is just below 100 per cent.[192] It is for the parent company in question to rebut the presumption by adducing sufficient evidence to demonstrate that the subsidiary company acted independently on the market.[193]

5.81 Where a parent company is able to exercise decisive influence over the conduct of a subsidiary, and does in fact exercise such decisive influence, the conduct of a subsidiary may be imputed to its parent company (with joint and several liability for the subsidiary and its parent). In such circumstances, the

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[190] Judgment in *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 55.

[191] Judgment in *ICI v Commission*, EU:C:1972:70, paragraphs 132 and 133; Judgment in *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 58.

[192] Judgment in *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraphs 60 and 61; Judgment in -174/05 *Elf Aquitaine v Commission*, EU:T:2009:368, paragraphs 153 to 157 (where the presumption was held to apply inrelation to a shareholding of approximately 98 per cent); Judgment T-217/06 *Arkema France and Others v Commission*, EU:T:2011:251 at paragraph 53; Judgment of 27 October 2010, *Alliance One International and Others v Commission*, T-24/05, EU:T:2010:453, paragraphs 126-130. The GC has indicated, among other things, that neither the fact that the subsidiary operates independently in specific aspects of its policy on the marketing of the products concerned by the infringement, nor the lack of any direct involvement in, or knowledge of the facts alleged to constitute, the infringement by directors of the parent company, are sufficient, of themselves, to rebut the presumption. Judgment of 14 July 2011, *Total and Elf Aquitaine v Commission*, T-190/06, EU:T:2011:378, paragraph 64; Judgment of 14 July 2011, *Arkema France v Commission*, T-189/06, EU:T:2011:377, paragraph 65.

[193] Judgment of 27 November 2014, *Alstom v European Commission*, T-517/09, EU:T:2014:999, paragraph 55; Judgment in *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 61; Judgment in *Alliance One International and Others v Commission*, EU:T:2010:453, paragraph 130.

parent company and its subsidiary form a single economic unit and, therefore, the same undertaking, for the purpose of applying the Chapter I prohibition and Article 101 TFEU. [194]

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

Application to the Parties

TA

5.83 The CMA finds that TATL was directly involved in, and is therefore liable for, the Infringement.

5.84 The CMA finds that TAHL is jointly and severally liable with TATL for the Infringement. TAHL holds a 99.95 per cent shareholding in TATL and did so throughout Relevant Periods (a) and (b);[195] it can therefore be presumed to have exercised a decisive influence over TATL during Relevant Periods (a) and (b), and to form part of the same undertaking.

5.85 This Decision is therefore addressed to TATL and TAHL (together TA).

HT

5.86 The CMA finds that HTL was directly involved in, and is therefore liable for, the Infringement.

5.87 The CMA finds that CTHL is jointly and severally liable with HTL for the Infringement. CTHL holds a 100 per cent shareholding in HTL and did so throughout Relevant Periods (a) and (b);[196] it can therefore be presumed to have exercised a decisive influence over HTL during Relevant Periods (a) and (b), and to form part of the same undertaking.

5.88 This Decision is therefore addressed to HTL and CTHL (together HT).

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[194] Judgment in *Alstom v European Commission*, EU:T:2014:999, paragraph 55; Judgment in *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 59.

[195] See paragraph 2.12 of this Decision.

[196] See paragraph 2.19 of this Decision.

6. THE CMA'S ACTION

A. The CMA's decision

6.1 On the basis of the evidence set out in this Decision, the CMA finds that:

(a) between July 2006 and September 2008, HT and TA infringed the Chapter I prohibition and/or Article 101 TFEU by participating in a single continuous infringement through an agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of drawer fronts to customers in the UK (Infringement (a)); and

(b) between at least September 2011 and October 2011, HT and TA infringed the Chapter I prohibition and/or Article 101 TFEU by participating in an infringement through an agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of drawer fronts to customers in the UK (Infringement (b)).

6.2 The CMA finds that Infringements (a) and (b) together formed a single repeated infringement (the 'Infringement').

B. Attribution of liability

6.3 As set out in paragraphs 5.83 to 5.88 above, the CMA finds TA and HT liable for the Infringement.

C. Directions

6.4 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, 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.

6.5 As the CMA considers that the Infringement has already come to an end it is not issuing directions in this case.

D. Financial penalties

6.6 Section 36(1) of the Act provides that on making a decision that an agreement has infringed the Chapter I prohibition and/or Article 101 TFEU, 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').[197]

6.7 The CMA considers that it would be appropriate to impose penalties on TA and HT for the Infringement. TA has agreed as part of settlement to accept a maximum penalty of £684,000; and HT has agreed as part of settlement to accept a maximum penalty of £688,000.

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

6.8 Provided the penalties it imposes in a particular case are (i) within the range of penalties permitted by section 36(8) of the Act and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (the '2000 Order'),[198] 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.[199] The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.[200] Rather, the CMA makes its assessment on a case-by-case basis,[201] having regard to all relevant circumstances and the objectives of its policy on financial penalties. 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 prohibition in Chapter I of the Act (as well as other prohibitions under the Act and the TFEU as the case may be).[202]

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[197] *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board.
[198] SI 2000/309, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.
[199] *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].
[200] See, for example, *Eden Brown and Others v OFT* [2011] CAT 8 *(Eden Brown*), at [78].
[201] 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'*.
[202] Section 36(7A) of the Act and Penalties Guidance, paragraph 1.4.

Small agreements

6.9 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 turnover of the Parties exceeds £20 million and, in any event, the Infringement amounts to a 'price fixing agreement' within the meaning of section 39(9) of the Act.[203] Section 39 does not apply in respect of infringements of Article 101 TFEU.

Intention/negligence

6.10 The CMA may impose a penalty on an undertaking which has infringed the Chapter I prohibition or Article 101 TFEU only if it is satisfied that the infringement has been committed intentionally or negligently.[204] However, the CMA is not obliged to specify whether it considers the infringement to be intentional or merely negligent.[205]

6.11 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*'.[206]

6.12 This is consistent with the approach taken by the Court of Justice, which has confirmed:

'*the question whether the infringements were committed intentionally or negligently…is satisfied where the undertaking concerned cannot be unaware*

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[203] A '*price fixing agreement*' within the meaning of section 39(9) of the Act is '*an agreement which has as its object or effect, or one of is objects or effects, restricting the freedom of a party to the agreement to determine the price to be charged (otherwise than as between that party and another party to the agreement) for the product, service or other matter to which the agreement relates*'. By virtue of section 39(1)(b) of the Act, such an agreement is excluded from the benefit of the limited immunity from penalties provided by section 39 of the Act.
[204] Section 36(3) of the Act.
[205] *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].
[206] *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at 221.

of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty'.[207]

6.13 The circumstances in which the CMA might find that an infringement has been committed intentionally include the situation in which the agreement and/or concerted practice or conduct in question has as its object the restriction of competition.[208]

6.14 Ignorance or a mistake of law does not prevent a finding of intentional infringement.[209]

6.15 For the reasons set out at paragraphs 5.40 to 5.44 above, the CMA finds that the 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. The CMA therefore concludes that the infringement was committed intentionally or, at the very least, negligently.

Calculation of penalty

6.16 The Penalties Guidance sets out a six-step approach for calculating the penalty.

Step 1 – starting point

6.17 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.[210]

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[207] Judgment of 14 October 2010 in *Deutsche Telekom v Commission*, C-2080/08P, EU:C:2010:603, paragraph 124.
[208] See *OFT's Guidance on Competition law application and Enforcement* (OFT407, December 2004), adopted by the CMA Board ('Guidance on Enforcement'), paragraph 5.9.
[209] See Judgment of 18 June 2013 in *Bundeswettbewerbsbehörde v Schenker & Co AG,* C-681/11, EU:C:2013:404, paragraph 38: '*the fact that the undertaking concerned has characterised wrongly in law its conduct upon which the finding of the infringement is based cannot have the effect of exempting it from imposition of a fine in so far as it could not be unaware of the anti-competitive nature of that conduct*'. See also *Guidance on Enforcement*, paragraph 5.10.
[210] Penalties Guidance, paragraphs 2.3 to 2.11.

- *Relevant turnover*

6.18 The 'relevant turnover' is the turnover of the undertaking in the relevant market affected by the infringement in the undertaking's last business year.[211] The 'last business year' is the undertaking's financial year preceding the date when the infringement ended.[212]

6.19 In the present case:

(a) the 'last business year' of TA is the financial year ending 30 September 2011, which results in a relevant turnover of £974,749;

(b) the 'last business year' of HT is the financial year ending 31 March 2011, which results in a relevant turnover of £688,410.

- *Seriousness of the infringement*

6.20 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.[213] 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.[214] When making its assessment of the seriousness of the infringement, the CMA will consider a number of factors.[215] 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.[216] The CMA will also take into account the need to deter other undertakings from engaging in such infringements in the future. The assessment is made on a case-by-case basis, taking account of all the circumstances of the case.[217]

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[211] 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).

[212] Penalties Guidance, paragraph 2.7.

[213] Penalties Guidance, paragraph 2.5.

[214] Penalties Guidance, paragraph 2.4.

[215] 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.

[216] Penalties Guidance, paragraph 2.5.

[217] Penalties Guidance, paragraph 2.6.

6.21 In assessing the seriousness of the Infringement, taking account of the principles set out in the previous paragraph, the CMA considers that, on the one hand, the following factors point to a starting point towards the upper end of the range:

(a) the Infringement involved the most serious type of cartel behaviour: market sharing and the coordination of commercial behaviour (in particular pricing practices) through bid rigging and the exchange of confidential, competitively sensitive information, with the object of dividing the market based on customer type and avoiding competition on price, thereby reducing customer choice;

(b) the conduct was carried out across the whole of the UK; as a consequence, it had the potential to affect UK and EU interstate trade;

(c) the Infringement involved two leading manufacturers of drawer fronts to key bedding furniture customers in the UK;

(d) a lower starting point would send the wrong message in terms of general deterrence, particularly given the need to provide general deterrence in respect of infringements that by their very nature are likely to cause harm.

6.22 On the other hand, the CMA has also taken account of:

(a) the potentially limited impact of the conduct on consumers, given the relatively low value of the cartelised products; and

(b) the fact that TATL and HTL were not the only independent manufacturers of drawer fronts in the UK during Relevant Periods (a) and (b), and therefore alternative suppliers were potentially available to customers.

6.23 Taking the above factors in the round, [218] the CMA considers that the starting point for the Infringement should be at the high (but not the highest) end of the range, and in the circumstances it considers that it is appropriate to apply as a starting point 26 per cent of the Parties' relevant turnover. Applying 26 per cent to:

(a) TA's relevant turnover of £974,749, results in a penalty of £253,435 at step 1;

[218] The CMA has taken account of the evidence relating to these factors set out in sections 3, 5H and 5I above.

(b) HT's relevant turnover of £688,410, results in a penalty of £173,787 at step 1.

Step 2 – adjustment for duration

6.24 The starting point under step 1 may be increased, or in particular circumstances decreased, to take into account the duration of an infringement. Penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement.[219] Part years may be treated as full years for the purposes of calculating the number of years of the 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.[220] Where the duration of an infringement is more than one year, the CMA will usually round up to the nearest quarter year.[221]

6.25 The CMA has applied a multiplier of 2.25 to the starting point, to take account of the duration of the Infringement, specifically:

(a) Infringement (a) lasted from 25 July 2006 and continued until 23 September 2008. The duration of Infringement (a) was, therefore, two years and two months;

(b) Infringement (b) lasted from at least 27 September 2011 to 3 October 2011. The duration of Infringement (b) was, therefore, 7 days,

giving an overall duration of two years, two months and six days.

6.26 Applying this multiplier results in a penalty of:

(a) £570,228 for TA, and

(b) £391,020 for HT,

at step 2.

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[219] Penalties Guidance, paragraph 2.12.

[220] Penalties Guidance, paragraph 2.12.

[221] Penalties Guidance, paragraph 2.12.

Step 3 – adjustment for aggravating and mitigating factors

6.27 The amount of the penalty, adjusted as appropriate at step 2, may be increased where there are aggravating factors, or reduced where there are mitigating factors. A non-exhaustive list of aggravating and mitigating factors is set out in the Penalties Guidance.[222] In the circumstances of this case, the CMA considered at step 3 the factors set out below.

- *Aggravating factor: involvement of directors or senior management*

6.28 The involvement of directors or senior management in an infringement can be an aggravating factor.[223] The CMA has increased the penalty at step 3 by 15 per cent for the Parties. This is on the basis that the arrangements, which were the most serious kind of infringement, were set up and implemented by [senior employees] of the Parties. The CMA considers that an uplift of 15 per cent is appropriate and proportionate in the circumstances of this case.

- *Mitigating factor: cooperation*

6.29 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).[224]

6.30 The CMA considers that it is appropriate to decrease the penalty at step 3 to reflect to reflect the fact that the vast majority of witnesses from the Parties agreed to provide witness statements following interview, and that these were provided on a voluntary basis. In addition, the Parties provided separate legal representation for some of their employees, which enabled the CMA to conclude its investigation more quickly than would otherwise have been possible.

6.31 The CMA considers that a 5 per cent reduction for cooperation is appropriate and proportionate in the circumstances of this case.

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[222] Penalties Guidance, paragraphs 2.13 to 2.15.
[223] Penalties Guidance, paragraph 2.14.
[224] Penalties Guidance, paragraph 2.15 and footnote 28.

- *Mitigating factor: compliance*

6.32 The CMA may decrease the penalty at step 3 where an undertaking can show that adequate steps have been taken to ensure compliance with competition law.[225] To qualify, an undertaking has to show evidence of adequate steps taken to achieve a clear and unambiguous commitment to competition law compliance throughout the organisation, from the top down - together with appropriate steps relating to competition compliance risk identification, risk assessment, risk mitigation and review activities. The CMA will consider carefully whether evidence presented of an undertaking's compliance activities in a particular case merits a discount to the penalty of up to 10 per cent.

6.33 Prior to settlement, TA provided the CMA with details of its compliance plan and the steps taken to ensure a compliance culture within TA. Following the settlement in January 2017, the CMA also received evidence of HT's compliance activities.

6.34 The CMA considers that both TA and HT have provided sufficient evidence of compliance activities, demonstrating a clear and unambiguous commitment to competition law compliance throughout the organisation from the top down, to warrant a reduction in penalty. In particular, the Parties have:

(a) developed a competition compliance policy, which is provided to every member of staff who may come into contact with other businesses in the course of their employment;

(b) provided the CMA with evidence that senior managers, directors and sales teams have been trained in competition compliance, and that employees in appropriate roles will receive competition compliance training on a regular basis;

(c) published a compliance plan on their websites.[226]

6.35 The CMA therefore considers that a 10 per cent reduction for compliance for the Parties is appropriate and proportionate in the circumstances of this case. This reduction is granted on the condition that the Parties provide an annual

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[225] Penalties Guidance, paragraph 2.15 and footnote 26. See also OFT1341 *How your client's business can achieve compliance with competition law*.

[226] See: http://www.thomasarmstrong.co.uk/-about-us-/our-policies/; and http://www.cth.co.uk/corporatecompliance.php.

update to the CMA confirming their ongoing commitment to compliance activities, for the next three years.

6.36 Applying the percentage increase and the percentage decreases for aggravating and mitigating factors, respectively, results in a penalty of:

(a) £570,228 for TA, and

(b) £391,020 for HT,

at step 3.

Step 4 – adjustment for specific deterrence and proportionality

6.37 The penalty may be adjusted at this step to achieve the objective of specific deterrence (namely, ensuring that the penalty imposed on the infringing undertaking will deter it from engaging in anti-competitive practices in the future), or to ensure that a penalty is proportionate, having regard to appropriate indicators of the size and financial position of the undertaking as well as any other relevant circumstances of the case.[227] At step 4, the CMA will assess whether, in its view, the overall penalty is appropriate in the round. Adjustment to the penalty at step 4 may result in either an increase or a decrease to the penalty.

6.38 Increases to the penalty figure at step 4 will generally be limited to situations in which an undertaking has a significant proportion of its turnover outside the relevant market, or where the CMA has evidence that the infringing undertaking has made or is likely to make an economic or financial benefit from the infringement that is above the level of the penalty reached at the end of step 3.[228] 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.[229]

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[227] Penalties Guidance, paragraph 2.16. The CMA has considered a range of financial indicators in this regard, based on accounting information publicly available and/or provided by TA and HT at the time of calculating the penalty. Those financial indicators included relevant turnover, total worldwide turnover for the last financial year, total worldwide turnover over a three year average, net assets for the last financial year, profit after tax for the last financial year, and profit after tax over a three year average, dividends over a three year average, TAs management accounts for the three year period ending 30 September 2015, HT's management accounts for the three year period ending 31 March 2015.

[228] Penalties Guidance, paragraph 2.17.

[229] Penalties Guidance, paragraph 2.19.

6.39 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 infringing undertaking's size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the undertaking's infringing activity on competition.[230]

6.40 As the penalties after step 3 are small compared to the overall size and financial position of the Parties, the CMA considers that it is appropriate to make adjustments to ensure sufficient deterrence for each of the Parties as follows:

- *TA*

6.41 The CMA considers that TA's penalty after step 3 should be increased by 50 per cent to a figure of £855,342 to ensure that the level of penalty is sufficient for deterrence and appropriate in the circumstances. The CMA considers that such an increase is appropriate having regard to TA's size and financial position.

6.42 The CMA notes that the adjusted figure represents approximately:

(a) 0.69 per cent of TA's average annual worldwide turnover (over the three year period ending 30 September 2015);

(b) 0.75 per cent of TA's adjusted net assets;[231]

(c) 11.8 per cent of TA's average annual profit after tax (over the three year period ending 30 September 2015).

6.43 As stated in paragraph 2.40 above, on the same day as this Decision is issued, the CMA is issuing a decision imposing a financial penalty on TA for its participation in the Drawer Wrap Infringement involving a closely related market.[232] The CMA has therefore taken a step back and carried out a cross check across the two penalties to ensure that, taken together, they would not

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[230] Penalties Guidance, paragraph 2.20.

[231] Being net assets in the financial year ending 30 September 2015, together with dividends paid out in the financial years ending 30 September 2013, 2014 and 2015.

[232] The CMA is imposing a penalty on TA of £1,509,000 (after settlement discount) for the Drawer Wrap Infringement.

lead to the imposition of a total penalty across both infringements that is excessive or disproportionate.[233]

6.44 The CMA notes that, when the CMA's penalty for the Infringement at step 4, (£855,342 after adjustment) is combined with the CMA's penalty in relation to the Drawer Wrap Infringement at step 4 (£1,886,982), TA's total penalty at step 4 amounts to £2,742,324, which represents:

(a) 2.23 per cent of TA's average annual worldwide turnover (over the three year period ending 30 September 2015);

(b) 2.41 per cent of TA's adjusted net assets;[234]

(c) 37.7 per cent (or approximately 4.5 months) of average annual profit after tax (over the three year period ending 30 September 2015).

6.45 Assessing the penalty for the Infringement in the round and taking into account the penalty for the Drawer Wrap Infringement, the CMA considers that a penalty of £855,342 after step 4 is appropriate and sufficient in this case for deterrence purposes without being disproportionate or excessive.

- *HT*

6.46 The CMA considers that HT's penalty after step 3 should be increased by 100 per cent to a figure of £782,040 to ensure that the level of penalty is sufficient for deterrence and appropriate in the circumstances. The CMA considers that such an increase is appropriate having regard to HT's size and financial position.

6.47 The CMA notes that the adjusted figure represents approximately:

(a) 0.68 per cent of HT's average annual worldwide turnover (over the three year period ending 31 March 2015);

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[233] See *Kier Group and Others v OFT* [2011] CAT 3, at [180] where the CAT noted that, *'In our view, if more than one discrete infringement is being pursued then whatever deterrent element is appropriate for each infringement should be included in the specific penalty for it. This should not result in an excessive overall penalty provided that the 'totality' principle is respected and any necessary adjustments are made to each separate penalty.'*

[234] Being net assets in the financial year ending 30 September 2015, together with dividends paid out in the financial years ending 30 September 2013, 2014 and 2015.

(b) 5.28 per cent of HT's adjusted net assets;[235]

(c) 38.6 per cent (or approximately 4.5 months) of HT's average annual profit after tax (over the three year period ending 31 March 2015).

6.48 The CMA also considers that an uplift of 100 per cent is necessary to take account of the fact that HT's relevant turnover in 2011 (the year before the end of Relevant Period (b)) was significantly lower than it was in 2008 (the year before the end of Relevant Period (a)).[236] Without such an adjustment at step 4, the penalty imposed on HT for the Infringement would be significantly lower than that which would have been imposed solely for Infringement (a) (that is, had the infringement not been repeated), thus undermining compliance incentives. Specifically:

(a) a penalty calculated using HT's relevant turnover in 2011 results in a penalty after step 3 (without adjustment) of £391,020;

(b) a penalty calculated using HT's relevant turnover in 2008 (that is, without the repeated infringement), would result in a penalty after step 3 of £820,878.

6.49 Assessing the resulting penalty in the round, therefore, the CMA considers that the adjusted penalty of £782,040 at step 4 is appropriate and sufficient in this case for deterrence purposes without being disproportionate or excessive.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

6.50 The CMA may not impose a penalty for an infringement that exceeds 10 per cent 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.[237]

6.51 The CMA has assessed TA's and HT's penalty at step 4 against the maximum penalty threshold set out in the preceding paragraph. This assessment has

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[235] Being net assets in the financial year ending 31 March 2015, together with dividends paid out in the financial years ending 31 March 2013, 2014 and 2015.
[236] HTL's relevant turnover in 2008 was £1,403,210. See HTL's response dated 22 August 2016 to the CMA's section 26 notice dated 27 July 2016, question 1(a) URN H0147.
[237] Section 36(8) of the Act and the 2000 Order, as amended. See also Penalties Guidance, paragraph 2.21.

not necessitated any reduction to the penalty at step 5 of the penalty calculation.[238]

6.52 In addition, the CMA must, when setting the amount of a penalty for a particular agreement or conduct, take into account any penalty or fine that has been imposed by the European Commission, or by a court or other body in another EU Member State in respect of the same agreement or conduct.[239] As there is no such applicable penalty or fine, no adjustment is necessary in this case in that regard.

Step 6 – application of reduction for settlement

6.53 The CMA will reduce an undertaking's financial penalty at step 6 where the undertaking has agreed to settle the case with the CMA. This will involve, amongst other things, the undertaking admitting its participation in an infringement.[240]

6.54 As set out at paragraph 2.36 above, HT and TA have admitted the facts and allegations of infringement as set out in the draft Statement of Objections dated 6 January 2016, which are now reflected in this Decision. In light of those admissions, and HT's and TA's agreement to cooperate in expediting the process for concluding the investigation, the CMA has reduced HT's and TA's financial penalty by 20 per cent at step 6 such that:

(a) the maximum amount that will be payable by TA is £684,000[241] (provided that TA also complies with the continuing requirements of settlement);

(b) the maximum amount that will be payable by HT is £625,000[242] (provided that HT also complies with the continuing requirements of settlement).

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[238] The applicable turnover for TA is its worldwide turnover in the financial year ending 30 September 2011, namely £13,480,664. The penalty at step 4, namely £855,342, does not exceed 10 per cent of TA's applicable turnover. The applicable turnover for HT is its worldwide turnover in the financial year ending 31 March 2011, namely £13,697,949. The penalty at step 4, namely £860,244, does not exceed 10 per cent of HT's applicable turnover.

[239] Penalties Guidance, paragraph 2.24.

[240] Penalties Guidance, paragraph 2.26.

[241] The CMA considers it appropriate to round the penalty down to the nearest £1,000 in the circumstances of this case.

[242] The CMA considers it appropriate to round the penalty down to the nearest £1,000 in the circumstances of this case.

Penalty

6.55 The following tables set out a summary of the penalty calculations and the penalties that the CMA requires the Parties to pay in relation to the Infringement:

TA

Step	Description		Adjustment	Figure
	Relevant turnover			**£974,749**
1	Starting point as a percentage of relevant turnover		26%	£253,435
2	Adjustment for duration		x2.25	£570,228
3	Adjustment for aggravating or mitigating factors	Aggravating: director's involvement	*15%*	£85,534
		Mitigating: cooperation	*-5%*	-£28,511
		Mitigating: compliance	*-10%*	-£57,023
		Total adjustment		£0
		Total penalty after step 3		£570,228
4	Adjustment for specific deterrence or proportionality		50%	£855,342
5	Adjustment to take account of the statutory maximum penalty		No adjustment necessary	£13,480,664 (Statutory cap)
	Total penalty (before settlement)			£855,342
	Settlement discount		-20%	£171,068
	Penalty payable			**£684,000**[243]

[243] The CMA considers it appropriate to round the penalty to £684,000 in the circumstances of this case.

HT

Step	Description		Adjustment	Figure
	Relevant turnover			**£668,410**
1	Starting point as a percentage of relevant turnover		26%	£173,787
2	Adjustment for duration		x2.25	£391,020
3	Adjustment for aggravating or mitigating factors	Aggravating: director's involvement	*15%*	*£58,653*
		Mitigating: cooperation	*-5%*	*-£19,551*
		Mitigating: compliance	*-10%*	*-£39,102*
		Total adjustment		*£0*
		Total penalty after step 3		£391,020
4	Adjustment for specific deterrence or proportionality		100%	£782,040
5	Adjustment to take account of the statutory maximum penalty		No adjustment necessary	£13,697,949 (Statutory cap)
	Total penalty (before settlement)			£782,040
	Settlement discount		-20%	£156,408
	Penalty payable			**£625,000**[244]

E. Payment of penalty

TA

6.56 The CMA therefore requires TA to pay a penalty of £684,000.

[244] The CMA considers it appropriate to round the penalty to £688,000 in the circumstances of this case.

6.57 The penalty will become due to the CMA on 29 May 2017[245] and must be paid to the CMA by close of banking business on that date.[246]

HT

6.58 The CMA therefore requires HT to pay a penalty of £625,000.

6.59 The penalty will become due to the CMA on 29 May 2017[247] and must be paid to the CMA by close of banking business on that date.[248]

SIGNED:

Stephen Blake, Senior Director - Cartels and Criminal, for and on behalf of the Competition and Markets Authority

[✂]

27 March 2017

[245] The next working day two calendar months from the expected date of receipt of the Decision.
[246] Details on how to pay are set out in the letter accompanying this Decision.
[247] The next working day two calendar months from the expected date of receipt of the Decision.
[248] Details on how to pay are set out in the letter accompanying this Decision.